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

ORDER MO-2221

Appeal MA-050200-2

Township of Georgian Bay

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NATURE OF THE APPEAL:

The Township of Georgian Bay (the Township) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

1. Agendas and/or minutes of all closed meetings 2004/2005

2. Any and all records to confirm business in closed session complies

    1) with rationale for closed meetings in 2004/05 in accordance with Municipal Act

    2) with public record of business arising from closed sessions 2004/05 i.e. records to show 1 led to 2

3. Record of information provided to council to result in resolution by council 2004/2005

The Township located records responsive to the request and issued a decision letter to the requester, indicating as follows:

> With respect to your request 1 above, please find enclosed copies of the agendas for Closed Session meetings for 2004 and 2005. These records have been severed as the severed portions would reveal the substance of deliberations of meetings of Council held in the absence of the public in accordance with the provisions of the *Municipal Act, 2001*, section 239(2) and/or (3), where applicable (section 6(1)(b) of the *Act*).
>
> With respect to your request 1 above, as you have been advised previously, minutes of closed session meetings are not taken and therefore the records requested do not exist.
>
> With respect to your request [2.1] above, please see section 239(2) and/or (3) of the *Municipal Act, 2001* which is publicly available. As well, please see resolutions passed by Council, which are also publicly available, which authorize the holding of Close Session meetings in accordance with the aforementioned sections of the *Municipal Act, 2001*. As these documents are publicly available, I am denying access under section 15(a) of the *Act*. Enclosed is a copy of an email record with a Municipal Advisor with the Ministry of Municipal Affairs and Housing with respect to Closed Session meetings.
>
> With respect to your request [2. 2] above, I assume you are asking for copies of any documentation provided to Council members in Closed Session and as such I am denying access in accordance with section 6(1)(b) of the *Act*.
>
> With respect to your request 3 above, this appears to be the same request as [2. 2] and as such the same exemption is applicable.

The requester, now the appellant, appealed the Township's decision to deny access to the requested records and also indicated that additional records should exist. The appellant also advised that she wished to appeal the fee of $21.00 charged by the Township.

During mediation, the parties clarified the issues on appeal.

Item 1 of Request - Agendas

The appellant advised the mediator that she believes there should be additional Agendas beyond those identified by the Township's decision letter. In particular, she advised that there should be six additional Agendas for the following dates: June 28, 2004; November 26, 2004; March 15, 2005; May 2 or 5, 2005; May 9, 2005 and June 13, 2005. The Township agreed to conduct an additional search for these particular records, and subsequently located one additional Agenda for June 28, 2004. The Township issued a supplementary decision dated November 7, 2005, in which it addressed the request for additional Agendas as follows:

- June 28, 2004 – severed agenda for personal information, enclosed
- November 26, 2004 – there was no meeting held on November 26, 2004; however, the November 29th Agenda was included in your August 5, 2005 Decision Letter. Enclosed is a second copy for your convenience.
- March 15, 2005 – There was no Closed Session Agenda for March 15, 2005.
- May 5, 2005 or May 2, 2005 – There was no Closed Session Agenda for May 5, 2005; however, the May 2, 2005 Closed Session Agenda was included in your August 5, 2005 Decision Letter. Enclosed is a second copy for your convenience.
- May 9, 2005 – There was no Closed Session Agenda for May 9, 2005.
- June 13, 2005 – There was no Closed Session Agenda for June 13, 2005.

Upon receipt of the supplementary decision, the appellant advised the mediator that she still believes there should be five additional Agendas for the following dates: November 26, 2004; March 15, 2005; May 5, 2005; May 9, 2005 and June 13, 2005. Accordingly, the existence of additional Agendas remains at issue in this appeal.

The appellant is also pursuing access to the severed portions of the Agendas, with the exception of individual's names if they are found to be personal information at adjudication. Accordingly, section 6(1)(b) remains an issue in dispute with respect to the Agendas.

Item 1 of Request - Minutes of Closed Session Meetings

The appellant advised the mediator that she believes minutes of the closed session meetings should also exist. During mediation, the appellant indicated that if the Township Clerk or Mayor was willing to provide an affidavit stating that there are no minutes of closed session meetings, then she would not pursue this issue further. The Township agreed with this approach, and the Mayor and CAO/Clerk-Treasurer subsequently provided affidavits to address this issue. The

appellant was satisfied with this response, and accordingly, the existence of minutes of closed session meetings is no longer an issue in dispute.

Item 2.1 of Request - Authority for Closed Session Meetings

In its decision letter, the Township advised that records relating to its authority for holding closed session meetings in accordance with the *Municipal Act, 2001* are publicly available, and therefore exempt pursuant to section 15(a) of the *Act*. The appellant advised the mediator that she does not wish to pursue Item 2.1 of her request, and accordingly, section 15(a) is no longer an issue in dispute.

Items 2.2 and 3 of Request - Clarification

There was some initial confusion over the interpretation of Items 2 and 3 of the request. During mediation, the appellant clarified the intent of Items 2 and 3 of her request to mean all correspondence and supporting documentation used in closed session meetings for 2004 and 2005. The Township confirmed its understanding of this request and advised that all records used in closed session meetings for 2004 and 2005 have been identified as responsive records in this appeal, and have been denied pursuant to section 6(1)(b) of the *Act*. The appellant advised that she wishes to pursue access to these records in their entirety (with the exception of individual's names if they are found to be personal information at adjudication), and accordingly, section 6(1)(b) remains an issue in dispute.

Additional Exemptions

On September 27, 2005, a Confirmation of Appeal was provided to both parties indicating that if the institution wishes to claim additional discretionary exemptions, it is permitted to do so by November 3, 2005. On November 10, 2005, the Township issued a supplementary decision claiming additional discretionary exemptions with respect to the responsive records, as outlined in an attached index. The Township also raised a mandatory exemption for the first time, the application of section 14(1), to some of the records at issue. Since the Township issued this decision only one week past the deadline, the appellant advised the mediator that she does not object to the Township's late-raising of additional discretionary exemptions in this appeal, but reiterated that she does wish to pursue access to the records in their entirety (with the exception of individual's names if they are found to be personal information at adjudication). Accordingly, the following sections of the *Act* are also at issue in this appeal: 6(1)(a), 7(1), 8(1)(a),(b), 8(2)(a), 11(c),(e),(f),(g), 12 and 14(1). The mediator also raised the possible application of section 38(a) in conjunction with 6(1)(b) to some of the records at issue as they appear to contain the personal information of the appellant.

Existence of Additional Records

In addition to the Agendas noted above, the appellant believes that there should also be correspondence and supporting documentation for closed session meetings on those particular dates as well (specifically: November 26, 2004; March 15, 2005; May 5, 2005; May 9, 2005 and

June 13, 2005). With respect to the existing Agendas, the Township's index indicates that for some agenda items, there are no responsive records (specifically: 1(b),(d); 2(a),(c),(d); 4(b); 5(a); 8(b); 9(a),(b),(c); 10(a),(b),(c); 11(a), 12(a),(b); 13(a),(d),(e); 14(a),(b); 18(c); 19(d); 20(b)(iii),(c); 21(b)(iv); 22(a),(b),(d); 23(a),(b),(c)(i),(c)(iii),(e); 24(a),(d); 25(a),(b); 26(a),(b),(c); 27(a),(b); and 28(a),(b),(d)). The appellant believes that there should be responsive records pertaining to these agenda items. Accordingly, the existence of additional records relating to closed session meetings for 2004 and 2005 remains an issue in dispute.

Fee

During mediation, the appellant advised the mediator that she does not wish to purse her appeal of the Township's fee, and accordingly, the fee is no longer an issue in dispute.

I began my inquiry by sending a Notice of Inquiry to the Township seeking representations. The Township chose not to submit representations. I then sent a copy of this Notice of Inquiry to the appellant, inviting representations. The appellant also advised that she did not wish to make any representations.

RECORDS:

The records at issue in this appeal consist of Agendas and all correspondence/supporting documentation used in closed session meetings for 2004 and 2005, as outlined on the Township's Index of Records - Revised March 24, 2006. The appellant has been provided with a severed copy of this index.

DISCUSSION:

DRAFT BY-LAW/CLOSED MEETING

Section 6(1)(a) and (b) read:

> A head may refuse to disclose a record,
>
> (a) that contains a draft of a by law or a draft of a private bill;
>
> (b) that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

Sections 6(2)(a) and (b) set out exceptions to the exemptions in sections 6(1)(a) and (b). They read:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a

record if,

(a) in the case of a record under clause (1)(a), the draft has been considered in a meeting open to the public;

(b) in the case of a record under clause 1(b), the subject matter of the deliberations has been considered in a meeting open to the public;

The Ministry claims that section 6(1)(a) applies to Record 29(a) and section 6(1)(b) applies to all of the records at issue in this appeal.

Analysis and finding

Section 6(1)(a) -Draft by-law

In Order M-394, Adjudicator Anita Fineberg found that the draft by-law exemption in section 6(1)(a) applies only to records which *contain* the draft by-law.

Having reviewed Record 29(a), it actually contains a draft by-law. Accordingly, I find that section 6(1)(a) applies to Record 29(a).

Section 6(2)(a) outlines an exception to the draft by-law exemption. That section states:

> Despite subsection (1) a head shall not refuse under subsection (1) to disclose a record if, in the case of a record under clause 1(a), the draft has been considered in a meeting open to the public.

I have been provided with no information which would indicate that this draft was considered in a meeting open to the public, and, from the face of the record it appears that it was considered in a private session. Therefore, I find that Record 29(a) is exempt under section 6(1)(a) of the *Act*.

Section 6(1)(b) - Closed meeting

For this section 6(1)(b) to apply, the institution must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting

2. a statute authorizes the holding of the meeting in the absence of the public, and

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting

[Orders M-64, M-102, MO-1248]

Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings [Order MO-1344].

Part 1 – a council, board, commission or other body, or a committee of one of them, held a meeting

On the face of the records, it appears that various meetings of the Township's Council were held to consider the subject matter of each of the records. I accept that these meetings did, in fact take place. Therefore, part 1 of the three-part test under section 6(1)(b) has been met.

Part 2 – a statute authorizes the holding of the meeting in the absence of the public

Section 239(2) of the *Municipal Act, 2001* authorizes a municipality to hold meetings in the absence of the public. This section states:

> A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
>
> (a) the security of the property of the municipality or local board;
>
> (b) personal matters about an identifiable individual, including municipal or local board employees;
>
> (c) a proposed or pending acquisition or disposition of land by the municipality or local board;
>
> (d) labour relations or employee negotiations;
>
> (e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
>
> (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
>
> (g) a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act.

Section 239(3) provides another exception to allow a closed meeting. That section reads:

> A meeting shall be closed to the public if the subject matter relates to the

> consideration of a request under the *Municipal Freedom of Information and Protection of Privacy Act* if the council, board, commission or other body is the head of an institution for the purposes of that Act.

I have reviewed the records closely and find that the majority of them deal with subject matters that fall within section 239(2) of the *Municipal Act, 2001*. Where the subject matter falls within section 239(2), a closed meeting is, therefore, authorized by the *Municipal Act, 2001* and for those records, the requirement of part 2 of the section 6(1)(b) test has been met.

In light of my finding with respect to part 3 of the section 6(1)(b) test, it is not necessary for me to distinguish between the records that deal with subject matters that fall within section 239(2) and those that do not.

Part 3 – disclosure of the record would reveal the actual substances of the deliberations of the meeting

Under part 3 of the test it must be shown that disclosure of the record would reveal the actual substance of the deliberations of the meeting.

- "deliberations" refer to discussions conducted with a view towards making a decision [Order M-184]

- "substance" generally means more than just the subject of the meeting [Orders M-703, MO-1344]

Previous orders of this office have established that it is not sufficient that the record itself was the subject of deliberations at the meeting in question [see Order M-98, M-208], where the record does not reveal the actual substance of the deliberations or discussions that took place leading up to the decisions that were made.

In Order MO-1344, former Assistant Commissioner Tom Mitchinson addressed the application of part 3 of the test in section 6(1)(b) to the minutes of a closed meeting held by a school board. He began his analysis by commenting generally that:

> To satisfy the third requirement of the test, the Board must establish that disclosure of the record would reveal the actual substance of the deliberations of this *in camera* meeting. As I found in Order M-98, the third requirement would not be satisfied if the disclosure would merely reveal the subject of the deliberations and not their substance (see also Order M-703). "Deliberations" in the context of section 6(1)(b) means discussions which have been conducted with a view to making a decision (Orders M-184, M-196 and M-385).

After quoting extensively from the decision of David Loukidelis, Information and Privacy Commissioner for British Columbia in Order 00-14, which dealt with an access request for the

entire minutes of a closed meeting held by a local Police Board, Assistant Commissioner Mitchinson continued his analysis as follows:

> The record at issue in this appeal identifies the date of the special Board meeting, the trustees who attended and those who sent regrets, and the three subjects dealt with at the meeting. The first and third subjects are the standard agenda approval and adjournment items normally associated with meetings of this nature, whether held *in camera* or otherwise. The remaining subject concerns with the recommendation received from the Board's Negotiations Advisory Committee.
>
> Applying the reasoning outlined by Commissioner Loukidelis, I find that disclosure of the top portion of the record containing the date and those attending and not attending the meeting, as well as the headings listing the three subjects discussed at the meeting, would not disclose the substance of the deliberations of the Board at this meeting, and do not qualify for exemption under section 6(1)(b). The other information contained under the first and third subject headings falls outside the scope of the appellant's request.

Based on my review of the records at issue in this appeal, they represent a collection of agendas describing items to be discussed at council meetings, along with any corresponding documentation that were put before council during those meetings to facilitate discussion about the agendas items. As noted above, the Township submitted no representations on this issue to explain how disclosure of the records for which section 6(1)(b) were claimed might reveal the *substance* of the deliberations of Township Council. I have reviewed the records closely and in my view their disclosure would not reveal the actual substance of the deliberations or discussions that took place leading up to any decisions that were taken on any of the issues to be addressed in any of the meetings.

Specifically, following the reasoning outlined by former Assistant Commissioner Mitchinson, I find that none of the severed information listed on all of the agendas (the information under the heading "items of discussion") would reveal the substance of the deliberations on those issues. The agendas simply list the subject matter of the issues that are intended to be addressed at the meetings. Additionally, with respect to the supporting records, while I accept that disclosure of those documents might also reveal the *subject* of the deliberations, I do not find that disclosure of the supporting documents would neither reveal the *substance* of the deliberations on those issues, nor would it reveal any discussions that took place leading up to any decisions that might have been taken. In fact, while it appears likely that the records were put before Council and that it was *intended* that the issues listed on the agendas were to be discussed, in many instances the records themselves do not reveal whether or not deliberations on the specific issues even occurred or whether any final decision was made with respect to the matter.

Accordingly, I find that none of the records at issue meet part 3 of the test and, therefore, they do not qualify for exemption under section 6(1)(b).

LAW ENFORCEMENT

In the index provided to this office, the Township claims that the exemptions at sections 8(1)(a) and (b) and 8(2)(a) apply to Records 1(c), 5(b), 17(c), 19(b)(ii), 19(b)(iii), 20(b)(i), 20(b)(ii), 21(c), 23(d), and 28(c)(ii).

Sections 8(1)(a) and (b), and section 8(2)(a) read:

> (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (2) A head may refuse to disclose a record,
>
> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b)

The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law [Orders M-16, MO-1245]
- a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085]

- a children's aid society investigation under the *Child and Family Services Act* [Order MO-1416]

- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997* [Order MO-1337-I]

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

- an internal investigation to ensure the proper administration of an institution-operated facility [Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.)]

- a Coroner's investigation under the *Coroner's Act* [Order P-1117]

- a Fire Marshal's investigation into the cause of a fire under the *Fire Protection and Prevention Act, 1997* [Order PO-1833]

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Sections 8(1)(a) and (b) use the words "could reasonably be expected to". To establish that either of these exemptions apply, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Furthermore, the law enforcement matter or investigation referred to in the section 8(1)(a) and (b) exemptions must be specific and ongoing. Sections 8(1)(a) or (b) do not apply where the law enforcement matter or investigation is completed, or where the alleged interference is with "potential" law enforcement matters [Orders PO-2085, MO-1578].

Additionally, the institution holding the records need not be the institution conducting the law enforcement matter for the exemption to apply [Order PO-2085].

For the exemption at section 8(2)(a), the word "report" means "a formal statement or account of the results of the collation and consideration of information". The title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Order MO-1337-I]. Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I].

Analysis and finding

Sections 8(1)(a) and (b)

For the section 8(1)(a) or (b) exemptions to apply, the Township must demonstrate the following:

1. The information contained in the record relates to "law enforcement"; and

2. there are law enforcement "matters" or "investigations" in existence that are ongoing; and

3. the disclosure of the record at issue could reasonably be expected to *interfere* with an ongoing matter or investigation.

Many previous orders of this office have found the term "law enforcement" to apply in the context of a municipality's investigation into a possible violation of a municipal by-law [Orders M-16, MO-1245 for example]. Records 1(c), 5(b), 19(b)(ii), 20(b)(i), 20(b)(ii), and 28(c)(ii) are all planning reports prepared by the Town Planner/Manager of Planning and Community Development for Township Council. Most of the reports also include attachments in the form of letters, court judgments, maps and diagrams relating to the subject matter addressed in the report. Records 17(c), 19(b)(iii), 21(c), 23(d) are all letters from individuals or lawyers to the Township in relation to possible by-law infractions. On my review of these records and attachments I agree that all of them relate to the Township's investigation into a possible violation of municipal by-laws. Accordingly, following the findings in the orders mentioned above, I conclude that all the records at issue relate to law enforcement for the purpose of section 8(1)(a) and (b) and meet part 1 of the test.

Part 2 of the test required that the law enforcement matter or investigation be ongoing. While I accept that investigations into all these potential by-law infraction were likely conducted, I am not satisfied that the investigations are ongoing. Some of the records indicate clearly that the investigation has been completed because the by-law infraction was either remedied or not found to exist. All of the records are approximately two years old or more and the Township has provided with no evidence to support a finding that any of these matters or investigations are still ongoing. Without such evidence, I cannot conclude that they are. However, in light of my finding with respect to part 3 of the test for section 8(1)(a) or (b), it is not necessary for me to make a determination on whether part 2 has been met.

Based on my review of the records, and in the absence of representations on this issue from the Township, I am not persuaded that disclosure of any of the records for which section 8(1)(a) and (b) are claimed could *reasonably* be expected to interfere with the law enforcement matter under investigation, as required by part 3. As noted above, it is clear from previous orders that for these exemptions to apply, the onus is on the Township to provide detailed and convincing evidence to demonstrate that the harms contemplated by disclosure could reasonably be expected to occur. For example, the Township could provide specific examples of the types of harm envisioned.

In my view, by not submitting any representations in support of these exemption claims, the Township has failed to establish a sufficient evidentiary link between the disclosure of the records and the harm addressed by either of section 8(1)(a) or (b). In reviewing the contents of the records themselves, I do not conclude that the disclosure of any portion that might reasonably be considered to contain information related to a law enforcement matter or investigation could reasonably be expected to interfere with that matter or investigation. In the absence of such evidence, a blanket assertion that the disclosure of this information will interfere with a law enforcement matter or investigation is insufficient to establish the application of either exemption.

Accordingly, I find that the Township has failed to establish the application of either section 8(1)(a) or (b) to the records for which they were claimed and therefore, they do not apply.

I will now consider whether the exemption at section 8(2)(a) applies to these records.

Section 8(2)(a)

In order for a record to qualify for exemption under section 8(2) of the *Act*, the Township must satisfy each part of the following three-part test:

1. The record must be a report; and

2. the report must have been prepared in the course of law enforcement inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing or regulating compliance with a law.

   [Orders MO-1238, P-200, and P-324]

The word "report" is not defined in the *Act*. However, previous orders have found that to qualify as a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact (Order P-200).

This interpretation was affirmed by Senior Adjudicator David Goodis in Order MO-1238. In that case, Senior Adjudicator Goodis rejected arguments to the effect that this interpretation was too narrow. He stated:

> ... an overly broad interpretation of the word "report" could create an absurdity. If "report" means "a statement made by a person" or "something that gives information", all information prepared by a law enforcement agency would be exempt, rendering sections 8(1) and 8(2)(b) through (d) superfluous. The Legislature could not have intended that result. As stated in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the "Williams Commission") (at p. 294):
>
> > The need to exempt certain kinds of law enforcement information from public access is reflected in all of the existing and proposed freedom of information laws we have examined. This is not surprising; if they are to be effective, certain kinds of law enforcement activity must be conducted under conditions of secrecy and confidentiality. Neither is it surprising that none of these schemes simply exempts all information relating to law enforcement. The broad rationale of public accountability underlying freedom of information schemes also requires some degree of openness with respect to the conduct of law enforcement activity. Indeed, if law enforcement is construed broadly to include the enforcement of many regulatory schemes administered by the provincial government, an exemption of all information pertaining to law enforcement from the general right to access would severely undermine the fundamental objectives of a freedom of information law.

This office's interpretation of the word "report" in section 8(2)(a) is not only plausible, but also promotes the purposes of the legislation. The Commissioner's interpretation takes into account the public interest in protecting the integrity of law enforcement procedures which underlies the purpose of the exemption. To the extent that any harm could reasonably be expected to result from disclosure of law enforcement records, the various exemptions in sections 8(1) and 8(2)(b) to (d) may apply (for example, where disclosure could reasonably be expected to interfere with a law enforcement matter under section 8(1)(a), or deprive a person of the right to a fair trial under section 8(1)(f)). In addition, certain law enforcement records which consist of a formal statement or account of the results of the collation and consideration of information qualify for exemption under section 8(2)(a), regardless of the potential for harm from disclosure [see, for example, Order MO-1192]. At the same time, this interpretation takes into account the public interest in openness as articulated by the Williams Commission, since records which do not meet the specific definition of report,

> and which do not otherwise qualify for exemption under the remaining provisions of section 8, cannot be withheld under this exemption.

In Order MO-1238, Senior Adjudicator Goodis made it clear that the title of a document will not necessarily determine whether or not it is a "report". For example, he found that section 8(2)(a) did not apply to a Field Inspection Report or an Inspection Record of a municipal building department, both of which contained entries made over a period of time, on the basis that documents of this kind did not satisfy the first requirement of the section 8(2)(a) exemption test. Similarly, in Order M-158, Adjudicator Anita Fineberg found that a number of memoranda met the definition of "report", while a number of others did not.

Similarly, in the current appeal, I have applied the three-part test for the application of section 8(2)(a). I find that some of the records at issue qualify for exemption under that section while others do not.

First, I find that section 8(2)(a) does not apply to Records 17(c), 19(b)(iii), 21(c), and 23(d). Each of these records is comprised of letters from individuals or solicitors to the Township. They do not, therefore, meet part 2 of the test as they were not prepared in the course of law enforcement inspection or investigations, or part 3 of the test as they were not prepared by an agency which has the function of enforcing or regulating compliance with a law. Where the records also contain attachments (such as maps, diagrams or emails), on my review, none of the attachment information qualifies as a "report" within the meaning of part 1 of the test; nor does it appear that any of it has been prepared in the course of a law enforcement inspection or investigation as required by part 2. As all three parts of the test must be met for section 8(2)(a) to apply, I find that Records 17(c), 19(b)(iii), 21(c), and 23(d) are not exempt under this section.

As for the planning reports, Records 1(c), 5(b), 19(b)(ii), 20(b)(i), 20(b)(ii), and 28(c)(ii), I find that they qualify for exemption under section 8(2)(a) as "reports" within the meaning of that term established by previous orders.

In making this determination I have reviewed all of the planning reports and their attachments and have assessed whether each report, on it's own, consists of a "formal statement or account of the results of a collation and consideration of information", as opposed to a "mere observation or recording of facts". In my view, all of Records 1(c), 5(b), 19(b)(ii), 20(b)(i), 20(b)(ii), and 28(c)(ii), together with their attachments, qualify as formal statements or accounts that resulted from a collation and consideration of information by the Township Planner/Manager of Planning and Community Development. Accordingly, I conclude that these records qualify as a report within the meaning of part 1 of the section 8(2)(a) test. They contain factual information provided by the Town Planner/Manager of Planning and Community Development as well as conclusions that he has drawn as a result of the consideration of the by-law infraction information contained in the records. I am also satisfied that the planning reports were prepared in the course of an investigation into by-law infraction by the Township, which is an agency which has the function of enforcing or regulating compliance with the by-laws, thereby meeting parts 2 and 3 of the test.

Therefore, I find that Records 1(c), 5(b), 19(b)(ii), 20(b)(i), 20(b)(ii), and 28(c)(ii) qualify as "law enforcement reports", and are exempt from disclosure under section 8(2)(a).

ADVICE TO GOVERNMENT

In its Index of Records, the Township claims section 7(1) applies to exempt the information contained in Records 1(c), 5(b), 8(a), 19(b)(ii), 20(b)(i), 20(b)(ii), 21(b)(iii), 28(c)(ii), 28(c)(iii).

As I have found Records 1(c), 5(b), 19(b)(ii), 20(b)(i), 20(b)(ii), and 28(c)(ii) to be exempt under section 8(2)(a), it is not necessary for me to determine whether any other exemption apply to these records. Accordingly, my analysis will focus on whether section 7(1) applies to Records 8(a), 21(b)(iii) and 28(c)(iii).

Section 7(1) states:

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

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004]

O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563]

Examples of the types of information that have been found not to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564]

Records 8(a) and 21(b)(iii) are Planning Reports prepared for the Township Council by its Town Planner/Manager of Planning and Community Development. Having reviewed both records carefully, I find that the majority of the information contained in these records does not qualify as advice or recommendations, as it consists of factual or background information. In my view, most of the information does not consist of advice or recommendations; nor would its disclosure permit one to accurately infer advice or recommendations. Therefore, it does not qualify for exemption under section 7(1). However, each of these Planning Reports has a section entitled "Recommendations". Having reviewed the information under that heading, I find that it contains one or more recommendations made by the Town Planner/Manager of Planning and Community Development. I find that this portion of Records 8(a) and 21(b)(iii) is exempt from disclosure under that section. In my view, the information in those specific portions reveals a suggested course of action that will ultimately be accepted or rejected by Council, which is the entity being advised

Record 28(c)(iii) is a 1-page draft letter (undated) from the Township to the Township's Library Board, along with and an attached resolution that has been signed and dated. In my view, none of the information in this record describes a suggested course of action that will ultimately be accepted or rejected by Council, and therefore, it does not consist of advice or recommendations within the meaning of section 7(1).

In summary, I have found that information found under the heading "Recommendations" in both Records 8(a) and 21(b)(iii) are exempt from disclosure under section 7(1) while Record 28(c)(iii), in its entirety, does not qualify for exemption under that section.

ECONOMIC AND OTHER INTERESTS

The Township claims, in its Index of Records, that section 11(c) applies to exempt Record 4(a), section 11(e) applies to exempt Record 28(c)(iii), section 11(f) applies to exempt Records 7(a),(b), 28(c)(iii) and 29(a), and section 11 (g) applies to exempt Record 7(b)and 28(c)(iii).

As I have found that section 6(1)(a) applies to exempt Record 29(a) from disclosure, it is not necessary for me to address that record further.

The relevant portions of section 11 state:

> A head may refuse to disclose a record that contains,
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;
>
> (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;
>
> (g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the

> statute … Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For sections 11 (c) or (g) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Section 11(c): prejudice to economic interests

The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

As noted above, to qualify for exemption under section 11(c), the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm", the harm being prejudice to the institution's economic interests or competitive position. Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Record 4(a) is comprised of a 3-page CAO-Clerk's Report addressed to Council and dated March 1, 2004, a 1-page letter from the Township's CAO to a private company, a 2-page resolution by Council, a 1-page document entitled "Proposal for Township of Georgian Bay and District of Muskoka for Summer 2003", a 4-page CAO-Clerk's Report addressed to Council dated May 12, 2003, and a 4-page letter to the Township from a lawyer.

I find that the Township has failed to provide the necessary detailed and convincing evidence required to demonstrate that disclosure of the information contained in Record 4(a) could reasonably be expected to prejudice its economic interests or competitive position. In my view, disclosure of Record 4(a) would not prejudice the Township's ability to earn money in the competitive marketplace. In the circumstances, the Township does not appear to be earning money or competing for business with other public or private entities, but rather, it addresses only the solicitation of business from such entities and discusses certain Township expenditures. Accordingly, I find disclosure would not give rise to a reasonable expectation of prejudice to the Township's economic interests or competitive position as contemplated by the exemption at section 11(c).

Therefore, I find that section 11(c) does not apply in the circumstances of this appeal.

Section 11(e): positions, plans, procedures, criteria or instructions

In order for section 11(e) to apply, the Township must show that:

1. the record contains positions, plans, procedures, criteria or instructions, and

2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations, and

3. the negotiations are being carried on currently, or will be carried on in the future, and

4. the negotiations are being conducted by or on behalf of an institution. [Order PO-2064]

Section 11(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation [Order PO-2064].

The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding [Order PO-2034].

The Township claims that section 11(e) applies to exempt Record 28(c)(iii) from disclosure. Record 28(c)(iii) consists of a 1-page draft letter (undated) from the Township to the Township of Georgian Bay Library Board and an attached resolution that has been signed and dated.

Based upon my review of Record 28(c)(iii) and considering the contents of the record itself, I find that this severed information is not intended to be applied to negotiations. Therefore, part 2 of the section 11(e) test is not met. The information consists of a communication between the Township and the Library Board about a resolution made by Council. Accordingly, I find that Record 28(c)(iii) is not exempt under section 11(e).

Section 11(f): plans relating to the management of personnel

In order for section 11(f) to apply, the Township must show that:

1. the record contains a plan or plans, and

2. the plan or plans relate to:

   (i) the management of personnel, or
   (ii) the administration of an institution, and

3. the plan or plans have not yet been put into operation or made public [Order PO-2071]

Previous orders have defined "plan" as ". . . a formulated and especially detailed method by which a thing is to be done; a design or scheme" [Order P-348].

The Township claims that section 11(f) applies to exempt Records 7(a) and (b), as well as Record 28(c)(iii) from disclosure.

Record 7(a) consists of three draft notices describing three employment positions (job postings) for which the Township was recruiting. I accept that at the time the record was created it may have included a plan related to the management of personnel or the administration of an institution. However, I have not been provided with any evidence to show that these plans have not yet been put into operation or made public. The job postings provided that interested applicants should submit their resumes by April 20, 2004 and I have been provided with no evidence to indicate that these plans to recruit were not put into operation or made public between now and then. Accordingly, I find that section 11(f) does not apply to Record 7(a).

Record 7(b) consists of three draft policies and their respective schedules directed at Township employees. Although I accept that these policies relate to the management of personnel or the administration of an institution, all three of the policies have notations stating April 5, 2004 as the "date adopted by council". Without representations from the Township I am unable to confirm whether or not the policies were or were not adopted by Council on that date. Accordingly, I find that Record 7(b) is not exempt under section 11(f).

Record 28(c)(iii), as described in my analysis of the application of section 11(e), also does not qualify for exemption under section 11(f). Similar to Records 7(a) and (b), without representations I am unable to conclude that the exemption at section 11(f) applies. Accordingly, I find that the discretionary exemption at section 11(f) does not apply to Record 28(c)(iii).

Section 11(g): proposed plans, policies or projects

In order for section 11(g) to apply, the Township must show that:

1. the record contains information including proposed plans, policies or projects of an institution; and

2. disclosure of the record could reasonably be expected to result in:

   (i) premature disclosure of a pending policy decision, or
   (ii) undue financial benefit or loss to a person.

[Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)]

For this section to apply, there must exist a policy decision that the institution has already made [Order P-726].

As noted above, to qualify for exemption under section 11(g), the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm", the harm being disclosure of proposed plans, policies or projects of an institution if it could reasonably be expected to result in either the premature disclosure of a pending policy decision or result in undue financial benefit or loss to a person;. Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

In its Index of Records, the Township submits that section 11(g) applies to exempt Record 7(b) and 28(c)(iii). However, the Township has submitted no representations.

As noted above, Record 7(b) consists of three policies and their respective schedules directed at Township employees. Although these polices appear to be draft policies given that they have yet to be given a specific policy number and the resolution number is left blank; all three of the policies include notations indicating that April 5, 2004 was the "date adopted by council". Without representations from the Township I am unable to confirm whether or not the policies were or were not adopted by Council on that date.

As previously noted, in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner),* to establish that the exemption at 11(g) applies, the Township must provide me with "detailed and convincing" evidence to establish a "reasonable expectation of harm". The harm in section 11(g) being that the disclosure of proposed plans, policies or projects of an institution could reasonably be expected to result in either the premature disclosure of a pending policy decision or result in undue financial benefit or loss to a person.

I find that the Township has failed to provide the necessary detailed and convincing evidence required to demonstrate that disclosure of the information contained in Record 7(b) could reasonably be expected to result in the harm contemplated by section 11(g). Without such evidence I am unable to conclude that these policies continue to be pending, more than three years after they were intended to be brought before Council. Accordingly, I find that section 11(g) does not apply to Record 7(b).

Record 28(c)(iii), the letter and an attached resolution, is also in draft form. As I found with Record 7(b), without representations from the Township, which bears the burden of providing me with detailed and convincing evidence to show that the harm in section 11(g) is likely to occur, I am unable to conclude that this draft letter continues to be pending. Accordingly, I find that the Township has failed to provide the detailed and convincing evidence required to show that disclosure of Record 28(c)(iii) would result in the disclosure of proposed plans, policies or projects of an institution which in turn could reasonably be expected to result in the premature disclosure of a pending policy decision or result in undue financial benefit or loss to a person. Therefore, I find that section 11(g) does not apply to Record 28(c)(iii).

In summary, I find that none of the exemptions at sections 11(c), (e), (f) and (g) apply in the circumstances of this appeal.

SOLICITOR-CLIENT PRIVILEGE

Section 12 states as follows:

> 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.

Section 12 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

The Township claims that section 12 applies to exempt Records 4(a), 5(c), 15(b), 16(a), 19(b)(i), 19(c), 22(c), and 24(c)(i) from disclosure. It does not identify which branch it is claiming for each record.

Branch 1: common law privilege

Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 457 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

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].

The privilege applies to "a continuum of communications" between a 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 [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also 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].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank* (cited above)].

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Loss of privilege

Termination of litigation

Common law litigation privilege may be lost through termination of litigation or the absence of reasonably contemplated litigation. As stated in Order P-1551:

> Litigation privilege ends with termination of the litigation for which the documents were prepared or obtained [*Boulianne v. Flynn*, [1970] 3 O.R. 84 at 90 (Co. Ct.); *Meaney v. Busby* (1977), 15 O.R. (2d) 71 (H.C)]. The exception to this rule is where the policy reasons underlying the privilege remain, despite the end of the litigation. For example, privilege may be sustained in related litigation involving the same subject matter in which the party asserting the privilege has an interest [*Carleton Condominium Corp. v. Shenkman Corp.* (1977), 3 C.P.C. 211 (Ont. H.C.)]. In other words, the law will only give effect to the privilege while the purpose for its recognition continues to be served. Unlike solicitor-client communication privilege, the purpose of which is to protect against disclosures which could have a chilling effect on the solicitor-client relationship, the purpose of litigation privilege is to protect against disclosures which could have a chilling effect on the lawyer's preparation for the particular litigation, or any related litigation arising out of the same subject matter.

Note, however, that termination of litigation does not affect the application of statutory litigation privilege under branch 2 (see below) [*Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.)].

Waiver

Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege [Orders PO-2483, PO-2484].

Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege

> [*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

Waiver has been found to apply where, for example

- the record is disclosed to another outside party [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)]

- the communication is made to an opposing party in litigation [Order P-1551]

- the document records a communication made in open court [Order P-1551]

Waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party. The common interest exception has been found to apply where, for example

- the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties [*General Accident Assurance Co. v. Chrusz* (above); Order MO-1678]

- a law firm gives legal opinions to a group of companies in connection with shared tax advice [*Archean Energy Ltd. v. Canada (Minister of National Revenue)* (1997), 202 A.R. 198 (Q.B.)]

- multiple parties share legal opinions in an effort to put them on an equal footing during negotiations, but maintain an expectation of confidentiality vis-à-vis others [*Pitney Bowes of Canada Ltd. v. Canada* (2003, 225 D.L.R. (4th) 747 (Fed. T.D.)]

Branch 2: statutory privileges

Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice."

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation."

Loss of Privilege

The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the *head of an institution* (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)) and

- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)).

Analysis and finding

As outlined above, the Township claims that section 12 applies to exempt Records 4(a), 5(c), 15(b), 16(a), 19(b)(i), 19(c), 22(c), and 24(c)(i) from disclosure. In my view, a number of these records or portions of these records are exempt from disclosure under the solicitor-client communication privilege portion of the branch 1 common law privilege. I find that section 12 applies to Records 5(c), 19(b)(i), 19(c) and 22(c) in their entirety, which are all communications, either letters or emails, between the Township and its lawyer. Additionally, I find that certain portions of Records 4(a), 15(b) and 16(a) also qualify for solicitor-client communication privilege on the same basis. Specifically, these portions are:

- Record 4(a) – The portion of the CAO-Clerk's Report 14-03 dated May 12, 2003 under the heading "Legal Opinion" and the 4-page legal opinion prepared for the Township by the Township's lawyer.

- Record 15(b) – the 4-page email exchange between the Township's lawyer and Township employees.

- Record 16(a) – The 1-page email exchange between the Township's lawyer and the Township's Deputy Clerk.

Having reviewed these records and portions of records closely, in my view, they are all direct communication of a confidential nature between a solicitor and a client for the purpose of obtaining or giving professional legal advice.

Accordingly, I find that Records 5(c), 19(b)(i), and 19(c), the portion under the heading "Legal Opinion" in the CAO-Clerk's Report 14-03 and the 4-page legal opinion in Record 4(a), the 4-page email exchange in Record 15(b), and the 1-page email exchange in Record 16(a) are exempt from disclosure under section 12 of the *Act*.

I have found that the remaining records or portions of records (Records 22(c) and 24(c)(i) and portions of Records 4(a), 15(b) and 16(a)) do not qualify under the solicitor-client privilege exemption for the following reasons.

The remaining portions of Record 4(a) include parts of the 3-page CAO-Clerk's Report addressed to Council dated March 1, 2004, a 1-page letter from the Township's CAO to a private company, a 2-page resolution by Council, a 1-page document entitled "Proposal for Township of Georgian Bay and District of Muskoka for Summer 2003", and a 4-page CAO-Clerk's Report addressed to Council dated May 12, 2003. The remaining portion of Record 15(b) is a letter to an

individual from the Township. The remaining portion of Record 16(a) is a 1-page letter from the Township Secretary & Treasurer to the Township's Mayor and CAO.

In my view, as none of this remaining information appears to have been prepared by or for a lawyer, these records cannot qualify as privileged communications between a solicitor and his client. Additionally, from my review, none of it as it been prepared in contemplation of litigation. Accordingly, I find that the common law privileges of branch 1 cannot apply to these particular documents. Moreover, the information also does not qualify for exemption under the statutory privilege of branch 2 as it was not prepared by or for "counsel retained by [the Township] for use in giving legal advice or in contemplation of or for use in litigation". Therefore, I find that the remaining portions of Records 4(a), 15(b) and 16(a) do not qualify for exemption under section 12 of the *Act*.

Record 22(c) is a letter addressed to the appellant from the Township's lawyer. As the letter is not a communication between a solicitor and client, it cannot qualify for solicitor-client communication privilege. For Record 22(c) to qualify for litigation privilege, any privilege that might have existed would have ended with the termination of litigation. As I have been provided with no evidence to demonstrate whether or not the litigation, specifically the appeals before the Ontario Municipal Board, have terminated I cannot make a conclusive determination on whether litigation privilege applies. However, even if the record was created for the dominant purpose of existing or reasonably contemplated litigation, in my view, the principle of waiver applies. As noted above, generally, disclosure of privileged information to parties who are adverse in interest, such as the appellant, constitutes waiver of privilege. Waiver has been found to apply where, for example, the record is disclosed to another party or the communication is made to an opposing party in litigation. As the record is a letter addressed to the appellant from the Township's lawyer, the information that it contains can no longer qualify for litigation privilege. Similarly, even if the statutory privilege were found to apply to this records, in my view, disclosure to the appellant amounts to wavier of privilege by the Township and also demonstrates a "lack of a zone of privacy" in connection with the record.

Moreover, in my view, Record 22(c) is subject to the absurd result principle. In situations where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under the *Act* because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323]. The absurd result principle has been applied where, for example, the information is clearly within the requester's knowledge [Orders MO-1996, PO-1679, MO-1755]. However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge [Order M-757, MO-1323, MO-1378]. Record 22(a) is a letter that has been signed, dated and addressed to the appellant from the Township's lawyer. As the recipient of this letter, the information that it contains is clearly within the appellant's knowledge, and it would be absurd for it to be withheld.

Accordingly, I find that Record 22(c) is not exempt from disclosure under section 12 of the *Act*.

Finally, Record 24(c)(i) is a letter addressed to the appellant from the Ontario Municipal Board. As this record is neither a communication between a solicitor and his client, nor has it been prepared in contemplation of litigation, the common law privileges of branch 1 cannot apply. Additionally, as the record has not be prepared by or for counsel retained by the institution for the purpose of existing or contemplated litigation, the statutory privilege has no application. Accordingly, Record 24(c)(i) does not qualify for exemption under section 12 of the *Act*.

In summary, I have found that Records 5(c), 19(b)(i), and 19(c), the portion under the heading "Legal Opinion" in the CAO-Clerk's Report 14-03 and the 4-page legal opinion in Record 4(a), the 4-page email exchange in Record 15(b), and the 1-page email exchange in Record 16(a) are exempt from disclosure under section 12 of the *Act*.

However, I have found that the remaining records or portions of records (Records 22(c) and 24(c)(i) and portions of Records 4(a), 15(b) and 16(a)) do not qualify for exemption under solicitor-client privilege.

PERSONAL INFORMATION

In order to determine whether the exemption at section 14(1) may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

The meaning of "identifiable"

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Analysis and finding

Section 14(1) is a mandatory exemption. Accordingly, even if it has not been claimed, if personal information is found in a record, I am obliged to determine whether or not it applies to exempt the information from disclosure. Therefore, I must first identify all of the information in the records at issue that qualifies as "personal information".

The Township has identified that section 14(1) applies to Records 2(b), 3(a), 5(d), 6(a), 14(c), 15(a), 17(a), 18(a) and 20(a). On my review of the records, I find that there is a significant amount of information in some of the other records that might qualify as personal information relating to identifiable individuals but it has not specifically been identified as being withheld under the exemption at section 14(1). I will also address this information in my analysis since section 14(1) is a mandatory exemption.

During mediation, the appellant clarified that she was not seeking access to the personal information of identifiable individuals. Accordingly, all names that appear in a personal capacity fall outside the scope of this appeal. This includes the names listed on the agendas under items of discussions, the names, addresses and email addresses of any individuals who sent emails or letters to the Township, the names of individuals where they are found in any Planning Reports, CAO-Clerk's Reports, or other Township memoranda or documents that I have found not to be exempt from disclosure.

The appellant has also advised that she wants access to names of individuals where they appear in a professional capacity. All references to individuals in their professional capacity do not qualify as personal information and should be disclosed unless another exemption can be found to apply. Accordingly, the Township should disclose to the appellant the names of any individuals employed by the Township of Georgian Bay including their titles, contact information or designation which identifies that individual in a "business, professional or official capacity".

Record 2(b) is a collection of applications submitted by individuals hoping to be appointed as Library Board Trustees. They include the individual's name, address, phone numbers, email addresses (paragraph (d) of the section 2(1) definition of "personal information") and, in some instances, information about that individual's prior experience and skills and employment history (paragraph b). The applications also contain the individual's signatures. Records 3(a), 5(d) and 15(a) are each collections of applications submitted by individuals seeking to be appointed to various Township committees. These applications contain similar information about the individuals seeking to be appointed. In my view, all of the information contained in the applications qualifies as the personal information of these identifiable individuals, whether or not the name of the individual itself is severed from the record. As the appellant does not wish to have access to the personal information of identifiable individuals I find that the information in Records 2(b), 3(a), 5(b) and 15(a) should not be disclosed as it falls outside the scope of his request.

Record 6(a) is a two-page memorandum to Council prepared by the CAO-Clerk, dealing with a number of personnel issues to be addressed by it. Having reviewed the memorandum, I find that page one contains the name of an identifiable individual and his employment history (paragraph (b)), as well as information that would qualify as the personal opinion or views of another individual about the individual (paragraph (g)). I also find that the disclosure of the individual's name, would reveal other personal information about the individual within the meaning of paragraph (h) of the definition. Accordingly, I find that all of the information on page one of Record 6(a) consists of the personal information of an identifiable individual. As the appellant does not want such information, it should not be disclosed.

Page two of the memorandum that makes up Record 6(a) however, contains information about a different subject matter, and does not contain any information about an identifiable individual. Accordingly, I find that page two of Record 6(a) should be disclosed to the appellant. Attached to the memorandum are two documents, a five-page job description and a one-page solicitation for applications to the Township to fill that position. In my view, neither the job description nor

the one-page solicitation contains any information that qualifies as personal information and it should be disclosed to the appellant.

Record 14(c) includes a Treasurer's Report that deals with a tax arrears extension for a particular property. Attached to the Treasurer's Report is the corresponding by-law to authorize the execution of the tax arrears extension agreement and Schedule detailing the agreement between the Township and a named individual.

In Privacy Complaint Report MC-010006, the complainant, who was alleged to be in arrears of her taxes, asserted that her personal information had been improperly disclosed when a Final Notice of Registration of Tax Arrears Certificate and a Tax Arrears Certificate – Document General had been sent out to 13 addresses. The report summarized previous decisions of this office regarding when information is "personal" and when it is merely about a property. MC-010006 concluded that information about the status of an identifiable individual's property taxes was personal information, stating:

> I am satisfied that the information contained in the Notice of Registration of Tax Arrears does reveal financial information of the complainant … I am satisfied this information, which is about the complainant personally, meets the definition of personal information as defined in paragraph (h) of the *Act*.

I agree with the analysis found in Privacy Complaint Report MC-010006-1, and find that Record 14(c) contains similar types of information to that examined in Privacy Complaint Report MC-010006-1. Accordingly, I find that Record 14(c) contains the personal information of an identifiable individual that falls within paragraph (h) of the definition in section 2(1). As the appellant does not wish to have access to another individual's personal information, Record 14(c) should not be disclosed.

Record 17(a) includes a draft letter addressing an individual's contract of employment with the Township as well as an attached chart that lists the individual's hours of employment and specific salary. Also attached is an email from the individual to a Township employee. I find that the email includes the individual's name and address, along with information related to the individual's employment history and financial transactions in which he was involved. As a result I conclude that it qualifies as personal information within the meaning of paragraphs (b) and (d) of the section 2(1) definition of personal information. Having reviewed the information that makes up the record closely, I find that even if the individual's name were to be severed from the record, the nature of the information that remains would render him identifiable. Therefore, I find that all of the information in the record qualifies as the personal information of an identifiable individual and should not be disclosed to the appellant because she has advised she does not seek access to this type of information.

Record 18(a) is an email exchange between two Township staff about issues to be discussed in an up-coming closed Council meeting. The only personal information that appears in the record is the name of a particular individual. As the appellant has advised that she does not wish to have access to the personal information of identifiable individuals, the name should not be disclosed.

With the individual's name severed, the other information does not qualify as personal information and I have found that the only other exemption that has been claimed for this record (section 6(1)(b)) does not apply, Record 18(a) should be disclosed to the appellant with the individual's name severed.

Record 20(a) is a brief letter to the Township from the Chair of the Township of Georgian Bay Public Library Board. The letter makes reference to a named individual and provides the Chair's name and home phone number. Again, as the appellant has advised that she does not seek access to the personal information of identifiable individuals. The individual's name and the Chair's home phone number should be severed. The remainder of the information contained in the record should be disclosed as it does not qualify as personal information. As the Chair's name appears in his official capacity of Chair of the Library Board I find that it does not qualify as personal information and should be disclosed.

In summary, I have found that the following information qualifies as the personal information of identifiable individuals. As the appellant does not seek access to the personal information of identifiable individuals, this information should not be disclosed and should be severed from the records that remain at issue:

- All names, addresses and information belonging to an individual in a personal capacity;
- Records 2(b), 3(a), 5(d), 15(a) in their entirety;
- Record 6(a), page 1;
- Record 14(c), in its entirety;
- Record 17(a), the draft letter;
- Record 18(a), the individual's name;
- Record 20(a), the individual's name noted in the body of the letter and the Chair's home phone number.

As the remainder of the information in all of the records that remain at issue does not qualify as personal information, it should be disclosed to the appellant.

Also, as the remaining information does not qualify as personal information, it is not necessary for me to examine the application of the exemption at section 14(1) as this exemption only applies to information that qualifies as personal information.

REASONABLE SEARCH

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

During mediation, the appellant advised that she believes that there should be five additional Agendas for the following dates: November 26, 2004, March 15, 2005, May 5, 2005, May 9, 2005 and June 13, 2005. The appellant advised that there should also be correspondence and supporting documentation for closed session meetings on those particular dates as well.

With respect to the existing Agendas, the Township's index indicates that for some agenda items, there are no responsive records (specifically: 1(b),(d); 2(a),(c),(d); 4(b); 5(a); 8(b); 9(a),(b),(c); 10(a),(b),(c); 11(a); 12(a),(b); 13(a),(d),(e); 14(a),(b);18(c); 19(d); 20(b)(iii),(c); 21(b)(iv); 22(a),(b),(d); 23(a),(b),(c)(i),(c)(iii),(e); 24(a),(d); 25(a),(b); 26(a),(b),(c); and 28(a),(b),(d)). The appellant believes that there should be responsive records pertaining to these agenda items.

It is important to note that the *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Additionally, although an appellant will rarely be in a position to indicate precisely which records the institution has not identified, the appellant still must provide a reasonable basis for concluding that such records exist.

As previously noted, none of the parties submitted representations, which makes it difficult for me to make a finding on whether the Township has made a reasonable effort to identify and locate records responsive to the request. However, based on the parties' positions and actions during mediation, I find that I have sufficient information to make a determination as to whether the Township has made a reasonable effort to locate responsive records and whether the appellant has provided a reasonable basis upon which to conclude that additional responsive records might exist.

The appellant asserts that five additional Agendas exist for closed session meetings that occurred on five specific dates. As described above, during mediation the appellant advised the mediator that six additional Agendas should exist for six specific dates. In response to this, the Township agreed to conduct an additional search. Following that search, the Township issued a supplementary decision letter advising that it had located an additional Agenda for one of the dates, but that for each of the remaining dates, no Closed Session Agendas existed. Despite the Township's additional search and decision letter, the appellant continues to take the position that additional Agendas for the five remaining dates must exist.

In my view, apart from a blanket assertion that these additional Agendas exist, the appellant has not provided me with a reasonable basis upon which to draw such a conclusion. The Township, on its part, conducted an additional, focused search during mediation for the specific records that the appellant claims might exist. As noted above, the *Act* does not require the institution to prove with absolute certainty that further records do not exist but rather, demonstrate that it has made a reasonable effort to identify and locate responsive records. In the circumstances of this appeal, I find that it has. Therefore, I uphold the Township's search for the additional Agendas and find that it was reasonable.

Addressing the agenda items for which no responsive records have been identified, I note that for each of those items specified by the appellant, the respective agenda indicates that that item is to be addressed in the meeting by a verbal report or update. Given this, I find it reasonable to conclude that no responsive records exist for the specified agenda items. The appellant has not provided me with any evidence to suggest otherwise. Accordingly, I find that the appellant has not provided a reasonable basis upon which to conclude that responsive records might exist for these agenda items. Therefore, I will not order the Township to conduct a further search with respect to records related to those agenda items.

In conclusion, I uphold the Township's search for responsive records.

EXERCISE OF DISCRETION

The exemptions at sections 6(1)(a),(b), 8(1)(a),(b), 8(2)(a), 7(1), 11(c),(e),(f),(g) and 12 are discretionary. Accordingly, the Township has the discretion to disclose the information contained in the records even if those exemptions apply. I have upheld the Township's decision to apply section 6(1)(a) to Record 29(a), section 7(1) to portions of Records 8(a) and 21(b)(iii), section 8(2)(a) to Records 1(c), 5(b), 19(b)(ii), 20(b)(i), 20(b)(ii), and 28(c)(ii) and section 12 to Records 5(c), 19(b)(i), 19(c), and portions of Records 4(a), 15(b), and 16(a). I must now review the Township's exercise of discretion in determining not to release that information.

On appeal, an adjudicator may review the institution's decision to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so. I may find that the Township erred in their 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. In these cases, I may send the matter back to the Township for an exercise of discretion based on proper considerations [Order MO-1573]. However, I may not substitute my own discretion for that of the Township.

Although the Township made no submissions on their exercise of discretion, in light of the fact that I have ordered a substantial amount of information disclosed and in light of the nature of the information that I have withheld, I am satisfied that the Township did not err in their exercise of its discretion in withholding the information that will not be disclosed through this order. Therefore, I find that, given the circumstances of this appeal and the nature of the information at issue, the Township's exercise of discretion was adequate.

ORDER:

1. I uphold the Township's decision to withhold Records 1(c), 5(b), 5(c), 19(b)(i), 19(b)(ii), 19(c), 20(b)(i), 20(b)(ii), 28(c)(ii), 29(a), the information under the heading "recommendations" in Records 8(a), 21(b)(iii), and the portions of Records 4(a), 15(b), 16(a), identified in the body of this order.

2. I order the Township not to disclose the information that I have found to qualify as the "personal information" of identifiable individuals to the appellant. Specifically, the following information should be severed from the records:

    - All names, addresses and information belonging to an individual in a personal capacity;
    - Records 2(b), 3(a), 5(d), 15(a) in their entirety;
    - Record 6(a), page 1;
    - Record 14(c), in its entirety;
    - Record 17(a), the draft letter;
    - Record 18(a), the individual's name;
    - Record 20(a), the individual's name noted in the body of the letter and the Chair's home phone number.

3. I order the Township to disclose the remainder of the information in the records to the appellant by **October 9, 2007** but not before **October 2, 2007**.

4. I uphold the Township's to search for responsive records.

5. In order to verify compliance with the terms of this order, I reserve the right to require the Township to provide me with a copy of the records as disclosed to the appellant, upon request.

Original signed by: August 31, 2007
Catherine Corban
Adjudicator