

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4593

Appeals MA22-00154 and MA22-00263

Town of Grimsby

November 13, 2024

**Summary:** This order resolves two appeals regarding access to records related to certain baseball associations and the Town of Grimsby (the town), under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The town issued a fee estimate to the requester, to process the request. The town decided to partially disclose some information without citing any sections of the *Act*. A party whose interests could be affected by disclosure (the affected party) appealed the town's decision to disclose some emails (or parts of emails) involving that party. The requester also appealed the town's decision, seeking access to the information withheld, and disputing the town's fee estimate, its decision not to waive the fee, and the reasonableness of its search.

In this order, the adjudicator allows the affected party's appeal and orders the town to withhold the three emails remaining at issue, in full, because the emails contain personal information that cannot be disclosed (under the discretionary personal privacy exemption at section 38(b) of the *Act*).

The adjudicator also allows the requester's appeal, in part. She finds that all personal information in the records cannot be disclosed (under section 38(b) or the mandatory personal privacy exemption at section 14(1), whichever applies). However, the adjudicator does not agree that the information in three records cannot be disclosed on the basis of the exemption for third party information [section 10(1)] and orders the town to disclose those records to the requester. The adjudicator does not uphold the town's fee (and only allows \$10 of it) but upholds the town's decision not to waive the fee. The adjudicator also upholds the town's search for responsive records as reasonable.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 2(1) (definition of "personal information"), 10(1), 14(1), 14(2), 17, 38(b), and 45; Regulation 823, sections 6 and 6.1.

**Order Considered:** Order MO-1783.

## **OVERVIEW:**

[1] This order resolves two appeals regarding access to records related to certain baseball associations and the Town of Grimsby (the town).

[2] The town received three separate requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records of all correspondence between the town, three specified baseball associations and Baseball Ontario as follows:

All meetings, notes, videos and any other conversations and communications between the Town of Grimsby and [individuals affiliated with the town]<sup>1</sup> including ...

- All emails and communications with [the associations]
- Emails and communications to current and former executive members including [specified individuals]
- Notes from or other minutes, recordings from meetings with any of the [specified] people or mention any of the [specified] people and organizations
- With a date range from Jan 1, 2018, up to and including the present day.

[3] The town processed the three requests as one request (the request). It notified affected parties about the request to obtain their views regarding disclosure of the records.<sup>2</sup> The town later decided to grant partial access to the requested records and withhold parts of the records. The reasons for this were later identified as the mandatory exemptions at section 10(1) (third party information) and 14(1) (personal privacy).

[4] Two appeals were filed with the Information and Privacy Commissioner of Ontario (IPC) – an affected party's appeal and the requester's appeal. The affected party objected to disclosure of information, while the requester opposed the withholding of information, as well as the town's decision not to waive its \$552.40 fee estimate.

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<sup>1</sup> In the Mediator's Report, these individuals were incorrectly referred to as representatives of the named baseball associations.

<sup>2</sup> As required by section 21(1) of the *Act*.

[5] The IPC assigned a mediator to explore resolution in each appeal. The affected party consented to certain records being disclosed but maintained objection to the disclosure of three records. The town issued a final fee of \$370.00 and granted a partial fee waiver, reducing the fee to \$185.00. The requester received responsive records, in full or in part.<sup>3</sup> However, he continued to pursue access to the remaining information, and to object to the issues of fee and fee waiver. He also raised the issue of reasonable search. The town also added the discretionary exemption at section 38(b) (personal privacy) because some of the records contain the requester's personal information.

[6] Further mediation was not possible so the appeals moved to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*.

[7] The previously assigned adjudicator conducted a written inquiry into the issues on appeal in which the town, the requester, and the affected party provided written representations. Some representations were withheld due to confidentiality concerns.<sup>4</sup> In the meantime, the town issued a revised decision granting full access to two records (records 108a and 127a), so these records are no longer at issue.

[8] The appeals were later transferred to me. On my review of the representations and the records, I determined that I did not need to hear further from any party.

[9] For the reasons set out in this order, I allow the requester's appeal (in part), and I allow the affected party's appeal, as follows:

- I uphold the town's determination that all of the records in which it claimed a personal privacy exemption contain personal information, and that this information is exempt from disclosure.
- I allow the affected party's appeal because I find that the entirety of the three records at issue in that appeal are personal information (not only parts of them, as the town had decided), and are exempt from disclosure.
- I do not uphold the town's decision to withhold records 125, 127, and 128 under section 10(1), and I will order those records disclosed (except for the small portions of record 125 that contain exempt personal information).
- I do not uphold most of the town's fee; I only uphold \$10 of the fee.
- I uphold the town's decision not to waive the fee.

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<sup>3</sup> Many of these records were disclosed on consent of the affected party, after further access decisions were made, and after the town conducted a further search.

<sup>4</sup> Under *Practice Direction 7* of the IPC's *Code of Procedure*. The requester was advised that the affected party does not consent to the disclosure of their personal information; he was provided with the non-confidential portions of the town's representations.

- I uphold the town's search as reasonable.

## **RECORDS:**

[10] The three records remaining at issue in the affected party appeal are records 78, 95, and 104. These are emails.

[11] The records remaining at issue in the requester appeal, taking into account the town's latest revised decision are: records 12-15, 18, 19, 21, 28, 36, 40a, 45-47, 59, 62, 69, 75, 76, 78, 89, 91, 93, 95, 96, 99, 101, 104, 108, 108b, 125, 127, 128, 165a, 170, 171 and 188. These are emails, some with attachments.

## **ISSUES:**

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- B. Does the mandatory personal privacy exemption at section 14(1) or the discretionary personal privacy exemption at section 38(b) apply to the information at issue?
- C. Does the mandatory exemption at section 10(1) for third party information apply to records 125, 127, and 128?
- D. Should the IPC uphold the institution's fee or fee estimate?
- E. Should the institution waive its fee?
- F. Did the institution conduct a reasonable search?

## **DISCUSSION:**

### **Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?**

[12] It is necessary to consider whether the records contain "personal information," and if so, to whom the personal information relates. Each record is examined on its own to determine whether there is personal information in it. For the reasons that follow, I find that certain records contain personal information related to individuals other than the requester and that certain records contain the requester's personal information (along with that of other identifiable individuals too).

### ***What is "personal information"?***

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

#### *Recorded information*

[14] "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.<sup>5</sup>

#### *About*

[15] 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.<sup>6</sup> Under section 2(2.1) of the *Act*, "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*.

[16] 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 of a personal nature about the individual.<sup>7</sup>

#### *Identifiable individual*

[17] 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.<sup>8</sup>

### ***What are some examples of "personal information"?***

[18] Section 2(1) of the *Act* gives a list of examples of personal information, and says, in part:

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

(a) information relating to the age, . . . marital or family status of the individual,

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<sup>5</sup> See the definition of "record" in section 2(1).

<sup>6</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>7</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>8</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

. . .

- (d) the address, telephone number, . . . 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.

[19] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."<sup>9</sup>

***Whose personal information is in the record?***

[20] 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.<sup>10</sup> Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.<sup>11</sup>

[21] The town submits that the withheld portions of the records containing information that qualifies as personal information under paragraphs (a), (d), (e), (f), (g), and (h) of the definition of "personal information," set out above. It explains that the views or opinions in the records include complaints to officials, town councillors, and the mayor; the emails were sent to the town in confidence and contain names of individuals. The information relating to marital status or family information relates to several individuals, including a town employee. In addition, the town withheld personal phone numbers, home addresses, and/or email addresses of affected parties.

[22] The affected party's representations indicate that the records they object to contain personal information such as the above, emphasizing that the correspondence containing their views was sent in confidence and is very sensitive in nature.

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<sup>9</sup> Order 11.

<sup>10</sup> 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.

<sup>11</sup> See sections 14(1) and 38(b).

[23] The requester's representations do not directly address the issue of whether the records contain personal information and if so, whose personal information it is. However, his overall position (that alleged complaints received by the town were used against him) can be seen as indicating that he believes, at the very least, that some if not all the records contain personal information that relates to him.

### ***Analysis/findings***

[24] Based on my review of the records and the representations before me, I find that the records fall in two categories, which I will call groups 1 and 2:

- group 1 - records 12-15, 19, 36, 45, 46, 59, 62, 76, 78, 91, 93, 95, 99, 104, 165a, and 188) contain the personal information of the requester and other identifiable individuals, and
- group 2 - records 18, 21, 28, 40a, 47, 69, 75, 96, 108, 108b, 125, 170, and 171 only contain the personal information of identifiable individuals other than the requester.

[25] Since the records in group 1 contain the requester's personal information, any right of access that he may have to the personal information withheld must be assessed under the discretionary personal privacy exemption at section 38(b) of the *Act*.

[26] Since the records in group 2 do not contain the requester's personal information (but the personal information of other identifiable individuals), any right of access that the requester may have to the personal information withheld must be assessed under the mandatory personal privacy exemption at section 14(1) of the *Act*.

[27] The personal information withheld in groups 1 and 2 includes names, contact information (such as email addresses), views or opinions, and/or correspondence sent to the town in confidence. These are listed examples of "personal information" under paragraphs (a), (d), (e), (f), (g), and (h) of the definition of that term. Some of the personal information withheld in some records also qualifies as such under the introductory wording of the definition of that term in section 2(1) of the *Act* ("recording information about an identifiable individual"). In addition, the fact that a town employee or employee of a company used their town or company email in some records at issue does not transform personal phone number(s) or other information unrelated to the individual's work as business information.

[28] While the above sufficiently addresses most of the records, I will elaborate on a few records, below.

#### ***Records 21, 96, 108, and 108b***

[29] In records 21, 96, and 108, the town withheld views or opinions of an identifiable individual that have been withheld (in full or in part), which is also "personal information"

under paragraphs (g) and (h) of the *Act*. Record 108 is also correspondence sent to the town in confidence, which is personal information under paragraph (f) of the *Act*.

[30] Record 108b is an attachment to record 108. It contains the personal information of identifiable individuals including their names, ages, and other recorded information about them. This is the personal information of each of these individuals under paragraphs (a), (b), and (h) of the *Act* and the introductory wording of the definition of "personal information." While it is possible that if portions of this record were disclosed they would not identify anyone, I cannot be certain of that on the evidence before me. In any case, even if these portions would not identify any individual, they would be snippets of meaningless or misleading information, which institutions are not required to release.<sup>12</sup>

### *Record 125*

[31] For record 125, the town claimed section 10(1) over this whole record, but due to my finding under Issue D below (that record 125 is not exempt under section 10(1) and must be disclosed), I must first note that record 125 contains personal information of two identifiable individuals [but not the requester's, meaning access to personal information must be considered under the mandatory personal privacy exemption at section 14(1)]. More specifically, record 125 contains a personal email address of an identifiable individual (the second email listed in the "cc" line), which is that individual's "personal information" under paragraph (d) of the definition of that term. Record 125 also contains personal information of a town employee in the third sentence of the third email from the top of the record. That sentence is that employee's "personal information" under the introductory wording of the definition of that term ("recorded information about an identifiable individual"), and it does not appear to be related to the individual's professional capacity. The town should take my findings under Issue C to apply to these portions of record 125 (and therefore redact them before disclosing the rest of record 125).

### *Records 78, 95, and 104 (at issue in both the requester's appeal and the affected party's appeal)*

[32] The town withheld portions of records 78, 95, and 104, but the affected party objects to the disclosure of any part of these emails. Therefore, the question is whether the parts that the town decided could be disclosed also contain personal information (and if so, whose it is).

[33] The affected party's representations can be understood to indicate a belief that the body of each of these emails is this affected party's personal information in the form of views or opinions under paragraphs (e) and (g) of the definition of personal information.

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<sup>12</sup> Order PO-2612.



[34] Based on my review of records 78, 95, and 104, I find that they contain the personal information of the requester and several identifiable individuals, consisting of the type(s) of information already discussed above (such as names, personal contact information, and/or views or opinions). Having reviewed these records, I accept the affected party's view that the emails in their entirety consist of that affected party's personal information (whether alone or inextricably mixed with the personal information of one or more other identifiable individuals, such that they cannot be reasonably severed).

### *Summary*

[35] In summary, access to the personal information in group 1 must be assessed under the discretionary personal privacy exemption at section 38(b), the records in group 2 must be assessed under the mandatory personal privacy exemption at section 14(1). I make those assessments next.

### **Issue B: Does the mandatory personal privacy exemption at section 14(1) or the discretionary personal privacy exemption at section 38(b) apply to the information at issue?**

[36] For the following reasons, I find that the personal information withheld in group 1 is exempt from disclosure under section 38(b) of the *Act* and the personal information withheld in group 2 is exempt from disclosure under section 14(1) of the *Act*.

[37] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides some exemptions from this right. Under the section 38(b) exemption, if a record contains the personal information of both the requester and another individual, the institution may refuse to disclose the other individual's personal information to the requester if disclosing that information would be an "unjustified invasion" of the other individual's personal privacy.<sup>13</sup> The section 38(b) exemption is discretionary. This means that the institution can decide to disclose another individual's personal information to a requester even if doing so would result in an unjustified invasion of other individual's personal privacy.

[38] In contrast, under section 14(1), if 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.

[39] Sections 14(1) to (4) provide guidance in deciding whether the information is

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<sup>13</sup> However, the requester's own personal information, standing alone, cannot be exempt under section 38(b) as its disclosure could not, by definition, be an unjustified invasion of another individual's personal privacy; Order PO-2560.

exempt under section 14(1) or 38(b), as the case may be.

[40] None of the relatively straightforward five exceptions at sections 14(1)(a) to (e) have been claimed, and I find no basis for concluding that any apply. The sixth exception, at section 14(1)(f) is more complicated than the ones at section 14(1)(a) to (e). I consider that exception next.

***Section 14(1)(f) exception: disclosure is not an unjustified invasion of personal privacy***

[41] In deciding whether either of the personal privacy exemptions applies, sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy.

[42] Only section 14(2) is relevant in the two appeals before me (and no one has claimed otherwise).

[43] Section 14(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy under one of the personal privacy exemptions (whether section 14(1) needs to be considered or section 38(b) does). The information will be exempt from disclosure under a personal privacy exemption unless the circumstances favour disclosure.<sup>14</sup>

[44] The list of factors under section 14(2) is not exhaustive. Other factors (besides the ones listed in sections 14(2)(a) to (i)) must be considered under section 14(2) if they are relevant. These may include, for example inherent fairness issues<sup>15</sup> and ensuring public confidence in an institution.<sup>16</sup>

*An unlisted section 14(2) factor favours disclosure*

[45] Each of the first four factors, found in sections 14(2)(a) to (d), if established, would tend to support disclosure of the personal information in question. None of these factors have been claimed and I find no basis for considering them.

[46] However, the requester raises (what I can summarize as being) an unlisted factor of inherent fairness to him and his organization. Without making any findings about his detailed representations regarding the events that the requester describes, I acknowledge that the circumstances giving rise to the records were charged. I accept that they involved distress to the requester and many other individuals, including the individuals whose personal information is at issue in the records. I also acknowledge that the requester feels that his reputation has been harmed and that withholding the information at issue would be unfair to him in that regard. As a result, I find that the

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<sup>14</sup> Order P-239.

<sup>15</sup> Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

<sup>16</sup> Orders M-129, P-237, P-1014 and PO-2657.

appellant has raised an unlisted factor that weighs in favour of disclosure of all of the personal information at issue, whether the records contain the requester's personal information or not (because all the records relate to the same charged circumstances).

*At least two section 14(2) factors do not favour disclosure*

[47] The remaining five factors found in sections 14(2) (e) to (i), if established, would tend to support non-disclosure of that information.

[48] The town submits that the factors weighing against disclosure at sections 14(2) (e), (f), (g), (h), and (i) apply. The requester disagrees.

[49] The affected party's representations do not cite section 14(2) factors, but I find that it is clear from their representations that section 14(2)(f) is very relevant to the three emails at issue in their appeal (records 78, 95, and 104).

[50] Since I have reviewed the records and representations, I find it is sufficient to consider sections 14(2)(f) and 14(2)(i) here for *all* of the records containing personal information (regardless of which personal privacy exemption access must be considered under).

Section 14(2)(f) – the personal information is highly sensitive

[51] Section 14(2)(f) is intended to weigh against disclosure when the evidence shows that the personal information is highly sensitive.

[52] To be considered "highly sensitive," there must be a reasonable expectation of significant personal distress if the information is disclosed.<sup>17</sup> For example, personal information about witnesses, complainants or suspects in a police investigation may be considered highly sensitive.<sup>18</sup>

[53] The town submits that the records contain highly sensitive information and their release would be likely to cause distress to the individuals implicated. As noted, I understand the affected party's representations to mean that the factor at section 14(2)(f) is highly relevant to the three emails at issue in that appeal.

[54] I agree with the town and the affected party, respectively. In my view, the circumstances described in the records and all of the representations before me lead me to conclude that if the personal information withheld would be released, there is a reasonable expectation of significant personal distress to the individuals to whom it relates. Therefore section 14(2)(f) applies to the information withheld (whether under section 14(1) or section 38(b)). I find that this factor weighs significantly against

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<sup>17</sup> Orders PO-2518, PO-2617, MO-2262 and MO-2344.

<sup>18</sup> Order MO-2980

disclosure.

Section 14(2)(i) - disclosure may unfairly damage an individual's reputation

[55] 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.<sup>19</sup>

[56] In light of my comments above about section 14(2)(f), it is also reasonable to conclude that disclosure might unfairly damage the reputation of any person referred to in the records, given the charged nature of the circumstances and the various views about them apparent in the records. Therefore, section 14(2)(i) applies to all the personal information withheld.

[57] Due to my findings that two factors weigh against disclosure, it is not necessary to consider whether other factors raised by the town are relevant.

***Has the section 14(1)(f) exception been proven?***

[58] As discussed, section 14(1)(f) is an *exception* to the mandatory and discretionary personal privacy exemptions. This exception applies if disclosure is *not* an unjustified invasion of personal privacy. The information will be exempt from disclosure under a personal privacy exemption unless the circumstances favour disclosure.<sup>20</sup>

[59] To decide whether the section 14(1)(f) exception applies, I considered section 14(2) factors. While I found that one unlisted factor weighs in favour of disclosure, I also found that two section 14(2) factors weigh against it (one of them significantly).

[60] For the records in group 2, this means that the section 14(1)(f) exception has not been proven. In other words, the evidence does *not* show that disclosure would *not* be an unjustified invasion of the personal privacy of the individuals whose personal information is found in group 2 records. Therefore, the personal information in these records cannot be disclosed, under the mandatory personal privacy exemption at section 14(1).

[61] For the records in group 1, considered under the discretionary personal privacy exemption at section 38(b) (that is, records containing the requester's personal information), I must weigh the factors and the balance of interests of the parties because the requester would have a higher right of access to records that contain his personal information. Above, I found that two factors weigh against disclosure (one of them significantly), and that one factor weighs in favour of disclosure. Weighing the factors and the interests of the parties, I find that disclosure of any of the personal information at issue in group 1 would be an unjustified invasion of personal privacy to the involved

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<sup>19</sup> Order P-256.

<sup>20</sup> Order P-239.

individuals.

[62] Since the records in group 2 had to be considered under the *mandatory* personal privacy exemption at section 14(1), if found to be exempt, the town is required to withhold the personal information at issue. However, since the records in group 1 had to be considered under the *discretionary* personal privacy exemption, the town could potentially disclose information even if it qualified for the exemption. I discuss the town's exercise of that choice (discretion), next.

***Did the town exercise its discretion under section 38(b)? If so, should the IPC uphold the exercise of discretion?***

[63] The section 38(b) exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[64] In addition, the IPC may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations; or
- it fails to take into account relevant considerations.

[65] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>21</sup> The IPC cannot, however, substitute its own discretion for that of the institution.<sup>22</sup>

*What considerations are relevant to the exercise of discretion?*

[66] Some examples of relevant considerations here are:

- 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, and the privacy of individuals should be protected,
- the wording of the exemption and the interests it seeks to protect,
- whether the requester is seeking their own personal information, and

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<sup>21</sup> Order MO-1573.

<sup>22</sup> Section 43(2).

- the relationship between the requester and any affected persons.

[67] In denying access to the personal information withheld in group 1 [to which section 38(b) applies], I am satisfied that the town exercised its discretion under section 38(b). I am satisfied that the town did so with the above relevant considerations in mind (and did not take into account irrelevant considerations), given both the nature of information withheld and decided to disclose. The evidence before me does not establish that this exercise of discretion was done in bad faith or an improper purpose. The requester's difficulties, as described by him, in dealing with the town (whether on the substantive baseball-related issues or in processing his requests) do not establish a basis for asking the town to re-exercise its discretion. Therefore, I uphold the town's exercise of discretion regarding the records in group 1.

### ***Conclusion***

[68] For these reasons, I uphold the town's decision to withhold the personal information in the records, in groups 1 and 2.

[69] Before proceeding to Issue C, I note that, amongst the records that the town claimed to be exempt under a personal privacy exemption are records 21, 108, 108b, and 127a, which the town also claimed section 10(1) over. Given my finding that records 21, 108, 108b, and 127a are exempt from disclosure under a personal privacy exemption, I will not consider whether they are also exempt under section 10(1). In addition, given my findings about the parts of record 125 that contain personal information [which is exempt under section 14(1)], my analysis of record 125 under Issue C, below, does not include that personal information.

### **Issue C: Does the mandatory exemption at section 10(1) for third party information apply to records 125, 127, and 128?**

[70] The town withheld records 125, 127, and 128 under section 10(1) of the *Act*. For the following reasons, I find that it there is insufficient evidence to uphold that decision, and I will order these records disclosed.

[71] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,<sup>23</sup> where specific harms can reasonably be expected to result from its disclosure.<sup>24</sup>

[72] Section 10(1) states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information,

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<sup>23</sup> *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

<sup>24</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

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

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

[74] The town states that three of the sixteen affected parties that it notified about the request expressed their concerns to the town about disclosure of the records. On my review of their concerns, they do not specifically mention records 125, 127, and 128, but all of these parties are included in part of the email chain that is record 125, and one of them is involved in the other two email chains (records 127 and 128), so I have considered these affected parties' concerns.

***Part 1 of the section 10(1) test: type of information***

[75] The town submits that records 125, 127, and 128 contain financial information. The town describes records 125 and 127 as email chains involving the town and certain individuals include specifics about grant applications, and record 128 as an email regarding a status update about a grant application made to the town. The town relies on Order MO-1783, where it says that the IPC partially upheld an institution's decision to withhold records relating to grant information. The town argues that based on how the

test for section 10(1) "was applied [in Order MO-1783] to records of a similar nature," the town says that records 125, 127, and 128 should not be released.

[76] Two of the affected parties did not specifically state which type of information was involved in records 125, 127, and 128. They said that "some" records [which I understand to be referring to all the records originally at issue under section 10(1)] include financial and technical information.

[77] The third affected party submitted that sharing "each of these emails [a group of emails that includes records 125, 127, and 127] would most definitely be divulging trade secrets and technical information" of two organizations.

### ***Analysis/findings***

[78] Based on my review of the parties' representations and the email chains that make up records 125, 127, and 128, I am not persuaded that these records would reveal a third party's "financial information," "technical information, or "trade secret," as those terms have been described by the IPC for the purpose of section 10(1) of the *Act*. As a result, these records do not meet part one of the test for section 10(1), and I do not need to consider the other two parts of the test because all three parts of the test must be met to be exempt under section 10(1).

[79] The IPC has described the types of information protected under section 10(1), and claimed in these appeals, as follows:

***Trade secret*** includes information such as a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:

- (a) is, or may be used in a trade or business;
- (b) is not generally known in that trade or business;
- (c) has economic value from not being generally known; and
- (d) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>25</sup>

***Technical information*** is information belonging to an organized field of knowledge in the applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. Technical information usually involves information prepared by a professional in the field, and

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<sup>25</sup> Order PO-2010.



describes the construction, operation or maintenance of a structure, process, equipment or thing.<sup>26</sup>

**Financial information** is information relating to money and its use or distribution. The record *must contain or refer to specific data*. Some examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.<sup>27</sup> [Emphasis added.]

[80] The purpose of a claimed exemption is a key aspect of deciding whether it applies. The purpose of the section 10(1) exemption is to protect the “informational assets” of third parties.<sup>28</sup> Such “informational assets” must be one of the types of information listed in section 10(1).

[81] Based on the evidence before me, the email exchanges that make up records 125, 127, and 128 do contain any trade secret, technical information, or financial information.

[82] While one of the affected parties asserts, without elaboration, that “each” of the emails “would most definitely be divulging the trade secret and technical information,” I am not persuaded that this assertion is enough to establish that either of these types of information is in the email exchanges of records 125, 127, and 128. There is nothing about these email discussions that can reasonably be considered “information such as a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism” to be a trade secret. Likewise, I find that nothing in these email exchanges can reasonably be described as “belonging to an organized field of knowledge in the applied sciences or mechanical arts” to be technical information. Therefore, I do not accept that records 125, 127, and 128 contain trade secrets or technical information of a third party.

[83] I now turn to the claim of the town (and perhaps the other two affected parties) that the records withheld under section 10(1) contain financial information. I find this claim to be unsupported by the evidence, considering the IPC’s description of “financial information” and the purpose of the section 10(1) exemption.

[84] Based on my review of the email exchanges that make up records 125, 127, and 128, I find that none of them can reasonably be said to “contain or refer to specific data,” as required of to be “financial information” under section 10(1) of the *Act*. The mere connection to the general subject matter of a grant application is not enough to transform these email exchanges into the type of information that section 10(1) exists to protect (“informational assets” of a third party). It is not clear to me what specific data in these emails constitutes the informational assets of the third party being discussed within the meaning of “financial information” under section 10(1).

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<sup>26</sup> Order PO-2010.

<sup>27</sup> Order PO-2010.

<sup>28</sup> Order MO-1706.

[85] The town asks that I treat these emails as some of the grant-related information in Order MO-1783 was treated, but I do not find that order helpful to the town's position. That appeal involved tender documents and a grant application information, which the adjudicator described as both containing information that qualifies as technical, commercial and financial information. He said that the records "include information about the proposed costs of the products and services to be provided to the Town by each bidder, details of the construction work to be undertaken by them, as well as various suggested improvements to the project, along with the bidders' guarantees and warranties of their work." Having reviewed records 125, 127, and 128, I do not find them "similar" in nature to the general description of the records in Order MO-1783, so I decline to follow its approach to those grant-related records.

[86] As a result, records 125, 127, and 128 do not meet part one of the test for section 10(1) and are not exempt from disclosure under section 10(1) of the *Act* (since all three parts of the test for section 10(1) must be met for the information to be exempt). Therefore, I will order the town to disclose these records to the requester (after redacting the personal information in record 125).

#### **Issue D: Should the IPC uphold the institution's fee or fee estimate?**

[87] Institutions are required to charge fees for requests for information under the *Act*. Section 45 governs fees charged by institutions to process requests.

#### ***Fee estimates and deposits***

[88] Under section 45(3), an institution must provide a fee estimate where the fee is more than \$25. The purpose of the fee estimate is to give the requester enough information to make an informed decision on whether or not to pay the fee and pursue access.<sup>29</sup> The fee estimate also helps requesters decide whether to narrow the scope of a request to reduce the fee.<sup>30</sup>

[89] The institution can require the requester to pay the fee before giving them access to the record.<sup>31</sup> If the estimate is \$100 or more, the institution may require the person to pay a deposit of 50 per cent of the estimate before it takes steps to process the request.<sup>32</sup>

[90] If the fee is \$100 or more, the fee estimate can be based on either the actual work done by the institution to respond to the request or a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.<sup>33</sup>

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<sup>29</sup> Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

<sup>30</sup> Order MO-1520-I.

<sup>31</sup> Regulation 823, section 9.

<sup>32</sup> Regulation 823, section 7(1).

<sup>33</sup> Order MO-1699.

[91] In all cases, the institution must include:

- a detailed breakdown of the fee; and
- a detailed statement as to how the fee was calculated.<sup>34</sup>

[92] The IPC can review an institution's fee and can decide whether it complies with the *Act* and regulations.

***What items can the institution charge for?***

[93] Section 45(1) sets out the items for which an institution is required to charge a fee:

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

- (a) the costs of every hour of manual search required to locate a record;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
- (d) shipping costs; and
- (e) any other costs incurred in responding to a request for access to a record.

[94] More specific fee provisions are found in sections 6 and 6.1 of Regulation 823. Section 6 applies to general access requests, while section 6.1 applies to requests for one's own personal information.

[95] It is important to know what type of request (or part of a request) is involved in a search because, under section 45(1) and Regulation 823, an institution can charge for certain actions but not for others, depending on the type of request.

***How did the institution calculate the fee?***

[96] The town states that it based its fee on the actual work completed by its staff.

[97] The town says that the breakdown of its initial fee estimate for six hours of search time (6 hours × \$7.50 per ¼ hour = \$180) and six hours of preparation time was (6 hours × \$7.50 per ¼ hour = \$180)<sup>35</sup> was \$360.00. (The town later reduced this fee at

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<sup>34</sup> Orders P-81 and MO-1614.

<sup>35</sup> The town reduced this from 8.5 hours.

IPC Mediation, to \$185.) Although the town initially also charged photocopying fees, it later removed and replaced those fees with the \$10 fee for disclosing information in an electronic format. Since the photocopying fee was removed, I make no findings about it in this order.

[98] In explaining how the town calculated its fee, the town states that the majority of the records requested were emails, so the Director of Information Technology Services and Innovation created “an intricate query” of the town’s email archiving system. The town says that due to the complexity of the search criteria, the search time for this request was six hours, not including “the wait time in between the system processing the extract once launched.”

[99] Although the town explains that this query included names and email addresses provided to the town by the requester (totally 88 external contacts and five town contacts), it does not explain whether these records included records containing the requester’s own personal information. This is important because under section 45(1)(b) and Regulation 823, time spent preparing a record for disclosure can *only* be charged for general requests, not requests for the requester’s own personal information.<sup>36</sup> Likewise, under section 45(1)(b) and the regulation, time spent preparing a record for disclosure can *only* be charged for general requests, not requests for the requester’s own personal information.<sup>37</sup> Given the nature of the records at issue in this appeal (with some containing the requester’s own personal information, and some not), without a more detailed breakdown of the town’s fee estimate, I am unable to conclude that the town was allowed to charge for six hours of search time and six hours of preparation time. As a result, I have insufficient evidence to uphold the \$360 fee charged (reduced to \$185) and I will not allow it.

[100] The only part of the fee I will allow is the \$10 fee mentioned earlier, which the town was allowed to charge under section 45(1)(c) of the *Act*, in responding to requests and requests for a requester’s own personal information.

[101] In conclusion, for the reasons set out above, I do not uphold the town’s reduced fee of \$185 charged to the requester. If the requester has paid a fee that I have not upheld (or a part of it), the town is to refund what he paid to him.

**Issue E: Should the institution waive its fee?**

[102] Although the town issued a fee waiver (reducing the fee from \$370 to \$185), the fee that I must consider under Issue E is the \$10 fee that I am allowing the town to charge. As I explain below, I find that the town should not waive the remaining \$10. To the extent that the requester and the town made arguments about this issue relating to the portion of the fee that I have not accepted (above, under Issue D), I do not set those

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<sup>36</sup> Regulation 823, sections 6 and 6.1.

<sup>37</sup> Regulation 823, sections 6 and 6.1.

arguments out here.

[103] The fee provisions in the *Act* establish a “user-pay” principle. The fees referred to in section 45(1) and outlined in sections 6 and 6.1 of Regulation 823 are mandatory unless the requester can show that they should be waived.<sup>38</sup>

[104] The *Act* requires an institution to waive fees, in whole or in part, if it is fair and equitable to do so. Section 45(4) of the *Act* and section 8 of Regulation 823 set out matters the institution must consider in deciding whether to waive a fee.

***What factors must be considered when deciding whether it would be “fair and equitable” to waive a fee?***

[105] A fee must be waived, in whole or in part, if it would be “fair and equitable” to do so in the circumstances.<sup>39</sup> Section 45(4) sets out factors that must be considered in deciding whether it would be fair and equitable to waive the fee; an institution is also expected to consider any other relevant factors. I discuss the factors that may be relevant, below.

*Actual cost in comparison to the fee: section 45(4)(a)*

[106] Where the actual cost to the institution in processing the request is higher than the fee charged to the requester, this may be a factor weighing against waiving the fee.<sup>40</sup>

[107] Although the town’s fee breakdown was not detailed enough, it is reasonable to accept that its actual costs to process the request were significantly more than the remaining \$10 allowable fee. This factor weighs in favour of not waving the \$10 fee.

*Financial hardship: section 45(4)(b)*

[108] For section 45(4)(b) to apply, the requester must provide evidence regarding their financial situation, including information about income, expenses, assets and liabilities.<sup>41</sup>

[109] The requester did not state that paying the initially higher fee would be a financial hardship to him, so it is reasonable to accept that paying the remaining \$10 would not. This is a factor that weighs against waiving the \$10 fee.

*Other relevant factors*

[110] The institution must consider any other relevant factors when deciding whether it would be fair and equitable to waive the fee.

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<sup>38</sup> Order PO-2726.

<sup>39</sup> See *Mann v. Ontario (Ministry of Environment)*, 2017 ONSC 1056.

<sup>40</sup> Order PO-3755. See also Order PO-2514.

<sup>41</sup> Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

[111] Since only \$10 of the fee charged may be waived now, I will not consider factors related to whether the town and the requester worked constructively together to narrow or clarify the request (though such factors are often considered as relevant in appeals of fee waiver decisions). In my view, two factors that are usually considered are relevant here:

- whether the request involves a large number of records, and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the requester to the institution.<sup>42</sup>

[112] The appellant received hundreds of pages of records (in full or in part) in response to this request. This weighs against a fee waiver.

[113] Regarding whether a waiver of the fee would shift an unreasonable burden of the cost from the requester to the institution, in my view, this factor is neutral. The \$10 is not significant so it would not be “an unreasonable burden” on the institution (or the taxpayer funding the institution), but the institution has already reduced its fee and had most of its fee struck (under Issue D).

[114] Considering the section 45(4) and other factors discussed above, I find that charging the requester the remaining \$10 would be consistent with the user-pay principle in the *Act*. As a result, the town should not waive this part of the fee.

#### **Issue F: Did the institution conduct a reasonable search for records?**

[115] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.<sup>43</sup> If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution’s decision. Otherwise, it may order the institution to conduct another search for records.

[116] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.<sup>44</sup>

[117] The *Act* does not require the institution to prove with certainty that further records do not exist.<sup>45</sup> However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;<sup>46</sup> that is, records that

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<sup>42</sup> Orders M-166, M-408 and PO-1953-F.

<sup>43</sup> Orders P-85, P-221 and PO-1954-I.

<sup>44</sup> Order MO-2246.

<sup>45</sup> *Youbi-Misaac v. Information and Privacy Commissioner of Ontario*, 2024 ONSC 5049 at para 9.

<sup>46</sup> Orders P-624 and PO-2559.

are "reasonably related" to the request.<sup>47</sup>

[118] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.<sup>48</sup> The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.<sup>49</sup>

### ***The town's evidence***

[119] The town explained the steps that it took to search for responsive records in representations that were searched with the appellant (so it is not necessary to set out these details here). It is enough to say that the town explained that its Director of Information Technology Services and Innovation created "an intricate query" of the town's email archiving system, as directed by the town clerk. The town explains that the staff member who created and ran that query is very knowledgeable in the subject matter of the request and in the systems in question, so that individual is a subject matter expert.

[120] In terms of the scope of the query, the town explains that it included the names and email addresses provided by the requester. After duplicates were removed, the results of the email search were given to the town clerk, deputy clerk, and Records and Information Management Coordinator, along with all the records for review.

[121] A tracking list of results was used to show how many records were located when searching particular parameters. These records were then reviewed so that duplicates and non-responsive information could be removed. In addition, at IPC mediation, the town conducted another search; town staff that were named in the request searched their own records (including handwritten records). This resulted in five additional records being located and were released to the requester through a revised decision letter.

[122] The town notes that during mediation, the town was given a list of records that the requester felt were missing. The town explains that none of the items referenced were records of phone or in-person conversations. The town states that it advised the requester in its revised decision that town staff are not obligated by the town (or required by law) to take notes of phone calls or in-person meetings that they attend. As a result, there are no records of these meetings unless any formal meeting notes were taken.

### ***The requester's position***

[123] The requester raised the reasonableness of the town's search on appeal. In his representations, he explains that in response to an earlier request, he received about 250 pages of records, and when he started the process all over again (for reasons described

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<sup>47</sup> Order PO-2554.

<sup>48</sup> Orders M-909, PO-2469 and PO-2592.

<sup>49</sup> Order MO-2185.

in his representations), there were over 1000 pages. He says that this proves that some records were missing (presumably, in reference to the earlier request). He states that he kept advising the town that not everything was in the records released to him and the freedom of information representative would go back and find a few more pages; this process repeated but he asserts not everything has been identified. The requester states that he knows there were communications between certain entities or persons (which he lists). He states that he has filed over 5000 pages of emails in a related court case and that "the other side has produced very little to support their position," in court.

### ***Analysis/findings***

[124] I uphold the town's search for responsive records as reasonable in the circumstances, based on the evidence before me. The town provided sufficient evidence that it engaged experienced employees knowledgeable in the subject matter of the request to identify responsive records. I accept its evidence about the query efforts made, given the scope of the request, as reasonable in the circumstances.

[125] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist,<sup>50</sup> and I am not satisfied that the requester has done so here. The fact that additional records were identified over time does not mean that the town's overall search efforts were not reasonable in the circumstances, assuming that the earlier request that he mentioned was the same as the one here (and he did not provide the wording of it in his representations). The number of pages that the appellant was able to attach to his court documentation does not establish that the town did not engage experienced employees knowledgeable in the subject matter of the request in response to his request, or that their efforts were not reasonable in the circumstances.

[126] As a result, I uphold the town's search for responsive records as reasonable in the circumstances.

### **ORDER:**

1. I allow the affected party's appeal and order the town to fully withhold records 78, 95, and 104 (at issue in both appeals).
2. I uphold the town's decision to withhold the remaining personal information at issue in the requester's appeal and dismiss that aspect of the appeal.
3. I order the town to withhold the personal information described in this order found in record 125.

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<sup>50</sup> Order MO-2246.



4. I order the town to disclose the remaining parts of record 125 and all of records 127 and 128 to the requester by **December 18, 2024**, but not before **December 13, 2024**.
5. I do not uphold the town's remaining \$185 fee and I only allow the town to charge the requester \$10. As a result, the town is to refund money due to the requester, if applicable.
6. I uphold the town's decision not to waive the fee and dismiss that aspect of the appeal.
7. I uphold the town's search for responsive records as reasonable in the circumstances and dismiss that aspect of the appeal.
8. I retain the right to obtain a copy of the records disclosed under provision 4 of this order, to ensure compliance.

Original Signed by: \_\_\_\_\_  
Marian Sami  
Adjudicator

\_\_\_\_\_ November 13, 2024