Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1180

Appeal MA-980126-1

Regional Municipality of Haldimand-Norfolk

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NATURE OF THE APPEAL:

The Police Services Act requires every regional municipality to provide adequate and effective police services in accordance with its needs. This responsibility may be discharged in a number of ways, including by establishing a local police force or by contracting with the Solicitor General for the provision of services by the Ontario Provincial Police (OPP).

In the fall of 1996 the Regional Municipality of Haldimand-Norfolk (the Region) began to investigate the possibility of moving from a shared service arrangement, by which the OPP and the Haldimand-Norfolk Regional Police Service (HNRP) provided police services to the Region, to a single service arrangement whereby one or the other of the forces would provide region-wide services. Upon the Region's request, the HNRP and the OPP submitted proposals for providing region-wide services. In September 1997 the Region decided to enter into a contract with the OPP for this service. In late 1997, the Haldimand-Norfolk Police Association (the Association) applied to the Ontario Court (General Division) Divisional Court for a judicial review of the Region's decision. The Association sought to have the Region's decision quashed on the basis that the Region's decision-making process was unfair. In February, 1998, the court dismissed the application.

The Region received a request from a newspaper reporter for access to the following:

> All correspondence (letters, memos, etc.) - both internal & external - regarding policing sent to or from Regional Chair ... or Regional CAO ... between April 1, 1997 and December 1, 1997.

The Region located several records responsive to the request and granted partial access to them. Access to the remaining records was denied on the basis of the exemptions at sections 7(1) (advice or recommendations), 9(1)(b) (relations with the Government of Ontario), 12 (solicitor-client privilege) and 14 (personal privacy).

The requester, now the appellant, appealed the Region's decision to deny access to the requested records. In her letter of appeal, the appellant made submissions which suggested the possible application of the section 16 "public interest override" to the records.

During the mediation stage of the appeal, the appellant indicated that she was no longer interested in gaining access to six records for which the section 14 "personal privacy" exemption was claimed, and one record for which the section 9(1)(b) "relations with the government of Ontario" exemption was claimed. As a result, 16 records remained at issue in this appeal.

A Notice of Inquiry was provided to the appellant, the Region and two affected person. Representations were received from all parties with the exception of one affected person.

DISCUSSION:

ADVICE OR RECOMMENDATIONS

Section 7(1) of the Act reads:

> A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

The section 7 "advice or recommendations" exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making or policy-making [Orders 94, M-847]. Put another way, its purpose is to ensure that:

> ... persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363].

Previous orders of this office have stated the following with respect to the meaning of the words "advice" and "recommendations" in the equivalent to section 7 in the Freedom of Information and Protection of Privacy Act [Orders 118, P-348, P-363, P-883]:

> "Advice" for the purposes of section 7(1) of the Act must contain more than mere information. Generally speaking, advice pertains to the submission of a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process. "Recommendations" are to be viewed in the same vein.

The Region has claimed the application of the section 7(1) exemption for Record 1, a memorandum from the Treasurer and Commissioner of Finance to the Chief Administrative Officer (CAO) dated June 18, 1997.

The Region submits that Record 1 "bears the Treasurer's thoughts on what strategy should be used in helping the HNRP prepare their costing proposal" and "reflects on advice given by the Clerk concerning timing of disclosure of documents." The Region further submits that the "Chief Administration Officer's hand written comments on the memo reflect his reaction to the advice in the course of his decision making." The Region further submits that:

> Orders 94 and M-847 enunciated the purpose of the exemption which is "to preserve the free flow of advice and recommendations within the deliberative process of government decision making." Communications obviously not penned for public distribution should be protected from disclosure. Order 118 sets out the principle that "employees are expected to use professional judgment to alert management to relevant information" and also distinguished between opinion and mere information. We believe that the contents of this memo meets those tests. Order P-363 set out that "it is a fact of life that staff would not feel free and open to express their minds in writing on specific issues if they were aware that their advice or recommendations were subject to possible public scrutiny. It cautioned that a "chilling effect" would result from disclosure "which is precisely the rationale behind the

> exemption." "Government must have the benefit of staff advice which is candid, direct and to the point."

The appellant submits that in Order M-40 this office pointed out that section 7 is not intended to exempt all communications between public servants and that Order M-83 indicates that the exemption should be restricted to records whose release would inhibit the free flow of advice and recommendations within the deliberative process of government decision making and policy making. The appellant argues that since the policing decision has now been made, the release of Record 1 "should not impede the free flow of advice and recommendations on the subject of policing." In addition, the appellant points out that the section 7 exemption is discretionary rather than mandatory, and suggests that the Region should have exercised its discretion to disclose any exempt material, regardless of the application of section 7.

Both the Region and the appellant make representations regarding the issue of the public interest in disclosure of Record 1. I will consider these submissions below under the heading "Public Interest Override".

In my view, the disclosure of portions of Record 1, as contained in the fourth, sixth and seventh paragraphs, would reveal the advice or recommendations of either the author of the memorandum, the Treasurer and Commissioner of Finance, or the Regional Clerk. I am satisfied in the circumstances that disclosure of these portions would have a chilling effect on the free flow of advice and recommendations in the Region, and that none of the exceptions in section 7(2) applies to this information. I accept, as the appellant has indicated, that the Region has already made its decision on policing. However, the fact that the decision making process in question has already been completed does not preclude the application of the exemption, which is designed to have a **prospective** effect on the free flow of advice and recommendations within government.

I acknowledge that section 7 is a discretionary rather than mandatory exemption. However, under section 43(2) of the Act, if I uphold the Region's decision that it may refuse to disclose a record or part, I do not have the power to override the Region's exercise of discretion and order the record or part disclosed. Further, in the circumstances, I see no reason to send the matter back to the Region for the purpose of re-exercising its discretion.

The remaining portions of Record 1 neither contain nor reveal advice or recommendations. This information consists of factual material which neither consists of nor reveals a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process. The Region submits that Order 118 sets out the principle that "employees are expected to use professional judgment to alert management to relevant information". In that case, former Commissioner Sidney B. Linden found that merely providing relevant information to management did not meet the test for "advice" or "recommendations". The findings in Order 118 are consistent with the conclusions I have reached in this

case. Further, the hand written comments of the recipient of the memorandum contained in this record do not contain or reveal the substance of any advice or recommendations.

SOLICITOR-CLIENT PRIVILEGE

Introduction

Section 12 of the Act states:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

This section consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and

2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Region must provide evidence that the record satisfies either of two tests:

1. (a) there is a written or oral communication;

   (b) the communication must be of a confidential nature;

   (c) the communication must be between a client (or his agent) and a legal advisor; and

   (d) the communication must be directly related to seeking, formulating or giving legal advice.

   OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for counsel employed or retained by an institution; and

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

Although the wording of the two branches is different, the Commissioner' orders have held that their scope is essentially the same:

> In essence, then, the second branch of [section 12] was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation. In my view, Branch 2 of [section 12] is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships.
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> [Order P-1342; upheld on judicial review in Ontario (Attorney General) v. Big Canoe, [1997] O.J. No. 4495 (Div. Ct.)]

The Region has claimed the application of section 12 for Records 8 through 16. I will address the application of this exemption to each of these records below, first in light of solicitor-client communication privilege and, where necessary, in light of litigation privilege.

Solicitor-client communication privilege

At common law, solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551]. This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This

> confidentiality attaches to all communications made within the framework of the solicitor-client relationship ...
>
> [Descôteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> ... the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.
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> [Balabel v. Air India, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409]

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [Susan Hosiery Ltd. v. Minister of National Revenue, [1969] 2 Ex. C.R. 27, cited in Order M-729].

Record 8

Record 8 is a letter to the Region from a law firm representing a named individual, indicating that the individual is contemplating bringing a judicial review application against the Region. This letter is attached to a covering memorandum to all members of Regional Council.

The Region submits that this record "was circulated in confidence to Regional Council" and that:

> ... Order P-1551 articulates the principle that privilege was waived if the communication was made to the opposing party in the litigation. In this instance the Regional Council would have been the opposing party in the litigation.

Record 8 does not constitute a communications between a solicitor and client; rather, in effect, it is a communication between opposing parties, the Region and the named individual and, as such, it lacks the requisite element of confidentiality for solicitor-client communication privilege to apply [Orders P-1551, P-1631]. In the circumstances, this record does not qualify for exemption under the solicitor-client communication privilege in section 12.

Records 9 and 10

Records 9 is a letter to the Region from a law firm recommending various other firms to the Region for the purpose of the judicial review proceedings. Record 10 is a letter to the Region from one of the recommended law firms later retained by the Region for those proceedings. Record 10 attached various resumés which are no longer at issue in this appeal. Although the Region had not formally retained either law firm at the time of these communications, this does not preclude the application of solicitor-client privilege. As stated by R.D. Manes and M. Silver in Solicitor-Client Privilege in Canadian Law (Markham, Ont.: Butterworths, 1993), at p. 34:

> The solicitor-client relationship arises as soon as the potential client takes the first steps and has the first dealings with the lawyer's office. This relationship arises even before the formal retainer agreement is established, and even if no retainer is taken out.

Further, communications between a solicitor and client for the purpose of retaining the solicitor are privileged even if there is no formal retainer agreement [Order P-1631; R.D. Manes and M. Silver, p. 47; Stevens v. Canada (Prime Minister) (1998), 161 D.L.R. (4th) 85 at 100 (Fed. C.A.)].

I am satisfied that Records 9 and 10 are confidential communications made for the purpose of retaining counsel and for the purpose of obtaining or providing legal advice in the context of the judicial review proceedings and, therefore, these records qualify for solicitor-client communication privilege under section 12.

Records 11 to 16

Records 11 and 12 are two letters to the Region from the law firm retained by the Region in the judicial review litigation, each attaching a letter from that firm to opposing counsel in the litigation. Records 13 and 16 are additional letters to the Region from the law firm retained by the Region in the judicial review litigation. Record 15 is a letter to the Region from the same law firm attaching a draft affidavit to be

submitted to the court, with four attached exhibits. Record 14 is a letter to the Region from another law firm retained by the Region for the purpose of an application by the Region's Police Services Board to the Ontario Civilian Commission on Police Services under section 40 of the Police Services Act to abolish the HNRP.

The two letters attached to the covering letters in Records 11 and 12, being communications between opposing parties, do not qualify for solicitor-client communication privilege for the reasons outlined above regarding Record 8. The two covering letters in Records 11 and 12 are confidential communications made for the purpose of providing legal advice and therefore are subject to solicitor-client communication privilege under section 12.

Records 13 and 16 clearly are confidential communications from counsel to the Region for the purpose of giving legal advice in the judicial review matter and therefore are also subject to solicitor-client communication privilege under section 12.

The covering letter forming part of Record 15 is a confidential communication for the purpose of providing legal advice in the judicial review matter and as such qualifies for solicitor-client communication privilege under section 12. The final version of the attachment would have been made available to the public by virtue of it being filed with the court. However, in draft form, as attached to the covering letter, the affidavit is exempt since it forms part of a confidential communication made between counsel and his client for the purpose of providing legal advice [Order M-1112].

Finally, Record 14 is a confidential communication made for the purpose of providing legal advice to the Region in the context of the application under section 40 of the Police Services Act. Therefore, Record 14 is subject to solicitor-client communication privilege and thus qualifies for exemption under section 12.

The appellant points out that section 12 is a discretionary rather than mandatory exemption, and suggests that the Region should have exercised its discretion to disclose any exempt material, regardless of the application of section 12. For the reasons outlined above under the "Advice or Recommendations" heading in the context of my discussion of section 43(2) of the Act, I see no reason not to uphold, or further inquire into, the Region's decision in respect of the records I found to qualify for exemption under section 12.

The appellant refers to the fact that the underlying litigation in this matter is now complete and, based on the principles in Order P-1551, solicitor-client privilege should not longer apply. In Order P-1551, it was found that litigation privilege (as opposed to solicitor-client communication privilege), generally speaking, ends when the litigation ceases. By contrast, where a record is found to qualify for solicitor-client communication privilege, even in the context of litigation, the termination of the litigation does not of itself remove the privilege. The main reason for this is that normally the rationale for solicitor-client communication privilege, to ensure that a client may confide in his or her lawyer on a legal matter without reservation, remains despite the end of litigation.

In summary, Records 9, 10, the covering letters in Record 11 and 12 (page one of each record) and Records 13-16 qualify for solicitor-client communication privilege under section 12. Record 8 and the attachments to Records 11 and 12 do not qualify for this privilege under section 12.

Litigation privilege

Litigation privilege, often referred to as the "work product" or "lawyer's brief" rule, protects documents which are not direct solicitor-client communications, but which are "derivative" of that relationship. This includes communications between the solicitor or the client and third parties, documents generated internally by the solicitor or the client, or documents compiled for a lawyer's brief, where the dominant purpose for which they were created or obtained is existing or reasonably contemplated litigation. Litigation privilege applies only if the document was made or obtained with an intention that it be confidential in the course of the litigation.

The rationale for litigation privilege is to protect the adversary system of justice by ensuring a zone of privacy for counsel preparing a case for litigation [Hickman v. Taylor 329 U.S. 495 at 508-511 (1947); Strass v. Goldsack (1975), 58 D.L.R. (3d) 397 at 424-425 (Alta. C.A.); General Accident Assurance Co. v. Chrusz (1997), 34 O.R. (3d) 354 at 370 (Gen. Div.), leave to appeal granted (1997), 35 O.R. (3d) 727 (Gen. Div.)]. As the Ontario Court (General Division) Divisional Court explained in Ottawa-Carleton (Regional Municipality) v. Consumers' Gas Co. (1990), 74 D.L.R. (4th) 742 at 748:

> The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel. The invasion of privacy of counsel's trial preparation might well lead to counsel postponing research and other preparation until the eve of or during the trial, so as to avoid early disclosure of harmful information. This result would be counter-productive to the present goal that early and thorough investigation by counsel will encourage an early settlement of the case. Indeed, if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forego conscientiously investigating his own case in the hope he will obtain disclosure of the research investigations and thought processes in the trial brief of opposing counsel.

Under the litigation privilege or work product rule, a distinction has been drawn between "ordinary" work product (documents gathered from third parties, the document itself or factual information) and "opinion" work product (counsel's mental impressions, conclusions, opinions or legal theories), with the latter enjoying a heightened protection [R.J. Sharpe, "Claiming Privilege in the Discovery Process", Law Society of Upper Canada Special Lectures, 1984 (Richard DeBoo Publishers, 1984), pp. 175-177; In re Sealed Case, 676

F.2d 793 at 809-810 (U.S.C.A., Dist. Col., 1982); C.A.); Mancao v. Casino (1977), 17 O.R. (2d) 458 (H.C.)].

Since I have found that Records 9, 10, the covering letters in Record 11 and 12 (page one of each record) and Records 13-16 qualify for solicitor-client communication privilege under section 12, I need not consider the application of litigation privilege to these documents.

I found above that Record 8 and the attachments to Records 11 and 12 did not qualify for solicitor-client communication privilege, on the basis that they were in effect communications between opposing parties and therefore lacked the requisite degree of confidentiality. For similar reasons, these records cannot qualify for litigation privilege.

To conclude, I find that Record 8 and the attachments to Records 11 and 12 do not qualify for exemption under section 12.

PERSONAL INFORMATION

The Region has claimed the application of this exemption for Records 2 through 7. Record 2 is a letter marked "private and confidential" to the Regional Chair from the Mayor of Parry Sound. Records 3, 4, 5 and 6 are attachments to Record 2, all marked "private and confidential", consisting of extracts of submissions to the Ontario Solicitor General and Minister of Correctional Services from the Town of Parry Sound. Record 7 is a revision of Record 2, dated July 23, 1997, and is not marked "private and confidential".

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where 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.

The Region has specifically cited paragraphs (e) (personal opinions or views) and (f) (private or confidential correspondence) of the section 2(1) definition as applicable to Records 2 through 7. Although I notified the author of Records 2 and 7 as an affected person in this inquiry, this individual did not submit representations to me.

Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official government capacity, and found that in some circumstances, information associated with a person in his or her professional or official government capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" [Orders P-257, P-427, P-1412, P-1621].

The following passage from a decision of the Supreme Court of Canada in Dagg v. Canada (Minister of Finance) (1997), 148 D.L.R. (4th) 385 at 413, 415, in the context of the federal Privacy Act, captures the essence of the distinction which this office has drawn between an individual's personal, and professional or official government capacity:

> The purpose of these provisions is clearly to exempt [i.e., from the definition of "personal information"] only information attaching to positions and not that which relates to specific individuals. Information relating to the position is thus not "personal information", even though it may incidentally reveal something about named persons. Conversely, information relating primarily to individuals themselves or to the manner in which they choose to carry out the tasks assigned to them is "personal information".
>
> . . . . .
>
> The fact that persons are employed in government does not mean that their personal activities should be open to public scrutiny. By limiting the release of information about specific individuals to that which relates to their position, the Act strikes an appropriate balance between the demands of access and privacy. In this way, citizens are ensured access to knowledge about the responsibilities, functions and duties of public officials without unduly compromising their privacy.
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> [Order P-1621]

In Reconsideration Order R-980015, Adjudicator Donald Hale stated the following in the context of an argument that letters authored by officials of various organizations constituted the personal information of those officials under the definition of "personal information" in section 2(1) of the Freedom of Information and Protection of Privacy Act:

> I find that the information associated with the names of the affected persons which is contained in the records at issue relates to them only in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not **about** these individuals and, therefore, does not qualify as their "personal information" within the meaning of the opening words of the definition.
>
> In order for an organization, public or private, to give voice to its views on a subject of interest to it, individuals must be given responsibility for speaking on its behalf. I find that

> the views which these individuals express take place in the context of their employment responsibilities and are not, accordingly, their personal opinions within the definition of personal information contained in section 2(1)(e) of the Act. Nor is the information "about" the individual, for the reasons described above. In my view, the individuals expressing the position of an organization, in the context of a public or private organization, act simply as a conduit between the intended recipient of the communication and the organization which they represent. The voice is that of the organization, expressed through its spokesperson, rather than that of the individual delivering the message [emphasis in original].
>
> In the present situation, I find that the records do not contain the personal opinions of the affected persons. Rather, as evidenced by the contents of the records themselves, each of these individuals is giving voice to the views of the organization which he/she represents. In my view, it cannot be said that the affected persons are communicating their personal opinions on the subjects addressed in the records. Accordingly, I find that this information cannot properly be characterized as falling within the ambit of the term "personal opinions or views" within the meaning of section 2(1)(e).

In my view, the principles cited above, and in particular the findings of Adjudicator Hale in Reconsideration Order R-980015, are applicable in these circumstances. It is clear from a review of Records 2 through 7 that the author is speaking in an official capacity about municipal and provincial government matters on behalf of the Town of Parry Sound, rather than in his or her personal capacity. The information in the records is not "about" the author within the meaning of the section 2(1) definition of "personal information". Although some of the records are marked "personal and confidential", this does not of itself inject the requisite personal element into the information, to bring it within the scope of the definition of "personal information". In my view, paragraph (f) of the definition requires that the correspondence in question be sent by an "individual" in a personal capacity, as opposed to in an official government or business capacity.

Since Records 2 through 7 do not contain personal information, the section 14 exemption cannot apply to these records in the circumstances. However, because section 14 is a mandatory exemption, I have reviewed all of the records not otherwise found by me to be exempt, for the purpose of determining whether they contain personal information of any individual. As a result, I find that Record 1 contains information about an employee of the Region in her personal as opposed to official government capacity (as contained in the fifth paragraph), and Record 8 contains the personal information of the affected person for similar reasons (the affected person's name on page one). I will determine below whether this information is exempt under section 14 of the Act.

PERSONAL PRIVACY

Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits disclosure of this information unless one of the six exceptions listed in the section applies. In these circumstances the only exception which may apply is section 14(1)(f), which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [Order P-1456, citing John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767 (Div. Ct.)].

The only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act or where a finding is made under section 16 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 14 exemption.

In this case the appellant has suggested that the criterion at section 14(2)(a) (disclosure is desirable for purpose of public scrutiny) is applicable. The Region has suggested that the criterion at section 14(2)(h) (supplied in confidence) is applicable. The affected person does not cite any particular factor under section 14(2).

In my view, the factor at section 14(2)(a) is not relevant to the personal information in Records 1 and 8. Further, I find no other factors weighing in favour of disclosure are applicable in the circumstances. On this basis, I am not persuaded that disclosure of this personal information would **not** constitute an unjustified invasion of the personal privacy of these two individuals. I also find that none of the section 14(4) exceptions applies in this case. Accordingly, this information is exempt under section 14(1). I will consider the applicability of the section 16 public interest override to the personal information in Records 1 and 8 below.

PUBLIC INTEREST IN DISCLOSURE

The appellant indicates that she believes that a public interest exists in the disclosure of the records. In this case, the section 16 public interest override could apply only to records found to be exempt under sections

7 or 14, being Records 1 and 8. Section 16 cannot override the section 12 solicitor-client privilege exemption.

The two requirements contained in section 16 must be satisfied in order to invoke the application of the so-called "public interest override": there must be a compelling public interest in disclosure; and this compelling public interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of the particular record in question [Order 24].

The appellant submits that her request was made "in an attempt to shed further light on a contentious political process." Regarding Record 1 and the section 7 "advice or recommendations" exemption, the appellant states:

> [Record 1] is of special interest, because regional finance staff created the format of the request for proposals which each force was required to submit. Once the proposals were submitted, the clerk refused council access to them until they had been analyzed by finance staff. Rather than simply providing raw numbers for council's review, staff adjusted the numbers in an attempt to fashion what they called a true "apples to apples" comparison. Their adjustments were so controversial that an outside auditor was engaged to review the numbers.
>
> Therefore, any recommendations made by treasury staff regarding the policing decision making process are of considerable interest to the public. Their elected officials use staff's analysis of many issues as the basis for decision making, and it is important for there to be confidence in the soundness and integrity of their advice. This contentious battle over policing destroyed some of that confidence. I would argue that there is, indeed, a compelling public interest in disclosing the record and that it clearly outweighs the purpose of the exemption.

The appellant makes further submissions on the public interest issue specifically aimed at any personal information which might be contained in Records 2-7. Since I found that those records are not exempt under section 14, I need not consider those submissions here.

The appellant also makes extensive and detailed submissions on the application of section 16 generally:

> The public interest favours the disclosure of the aforementioned records. As you will note from the enclosed [newspaper] articles, the process of choosing a single police force for Haldimand-Norfolk was both contentious and political. There was manoeuvring behind the scenes by both sides, but the public wasn't a real part of the process. Both forces held their own public information nights and brought their own supporters, but regional council declined to hold public meetings on the subject. It wasn't until the Reformer conducted its

> Angus Reid poll that there was any quantifiable indication about what the public wanted. And, it wasn't what many of the elected officials were trying to promote.
>
> The process was also fraught with accusations about the manipulation of numbers and the attempt to hide information from the public. Although government officials denied such accusations and continue to do so, many people gained a mistrust of their officials as a result of the ongoing problems. In fact, one member of regional council recently suggested that the Minister of Municipal Affairs audit the region's finance situation.
>
> This mistrust continues today, as the region faces a challenge to its very existence. Our local MPP, Toby Barrett, recently introduced a bill in Queen's Park calling for the dissolution of regional government. For some, any light that can be shed upon the government's workings during a difficult time may prove critical to their willingness to promote the retention of the current system. These documents held serve that purpose.
>
> Canadians expect governments to work in their best interests. They need to know if that isn't the case.

The Region made extensive and detailed representations on this issue. The Region cites Orders P-1121 and P-1456 in support of the principle that the information at issue under section 16 "must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has available to effectively express their opinion or to make political choices." The Region points out that the process in question, the selection of a police service, has already been completed, and that the process was challenged "through the proper legal channels, unsuccessfully."

The Region argues that the public has had extensive access to most of the process, and that there has been "abundant public debate", through open public meetings held by the Region, the Police Services Board, the Solicitor General and the OPP, and through print and television media reports. The Region submits that the Angus Reid poll referred to above indicated that 48% of respondents considered themselves well informed on the issue. The Region further submits that thousands of pages of supporting documentation is publicly available, and that access has been denied to only 16 records.

The Region submits that even if there were a compelling public interest, it would not be satisfied by the disclosure of these records:

> ... There have been no allegations of wrong doing of Regional officials that could be proved or disproved by these records. There were earlier allegations of wrong doing in terms of the proposal analysis. An independent auditing firm, Deloitte Touche was retained to examine staff's adjustments and these were found to be sound. The costing proposal process was challenged by the Regional Police Association and found by the court to be

> fair. These records do not reveal any arcane conspiracy to weight the debate or the process in favour of either of the competitors, nor will they reveal any other abuse of the public trust.
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> Order P-1456 distinguished between the public interest and the appellant's personal interest. It is clearly in the requester/appellant's personal interest to perpetuate the controversy that has dogged this issue. From the perspective of the Regional Council and staff, Police Services Board, Regional Police and Ontario Provincial Police, the issue has been resolved and we wish to carry on with its implementation in an orderly fashion.

Dealing first with the personal information I found to be exempt under section 14 contained in Records 1 and 8, in my view, there clearly is no public interest in the disclosure of this information. This information is at best remotely related to the public interest issue raised by the appellant, that is the process by which the Region selected a police service. Therefore, I find that section 16 does not apply to override the application of the section 14 personal privacy exemption to the personal information in Records 1 and 8.

The information in Record 1 I found to be exempt under section 7 relates more closely to the public interest issue raised by the appellant, and I accept that disclosure of this information would "shed further light on a contentious political process." In my view, the appellant has established that there is a public interest in the disclosure of the "advice or recommendations" contained in Record 1.

On the other hand, the Region's decision making process has been completed, and the Divisional Court has scrutinized the process and found it to be fair from a legal perspective. I acknowledge that there also is a public interest in scrutinizing the process from a political, as opposed to a strictly legal viewpoint. However, the fact of an independent court review lessens the weight of the public interest. Further, there has been a significant amount of public debate surrounding this issue, as well as a substantial degree of disclosure of relevant documents.

Taking all of the circumstances into account, including the specific information in question in Record 1, I find that the public interest in disclosure, although not insignificant, does not meet the threshold of "compelling" as required by section 16. Therefore, I find that section 16 does not apply to override the application of the section 7 exemption to Record 1.

ORDER:

1. I uphold the Region's decision to withhold Records 9 and 10, the covering letters in Record 11 and 12 (page one of each record), Records 13-16, and the portions of Record 1 and 8 as highlighted in the copies of these records which I have attached to the Region's copy of this order.

2. I order the Region to disclose the remaining, non-highlighted portions of Record 1 and 8 and the attachments in Records 11 and 12 to the appellant by **February 3, 1999** but not before **January 29, 1999**.

3. In order to verify compliance with the terms of this order, I reserve the right to require the Region to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: December 30, 1998
David Goodis
Senior Adjudicator