

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-4520-I

Appeal MA22-00320

Corporation of the Town of Collingwood

May 14, 2024

Summary: The appellant submitted a request under the *Act* to the town for emails relating to a recreational facility. The town withheld the emails of councillors on the basis that it does not have custody or control of them under section 4(1). The adjudicator finds that three emails are within the town's custody and control and orders the town to issue an access decision related to these emails. The adjudicator upholds the town's decision that the remaining emails withheld under section 4(1) are not in its custody or control.

The town also located other emails exchanged between staff and residents. The town granted the appellant partial disclosure to these emails claiming that disclosure would constitute an unjustified invasion of personal privacy under section 14(1). The adjudicator also finds that the personal privacy provision applies to the majority of the emails and upholds the town's decision to not to disclose them to the appellant under section 14(1). The adjudicator reserves her finding on the application of section 14(1) to three emails, pending notification of the individuals who might be affected by their disclosure.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 4(1), 14(2)(d), 14(2)(f), 14(2)(h), and 14(2)(i).

Orders and Investigation Reports Considered: Orders M-813, MO-2807, MO-4389

Cases Considered: *St. Elizabeth Home Society v. Hamilton (City)* (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.); *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.)

OVERVIEW:

[1] By way of background, the appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Town of Collingwood (the town) in 2013 for records relating to a recreational facility. The appellant appealed the town's access decision to the Information and Privacy Commission of Ontario (IPC). The appeal file relating to the appellant's 2013 request was subsequently closed as a result of mediation.

[2] The recreational facility referenced in the appellant's 2013 request was the subject of one of two major transactions reviewed in the Town of Collingwood Judicial Inquiry (Judicial Inquiry). The Judicial Inquiry was concluded in 2020 with the issuance of Associate Chief Justice Frank N. Marrocco's 914-page report. In the report, Justice Marrocco concluded that "[u]ndisclosed conflicts, unfair procurements, and lack of transparency stained both transactions, leading to fair and troubling concerns from the public."

[3] On April 14, 2021, the appellant submitted a four-part request under the *Act* to the town for emails related to the recreational facility referenced in their prior request. The appellant said that they filed this request as it became apparent to them that numerous documents that were produced during the Judicial Inquiry should have been identified as responsive to their 2013 request.¹

[4] The town issued seven access decisions in response to the appellant's 2021 request granting the appellant partial access to responsive records. The town took the position that the withheld information qualified for exemption under various mandatory and discretionary exemptions under the *Act*.

[5] The appellant appealed the town's seven access decisions to the IPC and a mediator was assigned to the file to explore settlement with the parties.²

[6] At the end of mediation, the appellant confirmed they no longer sought access to records responsive to certain decisions. The appellant also confirmed that they were not seeking access to duplicate records. However, the appellant continued to seek access to some of the withheld records.³ The town confirmed its position that most of the records were not in its custody or control (section 4(1)). The town says that the mandatory exemptions at section 10 (third party information) and section 14(1) (personal privacy) applied to the remaining records.

[7] No further mediation was possible and the file was transferred to the adjudication stage of the appeals process in which an adjudicator may conduct an inquiry. I

¹ The appellant refers to the 2021 request as their "redo/updated" request.

² The current appeal was opened to address the 7 access decisions.

³ The appellant continued to seek access to the records identified in decisions #5 and #7 in the mediator's report.

commenced my inquiry by inviting the representations of the town. In its representations, the town indicates that it no longer relies on the third-party information exemption at section 10(1). Accordingly, I removed this issue from the scope of the appeal.

[8] The town's complete representations were shared with the appellant who submitted written representations in response.⁴

[9] The appellant included a substantial amount of background information with their written representations. One of the main concerns raised by the appellant is that their 2013 and 2021 requests sought access to similar information for the same time-period and that the records before me should have been identified as responsive in 2013. The appellant suggests that, in processing their first request, the town intentionally withheld the emails and asks that the IPC conduct an independent investigation regarding the town's processing of their 2013 and 2021 requests. In the alternative, the appellant asks that the IPC facilitate a meeting with themselves and the town.⁵ In my view, the appellant's concerns raise issues relating to the conduct of individuals employed by the town. Such issues are outside the jurisdiction of the IPC. Accordingly, this order will not address the appellant's concerns related to the town's response to their 2013 request.

[10] For the reasons set out below, I find that the town has "bare possession" of most of the emails it withheld under section 4(1). Accordingly, I find that these emails are not in its custody or control and uphold its decision to deny the appellant access to them. However, I find that three emails sent by the deputy mayors/mayor are in the town's custody or control and order it to issue an access decision to the appellant.

[11] I find that disclosure of the majority of the remaining emails would constitute an unjustified invasion of personal privacy under section 14(1) and uphold the town's decision to withhold this information. However for three emails, I reserve my finding on the application of section 14(1), pending notification of three affected parties.

RECORDS:

[12] The records at issue in this appeal comprise of 62 emails described in "Schedule

⁴ The appellant submitted two sets of representations, one of which they did not raise any confidentiality concerns as contemplated under the confidentiality provisions regarding the sharing of representations set out in the *IPC's Code of Procedure*. For the remainder of this order, I will refer to the copy of representations the appellant prepared for the town as their representations. Although I reviewed both sets of representations that the appellant submitted and considered the relevant portions, this order does not reference or rely upon the confidential portions of the appellant's representations.

⁵ The appellant submitted two affidavits in support of their concerns about the town's response to the 2013 and 2021 requests. The individuals providing the affidavits attest that it is their opinion that the culture at the town did not promote openness and transparency during the time the appellant's freedom of information requests were processed.

1" attached to the town's representations, a copy of which was provided to the appellant.⁶ The first category records represent 35 emails the town calls "constituency records." In this order, I will refer to them as councillor records. The town takes the position that these emails are not in its custody or control under section 4(1).

[13] The remaining 27 records are emails between town staff and individuals. In this order I will refer to them as staff records. The town withheld portions of these emails claiming that disclosure would constitute an unjustified invasion of personal privacy under section 14(1).

ISSUES:

- A. Are the councillor records "in the custody" or "under the control" of the town under section 4(1) of the *Act*?
- B. Do the staff records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- C. Does the mandatory personal privacy exemption at section 14(1) apply to personal information withheld in the staff records?

DISCUSSION:

A. Are the councillor records "in the custody" or "under the control" of the town under section 4(1) of the *Act*?

[14] Section 4(1) provides for a general right of access to records that are in the custody or under the control of an institution governed by the *Act*. The right of access applies to a record that is either in the custody or under the control of an institution; the record need not be both.⁷

[15] The term "institution" is defined in section 2(1) and includes a municipality. The definition of "institution" does not specifically refer to elected offices such as a municipal councillor.

[16] There are exceptions to the general right of access set out in section 4(1).⁸ The record may be excluded from the application of the *Act* by section 52, or may be subject

⁶ In the schedule, the town divided the emails into three categories. It identified 35 emails as "category B" records which it describes as "constituency records." The remaining 27 emails were identified as "category C.1" and "category C.2" records which are emails between town staff and individuals. For the remainder of this order, I will refer to the schedule as the town's index.

⁷ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

⁸ Order PO-2836.

to an exemption from the general right of access.⁹ However, if the record is not in the custody or under the control of the institution, none of the exclusions or exemptions need be considered since the general right of access in section 4(1) is not established.

[17] The courts and the IPC have applied a broad and liberal approach to the custody or control question.¹⁰ In deciding whether a record is in the custody or control of an institution, the factors outlined below are considered in context and in light of the purposes of the *Act*.¹¹

[18] The IPC considers the following non-exhaustive list of factors when deciding if a record is in the custody or under the control of an institution.¹²

- Was the record created by an officer or employee of the institution?¹³
- What use did the creator intend to make of the record?¹⁴
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?¹⁵
- Is the activity in question a “core,” “central” or “basic” function of the institution?¹⁶
- Does the content of the record relate to the institution’s mandate and functions?¹⁷
- Does the institution have physical possession of the record, because its creator provided it voluntarily or pursuant to a statutory or employment requirement?¹⁸
- If the institution does have possession of the record, is it more than “bare possession”? In other words, does the institution have the right to deal with the record in some way and does it have some responsibility for its care and protection?¹⁹

⁹ Found at sections 6 through 15 and section 38 of the *Act*.

¹⁰ *Ontario Criminal Code Review Board v. Hale*, 1999 CanLII 3805 (ON CA); *Canada Post Corp. v. Canada (Minister of Public Works)*, 1995 CanLII 3574 (FCA), [1995] 2 FC 110; and Order MO-1251.

¹¹ *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.).

¹² Orders 120, MO-1251, PO-2306 and PO-2683.

¹³ Order 120.

¹⁴ Orders 120 and P-239.

¹⁵ Order P-912, upheld in *Ontario Criminal Code Review Board v. Hale*, cited above.

¹⁶ Order P-912.

¹⁷ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa Ontario*, cited above, and Orders 120 and P-239.

¹⁸ Orders 120 and P-239.

¹⁹ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of their duties as an officer or employee?²⁰
- Does the institution have a right to possession of the record?²¹
- Does the institution have the authority to regulate the record's content, use and disposal?²²
- Are there any limits on the ways the institution may use the record? If so, what are those limits, and why do they apply to the record?²³
- To what extent has the institution relied on the record?²⁴
- How closely is the record integrated with other records held by the institution?²⁵
- What is the usual practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature?²⁶

[19] As noted above, this list is not exhaustive. Some of these factors may not be relevant in a specific case, while other factors not listed above may be.

[20] In the circumstances of this appeal, I find that the relevant factors to consider are whether the emails were created by an officer or employee of the town and whether the content of the emails relate to the town's mandate. Also relevant is whether the town's possession of the emails amounts to more than "bare possession."

[21] Past IPC decisions have found that records held by individual municipal councillors may be subject to an access request under the *Act*, in two limited situations:

- Where a councillor is acting as an "officer" or "employee" of the municipality, or is discharging a special duty assigned by council, such that they may be considered part of the "institution"; or
- Where, even if the above circumstances do not apply, the councillor's records are in the custody or under the control of the municipality on the basis of established principles.²⁷

²⁰ Orders 120 and P-239.

²¹ Orders 120 and P-239.

²² Orders 120 and P-239.

²³ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

²⁴ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above, and Orders 120 and P-239.

²⁵ Orders 120 and P-239.

²⁶ Order MO-1251.

²⁷ Order M-813.

[22] Accordingly, to determine whether the councillor records before me are in the town's custody or control, I must decide whether they relate to matters in which councillors act in their capacity as elected representatives. In addition, I must determine whether the records are in the custody or control of the town.

Representations of the parties

[23] The town says that the councillor records are not in its custody or control for the purposes of section 4(1). In support of its position, the town states that most of the records:

... consist of correspondence between councillors and constituents. The remaining records consist of councillor correspondence with other municipal elected officials, Town staff and stakeholders, all of which relates to the councillors' activities as elected officials.

[24] The appellant's representations question the town's claim that the councillor records relate to the councillors acting as elected representatives. The appellant also dismisses the town's claim that the councillor records are not in its custody or control for the purposes of section 4(1) given that they are aware that the town provided copies of the emails in question to the IPC.

Decision and analysis

[25] In Order MO-4389, senior adjudicator Gillian Shaw cited *St. Elizabeth Home Society v Hamilton (City)*,²⁸ where the Ontario Superior Court of Justice described the relationship between a municipal council and its elected members as follows:

It is [a] principle of municipal law that an elected member of a municipal council is not an agent or employee of the municipal corporation in any legal sense. Elected members of council are not employed by or in any way under the control of the local authority while in office Individual

council members have no authority to act for the corporation except in conjunction with other members of council constituting a quorum at a legally constituted meeting; with the exception of the mayor or other chief executive officer of the corporation, they are mere legislative officers without executive or ministerial duties.

[26] Past IPC decisions have acknowledged that a councillor may wear several hats in discharging their duties. A councillor can act as an individual constituent representative, a politician or head of a municipal committee or board. Some of these roles may require

²⁸ (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.).

the councillor to act as an employee or officer of the municipality.²⁹

The councillors were not acting as officers or employees

[27] I have reviewed the email records and find that most of the records capture communications exchanged between councillors themselves or their constituents. In addition, I am satisfied that the subject-matter discussed in these emails relate to the recreational facility. I find that in these emails, the councillors were not acting as officers or employees but acting in their capacity as elected representatives. In addition, there is insufficient evidence before me suggesting that there are "unusual circumstances" which establish that the councillors should be considered officers of the town. In Order M-813, the IPC found that only in "unusual circumstances" is a councillor considered an officer for a municipality and therefore part of the institution for the purpose of the *Act*. Based on my review of the emails and the representations of the parties, I am satisfied that the emails before me were not the result of a special duty assigned to the councillors by council.

[28] In my view, the email communications before me are similar to the records at issue in Order MO-2807. In that order, the IPC found that records held by councillors discussing or tracking public opinion on issues related to cycling and bike lanes were not created in the councillors' capacity as officers or employees of the municipality. Instead, the councillors were found to be acting in their capacity of elected representatives as opposed to discharging a special duty. As a result, records in that appeal were found not to be in the custody or control of the municipality as they did not relate to a "city matter."

[29] Given that the councillors were not acting as employees or officers of the town in the emails before me, they cannot be considered as acting as officers or employees or conducting town business. However, that does not end the analysis of whether the emails are in the custody or control of the town and therefore subject to the *Act*.³⁰ I will go on to consider whether these emails are in the custody or control of the town on the basis of the above-listed factors.

The mayor and deputy mayors' emails are in the town's custody or control

[30] The only emails I find do not relate to a member of council in their elected representative role are three emails³¹ in which it appears that the mayor/deputy mayors communicate with an individual providing a paid service to the town. In my view, the content of these emails constitutes the town's business in which the mayor/deputy

²⁹ In Order M-813, the IPC found that if a municipal councillor is found to be acting as an officer, their records would be considered to be part of that institution and the record would be subject to the *Act*. That same order found that the term "officer" referred to a "high ranking individual within the municipal civic service, who exercises management and administrative functions, and who derives his or her authority from statute or from council."

³⁰ Order MO-4389.

³¹ Records C-1, C-2 and C-4 identified as category B records in the index prepared by the township which was provided to the appellant during the inquiry stage (records 1, 2 and 4).

mayors are authorized to conduct on its behalf. As these three emails cannot be said to be records in which an individual is acting in its capacity as an elected representative, I find that they are "under the custody" or "under the control" of the town. Accordingly, I will order the town to issue an access decision to the appellant regarding these three emails. The town's access decision should also address its position regarding disclosure of the attachment referenced in one of the emails, which was not provided with the copy of the records the town sent to the IPC.

The councillor records are not in the town's custody or control

[31] Whether a councillor records are within a municipality's custody or control depends on contextual factors including the circumstances of their creation and use.³² As noted above, the IPC has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution.³³ The list is not intended to be exhaustive; some of the listed factors may not apply in a specific case, while other factors not listed may apply.

[32] In Order MO-4389, the adjudicator concluded that although the records before her related to the municipality's business in a broad sense, the issue, for the purpose of determining custody or control, is not the subject matter of the records but rather whether the communication represents the exercise of a decision-making or executive function by the councillor on behalf of the town. The adjudicator went on to find that:

Based on the evidence before me, I find that the councillors here were doing what councillors typically do, which is to communicate with constituents and others on issues of interest to them. The emails would thus have been exchanged squarely within the political or constituency context. This is also true if any of the records at issue are emails exchanged among councillors, as the appellant suggests.³⁴ As noted in Order MO-2821, it would not be surprising if councillors communicate with each other about matters that fall within the mandate of a municipality:

In fact, it is entirely to be expected that councillors communicate regularly with each other and with any number of individuals and organizations about matters within the mandate of the city. Presumably, the reason for many of these communications is that an individual or organization wishes to express a view to councillors about an issue that may come to a vote at Council, or councillors wish to persuade each other about a position on an issue.

[33] I agree and adopt the approach applied in previous IPC orders and find that the emails in the councillor records, but for the deputy mayor's and mayor's emails, do not

³² Order MO-4389.

³³ Orders 120, MO-1251, PO-2306 and PO-2683.

³⁴ *St. Elizabeth Home Society v Hamilton (City)*, supra.

comprise of communications representing the exercise of a decision-making or executive function by the councillors on behalf of the town. Based on my review of the emails, I am satisfied that the emails were exchanged squarely within the political or constituency context, including those emails exchanged exclusively between councillors.

[34] Another relevant factor in the circumstances of this appeal is whether the town's possession of the emails is more than "bare possession." In other words, does the town have the right to possess the emails in question? Does the town have the right to deal with the emails in some way and does it have some responsibility for its care and protection?³⁵

[35] The appellant argues that the records are clearly in the custody of the town given its ability to provide copies to the IPC for the purposes of this appeal. The town's representations did not specifically address this issue. Based on my review of the emails it appears that the councillors sent and received emails using email accounts set up by the town. Accordingly, it follows that the emails in question would be in the town's possession given that its email servers were used. However, such possession is not determinative of custody unless other factors point to a finding of custody. I note that the adjudicator in Order MO-4389 found that the fact that an institution may have had the authority, pursuant to its IT policy, to monitor the councillors' email accounts for misuse, was not sufficient to bring the emails at issue within its custody under the *Act*.

[36] In my view, the circumstances of this appeal are similar to those in Order MO-4389. It would appear that the town has the authority, pursuant to its IT or other policy, to access the councillors' email accounts to retrieve emails. In this case, the town retrieved the emails to respond to the IPC's request for records.³⁶ Given these circumstances, I find that the town's ability to produce copies of the emails in question in the circumstances of this appeal amounts to bare possession. Accordingly, the fact that the town had the ability to access its email servers to produce copies of the emails for the IPC is not determinative of the custody or control issue. In addition, I am satisfied that the town does not have the right to possess the emails in question or have some responsibility for the emails.

[37] Accordingly, I find that the town's possession of the councillors' emails amounts to "bare possession". Bare possession does not amount to custody for the purposes of the *Act*.³⁷

Summary

[38] I have reviewed the list of factors the courts and the IPC have considered in

³⁵ Orders 120 and P-239

³⁶ The IPC sent a "Request for Documentation" to the township on June 9, 2022 in which a "copy of the record" was requested for purposes related to the IPC processing the appeal.

³⁷ *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.).

determining whether an institution has custody or control and find that the circumstances of this appeal do not point to a finding of custody or control. In arriving at this conclusion, I considered the circumstances in which the emails were created and by whom. In addition, I considered whether the content of the records relate to the town's mandate and functions. Finally, I found that the town has "bare possession" of the emails.

[39] Having considered and applied the various factors previously considered by the IPC, I find that the emails, but for the deputy mayor's and mayor's emails, are not in the custody or control of the town. Whether they are called councillor, personal, constituency or political records, they are records of councillors relating to their activities as elected representatives.

[40] Because the councillor records are not "under the custody" or "under the control" of the town, there is no right of access to them under section 4(1) of the *Act*.

[41] I will order the town to issue an access decision regarding the deputy mayor's and mayor's emails.

B. Do the staff records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[42] In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the record contains "personal information," and if so, to whom the personal information relates.

[43] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual."

[44] "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.³⁸

[45] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.³⁹

[46] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something

³⁸ See the definition of "record" in section 2(1).

³⁹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225. See also sections 2(2.1) and (2.2) of the *Act* which state that 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 even if the individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

of a personal nature about the individual.⁴⁰

[47] Information is about an “identifiable individual” if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.⁴¹

[48] It is important to know whose personal information is in the record. If the record contains the requester’s own personal information, their access rights are greater than if it does not.⁴² Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.⁴³

[49] The appellant did not specifically address the question of whether the withheld information in staff records contain the personal information of identifiable individuals or whether disclosure to them would constitute an unjustified invasion of personal privacy.

[50] The town says that the withheld information in these records constitute the personal information of identifiable individuals and cites paragraphs (e), (g) and (f) of the definition of “personal information” in section 2(1).⁴⁴ The town says that these records “relate to a few 2011-2012 discussions between then citizens, councillors and staff on different sides of a local debate over [the recreational facility].

[51] I have reviewed the records and find that most of the withheld information constitutes the personal information of identifiable individuals. I find that the paragraphs (d), (e), (g) and (h) of the definition of “personal information” in section 2(1) apply to this information. I am satisfied that this information relates to individuals acting their personal capacity as residents, including those who served on a volunteer committee.⁴⁵ I will proceed to consider whether these records are exempt under the mandatory personal

⁴⁰ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴¹ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁴² Under sections 36(1) and 38 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

⁴³ See sections 14(1) and 38(b).

⁴⁴ Section 2(1) of the *Act* states, in part:

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

- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (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.

⁴⁵ See Order 149 in which the IPC found that the names, addresses and telephone numbers of members of a steering committee constitutes “personal information.”

privacy exemption below.

[52] However, there are three staff records⁴⁶ for which I have determined the identifiable individuals should be notified. These are emails town employees exchanged with individuals representing companies. It is not clear to me in what capacity the individuals communicated with the town. I have decided to notify these individuals and provide them with an opportunity to make representations on the disclosure of these emails. Accordingly, at this time, I reserve my finding as to whether the information in these three emails constitutes "personal information" pending notification of the affected parties.

C. Does the mandatory personal privacy exemption at section 14(1) apply to personal information withheld in the staff records?

[53] For reasons stated below, I find that disclosure of the information I found contains the personal information of identifiable individuals to the appellant would constitute an unjustified invasion of personal privacy under section 14(1). Accordingly, it is not necessary for me to notify the individuals identified in these records to obtain their views about disclosure as I uphold the town's decision to withhold these portions of the records from the appellant.

[54] Under section 14(1), where a record contains personal information of another individual but *not* the requester, the institution cannot disclose that information unless one of the exceptions in sections 14(1)(a) to (e) applies, or the section 14(1)(f) exception applies, because disclosure would not be an "unjustified invasion" of the other individual's personal privacy.

[55] Sections 14(1) to (4) provide guidance in deciding whether the information is exempt under section 14(1). If any of the five exceptions in sections 14(1)(a) to (e) apply, neither the section 14(1) exemption. In deciding whether the section 14(1)(f) exception to the section 14(1) exemption applies, sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy.

[56] Section 14(2) lists other factors that help in deciding whether disclosure would be an unjustified invasion of personal privacy, and section 14(4) lists situations where disclosure would not be an unjustified invasion of personal privacy. If any of the section 14(4) situations is present, then sections 14(2) and (3) need not be considered. The parties have not claimed and I am satisfied that none of the situations set out in sections 14(3) or 14(4) apply to the circumstances of this appeal.

[57] Since the personal information at issue does not fit within any presumptions in section 14(3), I must consider the factors set out in section 14(2) to determine whether disclosure of the personal information would be an unjustified invasion of personal

⁴⁶ Records no. 1 and 63 in the C.1 records and record 62 in the C.2 records identified in the index prepared by the town which was provided to the appellant during the inquiry stage.

privacy. If no factors favouring disclosure in section 14(2) are present, the section 14(1) exemption applies because disclosure is not an unjustified invasion of privacy.⁴⁷

Analysis of the section 14(2) factors

[58] The town says that the factors weighing against disclosure at sections 14(2)(h) and (i) apply to the circumstances of this appeal. The appellant did not cite any factors favouring disclosure in their representations.⁴⁸ However, I am satisfied that the appellant's representations give rise to the possible application of the factors favouring disclosure at sections 14(2)(a) and 14(2)(d). I also find that the town's representations give rise to the possible application of the factor at section 14(2)(f).

[59] The relevant sections under 14(2) state:

(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;

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

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Consideration of the factors weighing in favour of disclosure

14(2)(a): disclosure is desirable for public scrutiny

[60] Section 14(2)(a) supports disclosure when disclosure would subject the activities of the government (as opposed to the views or actions of private individuals) to public

⁴⁷ Orders PO-2267 and PO-2733.

⁴⁸ The Notice of Inquiry sent to the appellant inviting their representations contained a section identifying the section 14(2) factors weighing in favour of disclosure and seeking the appellant's response as to whether any of the situations set out in sections 14(2)(a) to (d).

scrutiny.⁴⁹ It promotes transparency of government actions.

[61] The issues addressed in the information that is being sought do not have to have been the subject of public debate in order for this section to apply, but the existence of public debate on the issues might support disclosure under section 14(2)(a).⁵⁰

[62] Institutions should consider the broader interests of public accountability when considering whether disclosure is “desirable” or appropriate to allow for public scrutiny of its activities.⁵¹

[63] As noted above, the appellant in their representations raised concerns relating to the town’s processing of their 2013 and 2021 requests. In support of this position, the appellant provided two affidavits which attest that a culture of transparency did not exist when the appellant made their first request. The appellant’s representations suggest that disclosure of the withheld information would subject the activities of the town to public scrutiny.

[64] The town, in its representations, considered the possible application of this factor and stated:

Subsection 14(2)(a) (public scrutiny) focuses on scrutiny of the institution itself (i.e. the Town), not individuals, and has been found not to apply where disclosure would be unlikely to actually bring about increased scrutiny [Order MO-3238]. In the present case, the disclosure of the C.1 records to the requester provides no likelihood of increased scrutiny, since the relevant topics were addressed in great depth and detail by the Judicial Inquiry, and also formed the subject of a decade-long Ontario Provincial Police criminal investigation that concluded earlier this year.⁵² The completion of the Judicial Inquiry and the police investigation are matters of public record. Both processes were legally empowered to review all required Town records.

[65] In response, the appellant says that there are outstanding issues which the Judicial Inquiry did not address and that the records before me are connected to a separate ongoing legal matter.

[66] I have reviewed the representations of the parties and find that the factor at section 14(2)(a) does not apply. The withheld information before me contains the personal information and views of private individuals as opposed to individuals employed by the town. All of the individuals identified in the records are residents and some appear

⁴⁹ Order P-1134.

⁵⁰ Order PO-2905.

⁵¹ Order P-256.

⁵² The town provided the following link in their representations: <https://www.collingwood.ca/council-government/news-notice/opp-investigation-concluded>

to have served on a volunteer basis on a committee. The committee published its recommendations in a report, which is available to the public. In my view, disclosing individual views of residents and/or volunteer committee members would not result in subjecting the town's activities to public scrutiny.

[67] Accordingly, this factor has no application.

14(2)(d): the personal information is relevant to the fair determination of requester's rights

[68] This section weighs in favour of allowing requesters to obtain someone else's personal information where the information is needed to allow them to participate in a court or tribunal process. The IPC uses a four-part test to decide whether this factor applies. For the factor to apply, all four parts of the test must be met:

1. Is the right in question a right existing in the law, as opposed to a non-legal right based solely on moral or ethical grounds?
2. Is the right related to a legal proceeding that is ongoing or might be brought, as opposed to one that has already been completed?
3. Is the personal information significant to the determination of the right in question?
4. Is the personal information required in order to prepare for the proceeding or to ensure an impartial hearing?⁵³

[69] As noted above, the appellant did not make specific representations addressing the four-part test. Instead, the appellant says that the resolution of this appeal could affect their legal rights suggesting that disclosure of the withheld information would be significant to the determination of a legal right.

[70] The town addressed the possible application of section 14(2)(d) in its representations and stated "... the requester does not require records containing personal information in order to pursue any alleged losses suffered by [it] or its business." The town also stated:

Any such alleged losses were known to the Requestor at the time of those public developments, and any assessment of options on its part has also had the benefit of its previous access requests and the Judicial Inquiry's findings. Any civil proceeding commenced prior to applicable deadlines would have the full benefit of the civil discovery process.

[71] In response, the appellant provided details about the type of legal infraction they

⁵³ See 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.).

allege occurred. The appellant also says that the town's denial of access to the records at issue has impeded their investigation and identification of legal remedies which may be available to them. The appellant says that the records are "of high relevance" to their ongoing investigation and "is expected to provide final critical evidence" relating to when the town was aware of a situation which gave rise to the legal infraction they allege occurred.

[72] I have considered the parties representations and find that the section 14(2)(d) factor does not apply. Even if I was satisfied that parts 1, 2, and 4 of the four-part test have been met, I find that the appellant's evidence does not establish that part 3 of the test has been met. Based on my review of the records, I find that the personal information at issue is not significant to a determination to the right in question identified by the appellant. In my view, the right identified by the appellant is not significantly impacted if they are not granted disclosure to the personal information I found that relates to identifiable individuals who do not work for the town.

[73] Accordingly, this factor has no application.

Consideration of factors favouring privacy protection

[74] The town submits that the factors at sections 14(2)(h)(the personal information was supplied in confidence) and 14(2)(i)(disclosure may unfairly damage an individual's reputation) apply. In support of its position, the town says that "the identified individuals who supplied the withheld views and correspondence did so in strict confidence, in the course of an ongoing debate on a topic of local controversy." The town also says that given the degree of controversy related to the recreational facility, disclosure may unfairly damage the reputation of the individuals whose personal information has been withheld from the records. In my view, the town's representations also give rise to the factor at section 14(2)(f)(the personal information is highly sensitive).

[75] The appellant's representations did not specifically address these points.

[76] I am satisfied that the town provided sufficient evidence to demonstrate that the factors at sections 14(2)(f) and 14(2)(i) apply.

[77] Section 14(2)(f) is intended to weigh against disclosure when the evidence shows that the personal information is highly sensitive. To be considered "highly sensitive," there must be a reasonable expectation of significant personal distress if the information is disclosed. For example, personal information about witnesses, complainants or suspects in a police investigation may be considered highly sensitive.

[78] Section 14(2)(i) weighs against disclosure if disclosure of personal information might create damage or harm to an individual's reputation that would be considered "unfair" to the individual.

[79] Having regard to the records and the town's representations, I find that disclosure

of the withheld personal information would result in significant personal distress to the identified individuals. Given the controversy surrounding the recreational facilities, I find that the factor at section 14(2)(f) would apply to email communications individual residents had with the town. For similar reasons, I also find that disclosure of the personal information at issue might unfairly damage the reputation of the individuals identified in the records and that the factor at section 14(2)(i) applies. Given the application of the factors weighing in favour of privacy protection at sections 14(2)(f) and (i) it is not necessary that I also determine whether section 14(2)(h) also applies.

Summary

[80] As I have found that the factors weighing in favour of privacy protection at sections 14(2)(f) and (i) apply, and no factors weighing in favour of disclosure apply, I find that disclosure of the personal information at issue to the appellant would constitute an unjustified invasion of personal privacy. Accordingly, I uphold the town's decision to withhold this information under section 14(1).

ORDER:

1. I order the town to issue an access decision to the appellant for the deputy mayor/mayor emails (records 1, 2 and 4 in the councillor records) I found in its custody or control. For the purpose of the access decision, the town should treat the date of this order as the date of the request for administrative purposes.
2. I find that the remaining councillor records are not under the town's custody and control and uphold the town's decision to deny these records under section 4(1).
3. I uphold the town's decision to withhold the staff records under section 14(1) but for the three emails (records 1, 62 and 63) relating to the individuals I will notify under section 21(1).
4. In order to verify compliance with Order provision 2, I reserve the right to require the town to provide me with a copy of its access decision to me.
5. I remain seized of this appeal pending the resolution of the issues relating to three emails (records 1, 62 and 63) which relate to the individuals I will notify under section 21(1).

Original Signed by: _____
Jennifer James
Adjudicator

_____ May 14, 2024