



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **INTERIM ORDER MO-2316-I**

**Appeal MA-060149-1**

**The Corporation of the Town of Kingsville**



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## **NATURE OF THE APPEAL:**

The Town of Kingsville (the Town) invited tenders for the purchase of a specified property that was subject to a tax sale. The Town used the services of Realtax, a private corporation that provides Ontario municipalities with tax registration and tax sale services. One of the unsuccessful bidders filed a civil claim against the Town on the basis of alleged flaws relating to the tax sale and tendering process.

The Town received a sixteen-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the tax sale and tendering process from the unsuccessful bidder who had commenced a civil proceeding against the Town. The Town denied the requester access to the responsive records pursuant to the mandatory personal privacy exemption in section 14(1) and the discretionary solicitor-client privilege exemption in section 12 of the *Act*. The requester (now the appellant) appealed the Town's decision to this office.

During mediation, the Town issued a revised decision letter to the appellant. In its revised decision, the Town disclosed the records which respond to parts 12 and 13 of the request in full, that is, communications between itself and the appellant. The Town also indicated that it would not be providing a response to parts 6, 7 and 14 of the request, as it deemed these to be questions and not a request for recorded information.

The Town claimed that the records responsive to parts 2, 3, 4, 10(a) to (e) and (g), 11, 15 and 16 are exempt under section 14(1) (personal privacy) of the *Act*. The Town also claims that the records responsive to parts 11 and 16 are exempt under section 12 (solicitor-client privilege) of the *Act*. The Town further noted that records responsive to parts 1, 5, 8, 9 and 10(f) of the request do not exist.

At the end of mediation, the appellant advised that he is satisfied with the Town's response that no records exist for part 9 of his request but that he continues to seek access to the remaining requested information. Accordingly, the issues of reasonableness of search relating to parts 1, 5, 8 and 10(f) of his request (no records exist) and to parts 12 and 13 of his request (additional records exist), the application of exemptions in sections 12 and 14(1), and the Town's position regarding parts 6, 7 and 14 of his request (questions are not a request for recorded information) were referred to adjudication.

The mediator's report describes the records at issue as either "court-file" or "Realtax" records. The mediator's report also indicates that the Town relies on the discretionary exemptions at sections 38(a) and (b) to refuse the appellant's own information contained in the "court-file" records.

This office sought representations from the Town, initially. The Town's representations indicate that it no longer objects to the disclosure of "court file" documents comprising Records 2(c) and 6(ii). However, other than providing some clarification as to which records remain in dispute, the Town's representations provided very little detail regarding the issues in dispute.

This office provided the complete representations of the Town to the appellant and the appellant provided representations in response. The appellant's representations raised issues to which the

Town was given an opportunity to reply. As the representations of the Town provided little more than a reiteration of the sections of the *Act* that had been claimed to withhold the information, this office provided the Town another opportunity to provide representations in response to the issues in dispute.

The Town was also specifically directed to provide detailed submissions regarding its search for responsive records. The appellant consented to sharing his submissions with the Town which were provided to the Town.

Although the Town responded that it did not intend to provide further representations, the previous adjudicator decided that, in order to be able to properly address the issues in dispute, the Town's response to specific questions relating to the possible application of the mandatory exemption at section 14 was required. In particular, the Town was asked to respond to the appellant's position that some of the records at issue are publicly available. A Supplemental Notice of Inquiry was sent to the Town and it provided representations in response to the specific questions relating to public availability of some of the records at issue.

The previous adjudicator then decided to notify a number of individuals that were referred to in the records. Accordingly, Notices of Inquiry were sent to five affected parties who were invited to provide representations regarding their personal interests in the information at issue. The five affected parties were the successful bidder and four other individuals who submitted a tender for the subject property. A Notice of Inquiry was also sent to a corporate entity that was invited to provide representations regarding the possible application of the mandatory third party information exemption under section 10(1) of the *Act*, even though this exemption had not been raised by the Town. One of the individual affected persons contacted this office to ask some questions about the records and was directed to communicate with the Town. Neither that person nor any of the other individuals submitted representations. However, two of the Notices of Inquiries that had been sent to two individuals were returned to this office as undeliverable.

The corporation notified did not provide representations and as a result I am satisfied that the third party information exemption under section 10(1) of the *Act* has no application in the circumstances of this appeal.

I assumed carriage of this appeal following this office's receipt of the parties' representations.

## **RECORDS:**

The mediator's report identified the following records at issue:

### ***“Realtax” records***

- Real Tax File 02-12, Records 3(a) to (x) – pages 1 to 90, and
- Financial Billing and Invoices, Records 5(a) to (c) – pages 1 to 34.

***“Court-file” records***

- Letters to Tenderers, Records 2(a) to (b) – 5 pages,
- Correspondence with solicitors, Records 6(a) to (hh), (jj) and (kk) – pages 1 to 141 and 147-152,
- e-mail messages, Records 7(c) to (e) – pages 3 to 15, and
- fax messages, Record 8(b) – 2 pages.

Record 3(c) found at pages 6 to 13, appears to have been misfiled along with the records responsive to the appellant’s request for a copy of “Real Tax File 02-12.”

Record 3(c) is an unsigned copy of an affidavit from the Town’s Tax Collector relating to matters arising from the appellant’s civil claim. The affidavit identifies the appellant, the successful bidder and another bidder. Attached as exhibits to the affidavit are a copy of the envelope the successful bidder submitted to the Town and a copy of the appellant’s tender.

Record 3(c) appears to be non-responsive to the appellant’s request and I have decided that it is not a record at issue. In making my decision, I note that the appellant’s request does not seek access to the Tax Collector’s affidavit and it appears that a sworn copy of the affidavit would have been provided to the appellant during the litigation of his civil claim against the Town.

Records 6(a) to (ee), 7(c) to (e) and 8(b) consist of correspondence, emails and faxes between the Town and its lawyers or the Town’s lawyer and the appellant, including copies of correspondence and court documents the appellant himself or his counsel sent to the Town. As a result, some of these records appear to contain information regarding the appellant. The appellant, however, states in his representations that he does not seek access to records relating to the civil claim unless they also concern the transfer the subject property. The information contained in Records 6(a) to (ee), 7(c) to (e) and 8 (b) does not relate to the transfer of the subject property, and as a result, are not responsive to the appellant’s request

Accordingly, Records 3(c), 6(a) to (ee), 7(c) to (e) and 8(b) are not responsive to the appellant’s request, and I will not address them further in this Order.

**DISCUSSION:**

To determine whether section 14(1), 38(a) or 38(b) of the *Act* applies to the records at issue, I must first decide whether the information at issue contains “personal information” and, if so, to whom it relates.

## PERSONAL INFORMATION

The term “personal information” is defined in section 2(1), in part:

“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,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (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].

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.)].

### Representations of the parties

The Town’s representations state that the information at issue contains “...personal information that will identify both the individual and property location such as the telephone number of where the individual resides.”

The Index of Records prepared by the Town provides a little more detail. In this regard, the Town states that the information contained in Records 2(a) and (b) "...contains personal identifiable information of the successful tender." With respect to Records 3(a), (b) and (d) to (x) ("Realtax records"), the Town states that the "... information relates to the financial affairs of a particular property owner who was unable to pay municipal taxes and is considered personal." Finally, the Town states that the financial billings and invoice records contained in Records 5(a) to (c) are "... considered private."

The appellant's representations did not specifically address the issue of whether or not the information at issue qualifies as "personal information" under section 2(1). Rather, the appellant submits that the information at issue is publicly available. In particular, the appellant submits that the "Realtax records" are publicly available and states:

The information in [these] files relates to [individual's] addresses which are available by viewing the roll book and, telephone numbers that are readily available.

Most of this information has already been disclosed to either the courthouse, the land registry office, or should have been according to the [Municipal Tax Sale] Rules.

Before I consider the appellant's representations regarding the public availability of the information at issue, I must first determine whether it qualifies as "personal information" under section 2(1) of the *Act*.

## **Findings and Analysis**

### ***"Realtax" records***

#### *Records 3(a), (b) and (d) to (x): Information relating to property owners*

Records 3(a), (b) and (d) to (x) are described as the "Realtax" records. These records are responsive to parts 3 and 4 of the appellant's request for any records prepared or related to Realtax. Realtax's public website indicates that it completes title searches, prepares documents, mails notices, and registers the required instruments on title relating to tax sales on behalf of municipalities that retain its services.

The information contained in Records 3(a), (b) and (d) to (x) consist of documents prepared or obtained by Realtax for the purposes of reporting to the Town. Most of the documents contain information relating to the assessed owners of the subject property. Some of the records also contain information relating to other individuals.

*Information relating to the assessed owners of the subject property*

The assessed owners are identified by name, along with information relating to their residential and mailing addresses in Records 3(a), (b) and (d) to (w). Also identified is financial information relating to the assessed owners, such as details of the conveyance of the subject property and the amount of outstanding property taxes.

*Information relating to other assessed owners subject to a tax sale*

In addition to identifying the assessed owners of the subject property, Record 3(r) is a letter from Realtax to the Town that also identifies other assessed owners in relation to a different property subject to a tax sale.

*Information relating to other property owners*

In addition to identifying the assessed owners of the subject property, Record 3(s) also identifies other individual property owners. Record 3(s) is a letter from Realtax to the Town which attaches a one-page excerpt from the Town's assessment roll. The computer printout relates to the subject property. The printout, however, also contains assessment information relating to neighboring property owners. As a result, the computer printout appears to contain personal information about property owners including their name and address along with information showing the number of acres and current value of the property. The computer printout also identifies the individual's religion if they are Roman Catholic, and the type of school board the individual supports. In the row describing the subject property, there also appears a date stamp, two handwritten notations describing different dollar amounts and the Realtax file number. Neither the other assessed owners or the neighboring property owners were notified by the Town or this office.

In Privacy Complaint Report MC-010006-1, the complainant, who was alleged to be in arrears of 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 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 and 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 ...

I agree with the analysis found in Privacy Complaint Report MC-010006-1, and find that the portions of the Records 3(a), (b) and (d) to (w) which describe the tax arrears and property transactions relating to the subject property qualify as the "personal information" of the assessed owners within the meaning of paragraphs (b) and (h) of the definition of that term in section 2(1). Similarly, I find that the information identifying the other assessed owners as individuals subject

to a tax sale qualifies as “personal information” under paragraphs (b) and (h) of the definition of that term in section 2(1).

I also find that the computer generated assessment information relating to the assessed owners and neighboring property owners as well as the handwritten notations of dollar amounts, found at Record 3(s) qualifies as “personal information” under paragraphs (a), (b), (d) and (h) of the definition of that term in section 2(1). Further, I find that none of the information in the “Realtax” records contains the “personal information” of the appellant.

The remaining information in the “Realtax” records does not contain “personal information”, as defined under section 2(1). Since section 14(1) can only apply to personal information and no other exemptions have been claimed for the remaining information, this information should be disclosed to the appellant.

*Records 5(a) to (c): Financial Billings and Invoices*

Records 5(a) to (c) consists of computer printouts of the general ledger and subledger transactions numbered from 1 to 34. The Index of Records prepared by the Town describes these records as receipts, general ledger transactions, invoices and calculation of sale fees. The records that are dated cover the period of November 12, 2003 to June 22, 2004.

Pages 4 to 18 and 26 to 34 contain information identifying the assessed owner and successful bidder. In particular, the assessed owner’s and successful bidder’s names, address information and the amount of tax arrears and penalties owed or price paid for the subject property are identified. I find that this information found in the financial billings and invoices constitutes the “personal information” of the assessed owners and successful bidders as they describe financial transactions in which the individuals have been involved (paragraphs b and h of the definition of that term in section 2(1)).

Pages 1 to 3 and 19 to 25 relates to transactions and invoices between the Town and Realtax or the law firm retained to complete the tax sale. Though some of the records relate to the subject property they do not contain the “personal information” of the appellant, assessed owner or successful bidder. Rather, these records relate to the fees and expenses the Town’s lawyer and Realtax incurred in relation to the tax sale of the subject property. The only individual identified in these records is the Town’s lawyer retained to complete the tax sale. There is no evidence before me suggesting that the lawyer’s name appears in a context outside of his professional capacity [Orders P-1409, R-980015, PO-2225]. Accordingly, I find that the records relating to transactions and invoices between the Town and Realtax and the Town and its lawyer do not constitute “personal information”. Since section 14(1) can only apply to personal information and no other exemptions have been claimed for this information, it should be disclosed to the appellant.



***“Court File” records***

*Records 2(a) and (b): Letters to Tenderers*

Records 2(a) and (b) consist of a letter from the Town’s Tax Collector to the successful bidder, as well as copies of three envelopes and a blank page with a date stamp on it. The Town’s letter appears to be a form that the Town sent to the successful bidder, who upon completion returned it to the Town. Accordingly, the handwritten information on the form contains the names, addresses and telephone numbers as well as information, as to how the Town is to register the tax deed. Only one of the three envelopes contains the name and return address of an identifiable individual.

In my view, the name, address, telephone information contained in the form letter and envelope qualifies as “personal information” of the successful bidder under paragraphs (d) and (h) of the definition of that term in section 2(1). I also am satisfied that information describing how the successful bidder is to hold title qualifies as “personal information” under paragraph (b) of the definition.

I find that Records 2(a) and (b) do not contain the “personal information” of the appellant.

The remaining information does not contain information relating to an identifiable individual and thus does not qualify under the definition of “personal information” in section 2(1). The Town has, however, claimed that the solicitor-client exemption at section 12 applies to this information. Accordingly, I need to consider whether the exemption at section 12 applies to this information to determine if it should be disclosed to the appellant.

*Records 6(ff), (gg), (hh), (jj) and (kk): Correspondence with solicitors*

The only records which relate to the transfer of the subject land are Records 6(ff), (gg), (hh), (jj) and (kk). These records do not contain the “personal information” of the appellant but contain the name and the amount of money the successful bidder paid for the subject property. I already found that this information qualifies as “personal information” under paragraphs (b) and (h) of the definition. The records also contain the names and contact information of the Town’s Treasurer and lawyer. Again, there is no evidence before me suggesting that the names of the individuals employed or retained by the Town appear in a context outside of their professional capacity [Orders P-1409, R-980015, PO-2225]. Accordingly, I find that the information identifying the Town’s Treasurer and lawyer does not constitute “personal information” under the definition in section 2(1).

The Town has, however, claimed that the solicitor-client exemption at section 12 applies to this information. Accordingly, I need to consider whether the exemption at section 12 applies to this information to determine if it should be disclosed to the appellant.

### *Summary*

I find that the names, telephone number, addresses and financial information relating to the assessed owners, bidders and property owners constitutes the “personal information” of identifiable individuals. As the records responsive to the appellant’s request do not contain his “personal information” as defined in section 2(1), the discretionary exemptions at sections 38(a) and (b) have no application in the circumstances of this appeal.

Before I determine whether the information containing the “personal information” of identifiable individuals qualifies for exemption under section 14(1), I will first determine whether the solicitor-client privilege exemption applies to the “court-file” records.

## **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.

### **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. (4<sup>th</sup>) 257 (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.

## **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.”

## **Representations of the parties**

As noted above, the Town’s representations merely restate its position that the exemption at section 12 applies to all of the “court-file records.”

The appellant rejects the Town’s submission that all of the information at issue relates to counsel giving legal advice on the basis that some of the documents must relate to the transfer of the subject property. In particular, the appellant submits that some of the records contained in the “court file” records are forms prescribed by the *Municipal Tax Sale Rules* and were prepared in relation to the transfer of the subject land. The appellant’s representations state:

The [Town] has two Lawyers retained.

The first is [named individual] who I am told facilitated the transfer of land. [The named individual] was not retained in contemplation of litigation, but rather to advise and facilitate the transfer of property. The records regarding this advice on the transfer of land are sought.

The second lawyer the [Town] has retained is [named individual] who was retained in contemplation of litigation. His records are not being sought, unless there is overlap between his records and those of [first named individual].

The appellant also submits that by providing some of the documents to him regarding the transfer of the property that had been prepared by its counsel, the Town has waived any privilege that may have existed for this type of record.

## **Analysis and Findings**

The appellant’s position is that solicitor-client privilege at section 12 can not apply to the “court-

file records” relating to the transfer of the subject property.

*Records created by the Town’s lawyers finalizing the transfer of the subject property*

Records 6(ff), (gg), (hh), (jj) and (kk) are correspondence and attachments prepared by a law firm retained by the Town. The Town did not provide representations regarding the law firm’s role and retainer. It is, however, clear that the law firm that prepared Records 6(ff), (gg), (hh), (jj) and (kk) was not retained for the purposes of defending the appellant’s civil claim. Rather, it appears that this law firm was retained to finalize the sale and transfer of the subject property by paying the proceeds of the tax sale into court, which is not a service Realtax provides to its clients. The records relate to the Town’s obligation under sections 380(2) and (3) of the *Municipal Act* to pay the proceeds of the sale, minus the cancellation price, into the Superior Court of Justice, together with a statement outlining the facts upon which the payment into court is made. The statement referred to in section 380(2) and (3) of the *Municipal Act* must be in Form 5, which is responsive to part 10(g) of the appellant’s request.

I have carefully reviewed Records 6(ff), (gg), (hh), (jj) and (kk), and I am satisfied that they were reviewed by the Town’s counsel retained to defend the civil claim and thus fall within the ambit of the “continuum of communications” between a solicitor and his or her client as they represent communication between the Town and its lawyers for the purposes of building a defence to the appellant’s civil claim and fall. Accordingly, these records fall within the ambit of privileged communications as contemplated by *Balabel v. Air India*. Further, these records represent the confidential communications between the Town and its lawyers. As I have found that Records 6(ff), (gg), (hh), (jj) and (kk) fall within the solicitor-client communication privilege aspect of branch 1, it is not necessary for me to determine whether they also fall within the litigation privilege aspect of branch 1 or the statutory solicitor-client communication privilege in branch 2.

*Records relating to the tendering process*

These records, on their face, do not represent confidential communications pertaining to the giving or seeking of legal advice. Rather, Record 2(a) is a letter from the Town’s Tax Collector to the successful bidder. Record 2(b) consist of copies of the tender envelopes received by the Town relating to the subject property. The records themselves do not support a finding that they were created by or for counsel for the purpose of giving or receiving legal advice (solicitor-client communication privilege under branch 1) or for the dominant purpose of litigation (litigation privilege under branch 1). Rather, these documents appear to have been created as a result of the tendering process and, in my view, do not qualify for exemption under branch 1 of section 12.

There is no evidence before me supporting a conclusion that Records 2(a) and (b) were prepared by or for counsel employed or retained by the Town “for the use in giving legal advice” or “in contemplation of or for use in litigation”. Accordingly, I also find that these records do not fall within the ambit of branch 2 of section 12.

*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.)].

The appellant provided submissions in support of his position that the Town has waived any privilege in documents responsive to part 10 of his request, which sought access to the tax arrears certificate, tax deed and Forms 1 to 5 on the basis that these records "... have been disclosed to outside parties, such as the land registry office." The tax arrears certificate, tax deed and Form 1 to 4, however, are not contained in the "court-file" records. The only record responsive to part 10 of the appellant's request, found in the "court-file" records, is Form 5.

As Form 5 is the only record responsive to part 10 of the appellant's request found in the "court-file" records, I need only consider the appellant's argument that the Town waived any privilege to that document. The appellant's representations in this regard state:

The [Town] is required to make payment into court of the excess proceeds regarding the sale of the property. These documents have been shared with another party. The documents record a communication made in open court.

Waiver has been found to apply where 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.)] At issue in Order P-1342 was whether the Ministry of Attorney General waived its privilege by voluntarily releasing records relating to its prosecution of fraud charges against the requester to the Law Society of Upper Canada. In that Order, Inquiry Officer Holly Big Canoe found that the Ministry demonstrated a clear intention to forego the privilege by disclosing the records to the Law Society.

The circumstances of this appeal differ, however, as there is no evidence before me that the Town demonstrated a clear intention to forego the privilege attached to the copies of Form 5 found attached to correspondence from its lawyer retained to complete the tax sale. In particular,

I note that the copies of the Form 5 found at pages 148 and 152, are not duplicates and have slight differences. Further, there is no evidence, such as the court's stamp on the face of the forms, which demonstrates that either of the copies represents the version that was actually filed in court. Accordingly, I am not satisfied that the Town provided these versions of Form 5 to the court. As a result, I find that the Town did not waive its privilege with respect to these documents. Similarly, I am also not satisfied that these versions of Form 5 represent communications made in open court [Order P-1551].

Though I found that the versions of Form 5 found at pages 148 and 152 fall within the ambit of the solicitor-client privilege exemption, I am not entirely satisfied that the Town met its obligation to conduct a through search for records responsive to part 10(g) of the appellant's request. Accordingly, I will address this issue in my discussion of whether the Town conducted a reasonable search for records.

## **EXERCISE OF DISCRETION**

The section 12 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

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

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

The appellant submits that the Town did not properly exercise its discretion and has taken into account irrelevant considerations. Though the appellant's representations do not identify the irrelevant considerations the Town took into account, he submits that the Town acted in bad faith. The appellant's representations state:

There is a compelling need for this information. The Appellant wishes to review the process the township engaged in to complete the sale and transfer of the property as the [Town] advised [the] Appellant that the property would be sold to him if the highest bidder failed to meet his obligations under the Rules and information has been produced showing that the highest bidder did not meet his obligations under the Rules, yet the [Town] still conveyed the property to him.

The proper considerations for the release of the information are the prejudice which will apply to the Appellant and any and all other citizens who attempt to purchase a property in accordance to the Rules.

The relationship is one of mistrust between the requester of the information and the [Town] and disclosure of the information will ensure that in [the] future the institution will act in an open fair and non-discriminatory fashion in conducting its future business.

I have considered the appellant's representations and I am of the view that the records I found to be exempt under section 12 of the *Act* would not serve to inform the appellant or other citizens who are interested in purchasing property subject to a tax sale. In making my decision, I note that the records consist of correspondence between the Town and its lawyers regarding its defence of the appellant's civil claim. Though the Town did not provide representations specifically addressing its exercise of discretion, I am satisfied that the exempt records themselves support a finding that the Town exercised its discretion in good faith and has taken into account relevant factors and not irrelevant factors. As a result, I will uphold the Town's decision not to disclose Records 6(ff), (gg), (jj) and (kk) under section 12 of the *Act*.

## **PERSONAL PRIVACY**

The Town claims that the following "Realtax" records are exempt under section 14(1):

- Real Tax File 02-12, Records 3(a), (b) and (d) to (x)
- Financial Billing and Invoices, Records 5(a) to (c)

The Town also claims that section 14(1) applies to the "court-file" records, namely Records 2, 6, 7 and 8(b). I found above that Records 6(ff), (gg), (jj) and (kk) fall within the ambit of the solicitor-client privilege exemption at section 12. Accordingly, from these records, I need only consider the possible application of section 14(1) to Records 2(a) and (b):

- Letters to Tenderers, Records 2(a) and (b)

## **EXCEPTIONS TO THE EXEMPTION IN SECTION 14(1)**

Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14. As stated previously, none of the affected individuals consented to the release of their information. Accordingly, the exception at section 14(1)(a) has no application to the circumstances of this appeal.



Though the appellant did not make specific reference to any of the exceptions at section 14(1), his representations that the information at issue is publicly available appear to raise the exceptions at sections 14(1)(c) and (d), which read:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

- (c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;
- (d) under an Act of Ontario or Canada that expressly authorizes the disclosure;

In particular, the appellant submits that the prescribed forms under the *Municipal Tax Sale Rules* require the inclusion of the addresses of individuals receiving notice of the tax sale. The appellant's representations state:

The vast majority of the documents requested are made available under the Rules or are file in the courthouse or the land registry office and as such it is the intent that these documents be made public and the remaining documents requested are simply backup for these.

...

This information concerns the sale of Land by public tenders. The Rules governing this sale state that the sale must be conducted in public. The information provided by individuals with regard to the sale and information gathered for the sale of land by the municipality is contemplated to be made public under the Rules and therefore given that Statute instructs the release of information this release of information does not constitute a unjustified invasion of personal privacy.

The Supplemental Notice of Inquiry sent to the Town asked it to identify whether any of the records at issue are publicly available through the *Municipal Tax Sale Rules* and/or the Land Registry Office. The Town, in response, submits that no specific references are made in the *Municipal Tax Sale Rules* regarding which documents are to be made available to the public. The Town also identifies the following documentation relating to property transactions and property tax that are publicly available:

- Information contained in a tender document prepared by the Town for the purpose of a tax sale of property;
- Information contained in the Town's assessment roll; and

- Information available at the local Land Registry Office relating to property transactions, tax sale transactions and land registration documents.

***14(1)(c): public record***

A recurrent theme in the appellant's representations is that records relating to tax sales are public as tax sales, themselves, are conducted in public.

Previous decisions from this office have found that for the exception at section 14(1)(c) to apply, the primary purpose for the collection of the personal information is to create and maintain a public record [PO-2109, PO-2265]. Accordingly, evidence that the names and addresses of identifiable individuals may be available for inspection at a courthouse or Land Registry Office, will not necessarily lead to the conclusion that the exception at section 14(1)(c) applies.

The personal information at issue in this appeal consists of the names, addresses and financial information of the assessed owners, bidders and property owners. The information was collected by the Town pursuant to its authority to collect municipal taxes and conduct tax sales. Having regard to the purpose of the collection of the personal information at issue, I am not satisfied that the exception at section 14(1)(c) applies to this information.

***14(1)(d): another Act***

The phrase "under an Act of Ontario or Canada that expressly authorizes the disclosure" in section 14(1)(d) closely mirrors the phrase "expressly authorized by statute" in section 28(2) of the *Act*, which is the equivalent of section 38(2) of the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*) [Order PO-1933]. This office has stated the following with respect to the latter phrase in section 38(2) of the provincial *Act*:

The phrase "expressly authorized by statute" in subsection 38(2) of the *Act* requires either that specific types of personal information be expressly described in the statute, or a general reference to the activity be set out in the statute, together with a specific reference to the personal information to be collected in a regulation made under the statute i.e., in a form or in the text of the regulation [Compliance Investigation Report I90-29P].

The appellant's position is that the rules governing tax sales expressly authorize the disclosure of the information at issue. I have reviewed the forms prescribed under the *Municipal Sales Tax Rules* and note that Forms 1 to 4 contain the note "This document need not be registered."

For the exception in section 14(1)(d) to apply in the circumstances of this appeal, there must be a specific authorization in the statute for disclosure of the personal information at issue. Sections 374 and 379 of *Municipal Act* provide that the treasurer shall permit any person, upon request, to inspect and be provided copies of:

- Form 2 - statutory declaration stating the names and addresses of the persons who received notice of the registration of the tax arrears certificate (under section 374 of the *Municipal Act*); and
- Form 4 - statutory declaration stating the names and addresses of the persons who received final notice that the land will be advertised for public sale unless the cancellation price is paid (under section 379 of the *Municipal Act*).

The above-referenced statutory declarations are responsive to parts 10(d) and (f) of the appellant's request for Forms 2 and 4. Form 2 is found at pages 48-49 and duplicated at pages 53-54 of the 'Realtax' records. Form 2 was previously called Form 3 under the repealed *Municipal Tax Sales Act* and is listed as Form 3 in the Index of Records prepared by the Town.

As discussed previously, the Town claims that no records exist responsive to the appellant's request for a copy of Form 4.

Having regard to sections 374 and 379 of the *Municipal Act*, I am satisfied that the exception at section 14(1)(d) applies to Form 2.

As previously mentioned, Record 3(s) contains a computer printout of the assessment information relating to the subject property. The computer print out also contains assessment information relating to other neighboring properties. Section 14 of the *Assessment Act* sets out the information that MPAC is required to include on the assessment roll that it provides to each municipality. This information includes:

- A description of the property sufficient to identify it;
- The names and surnames, in full, of all persons liable to assessment in the municipality;
- The person's religion, if they are Roman Catholic;
- The type of school board the person supports under the *Education Act*;
- The number of acres, or other measures showing the extent of the person's land;
- The current value of the parcel of land;
- The value of the land leased to tenants; and
- The name of every tenant who is a supporter of a school board.

Section 39(2) of the *Assessment Act*, requires the Town's clerk to make the assessment roll available for inspection to the public. Section 39(2) of the *Assessment Act* reads:

Immediately upon receiving the assessment roll for the municipality, the clerk shall make it available for inspection by the public during office hours.

The Town has not provided any representations regarding the handwritten notations relating to sums of monies. Accordingly, I am unable to determine whether the handwritten notations which appear in the assessment roll are available for inspection. I have decided to treat this

information as the personal information of the assessed owners as the notations refer to sums of monies which presumably relate to a financial liability as the property was subject to a tax sale that was handled by Realtax. Accordingly, I am not satisfied that the exception at section 14(1)(d) applies to the handwritten notations relating to sums of monies.

I am, however, satisfied that the exception at section 14(1)(d) applies to the computer generated information, taking into account section 39(2) of the *Assessment Act*, and will order the Town to disclose this information to the appellant.

With respect to the remaining information at issue, I have not been provided with any evidence that any “Act of Ontario or Canada that expressly authorizes” its disclosure. Accordingly, I am not satisfied that the exception at section 14(1)(d) applies to the remaining personal information and will go on to consider whether the exception at section 14(1)(f) applies.

### **INVASION OF PRIVACY**

The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 14(1)(f). Section 14(4) has no application to the circumstances of this appeal.

If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the “public interest override” at section 16 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2) [*John Doe*, cited above]. If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

#### **Section 14(3): disclosure presumed to be an unjustified invasion of privacy**

The representations of the Town do not make specific reference to any of the presumptions found at section 14(3). The Town’s submission that the information at issue relates to the financial affairs of the identifiable individuals, however, gives rise to the presumption found at section 14(3)(f). This section reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information, describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

The appellant was asked to provide representations as to the possible application of one of the presumptions at section 14(3). The appellant's representations state:

The individuals who partook in the tax sale process have already been identified, as such it is highly unlikely that others will be identified by production of the documents and such burden should be placed on the [Town].

The information does not refer to the use of a property; however, it identified a property whose description is already known as it was advertised in the Ontario Gazette.

In my view, the information contained in the records relating to the assessed owners of the subject property describes their finances and identifies a liability that was subject to a tax sale [Order M-800]. Accordingly, the presumption at section 14(3)(f) applies to this information. Further, disclosure of the assessment roll number in correspondence prepared by Realtax constitutes a description of the other assessed property owner's finances and identifies a tax liability [Order MO-1627]. In making my decision, I considered the particular context of the information at issue; specifically that the information contained in the records relates to a tax sale and thus describes a financial liability.

Accordingly, I find that the names, addresses, telephone numbers of individuals identified as property owners subject to a tax sale should be severed along with information describing their financial liability including tax arrears, penalties, charges and interest in Records 3(a), (b) and (d) to (x) and pages 4 to 18 and 26 to 34 in Records 5(a) to 5(c).

The remaining personal information at issue relates to the successful bidder or other bidders:

- Name, address and telephone number of successful bidder along with information as to how the successful bidder is to hold title (Record 2(a));
- Name and return address of a bidder (Record 2(b)); and
- Name, address, amount of tender cheque and balance representing the total price paid for the property (Records 3(e), (f) and (g)).

Previous decisions from this office have found that the presumption at section 14(3)(f) applies to information describing an offer to purchase land [Order PO-1964 and Orders PO-2623]. I am satisfied that the information at issue which identifies and describes the amounts of monies paid for the subject property constitutes a description of an individual's finances and describes a "financial activity". Accordingly, the presumption at section 14(3)(f) also applies to the information describing the amounts of monies the successful bidder paid.

In conclusion, I find that disclosure of the personal information describing the names, addresses and finances of the assessed owners as well as the information describing the amounts of monies the successful bidder paid constitutes an unjustified invasion of privacy. Accordingly, the exception at section 14(1)(f) does not apply to this information. In making my decision, I also considered the absurd result principle as the appellant's representations suggest that he is already

aware of the identity of the successful bidder and how much the successful bidder paid for the subject property. For the principle of absurd result to apply in the circumstances of this appeal, it must be shown that the information at issue is clearly within the appellant's knowledge. In Order MO-1323, Adjudicator Laurel Cropley states:

In my view, to expand the application of the "absurd result" in personal information appeals beyond the clearest of cases risks contradicting an equally fundamental principle of the Act, the protection of personal privacy. In general, I find that the fact that a record does not contain the appellant's personal information weighs significantly against the application of the "absurd result" to the record. However, as I indicated above, all of the circumstances must be considered in determining whether this is one of those "clear cases" in which the absurdity outweighs the privacy protection principles.

I have considered the circumstances of this appeal and am not satisfied that this is one of those "clear cases" in which the absurd result principle would outweigh the privacy interests of the successful bidder. In making my decision, I adopted the reasoning of Adjudicator Cropley and find that the fact that the records do not contain the appellant's personal information weighs significantly against the application of the "absurd result" principle. I also took into account that it appears that the appellant may have obtained access to the identity of the successful bidder and how much the successful bidder paid for the subject property, not through the *Act*, but as a result of his participation in the tendering process and being present when the tenders were opened or as a result of his litigation against the Town. However, based on the information submitted to me by the appellant, I cannot determine whether the personal information relating to the successful bidder is clearly within the knowledge of the appellant. Accordingly, I find that the absurd result principle does not apply and that the presumption at section 14(3)(f) applies to the identity of the successful bidder and how much the successful bidder paid for the subject property.

I will go on to consider whether disclosure of the remaining personal information, which is not subject to the presumption in section 14(3)(f), constitutes an unjustified invasion of privacy. The remaining personal information is the:

- address and telephone number of the successful bidder (Records 2(a), 3(e), (f) and (g)); and
- name and return address of a bidder (Record 2(b)).

### **Section 14(2): factors and considerations**

If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

The Town did not raise the possible application of any of the factors favouring non-disclosure and none of the affected individuals provided representations in response to the Notice of Inquiry sent to them.

The appellant submits that factors favouring disclosure at paragraphs (a), (c) and (d) of section 14(2) apply. The relevant sections read:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
- (c) access to the personal information will promote informed choice in the purchase of goods and services;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

I will consider whether any of the factors raised by the appellant weigh in favour of disclosure of the names and contact information of the bidders contained in Records 2(a) and (b) and 3(e), (f) and (g) as described above.

***Section 14(2)(a): public scrutiny***

With respect to whether section 21(2)(a) is a factor, previous orders state:

Simple adherence to established internal procedures will often be inadequate, and institutions should consider the broader interests of public accountability in considering whether disclosure is desirable for the purposes outlined in clause (a) [Order P-256].

The appellant submits that the requested information would enable him to scrutinize the tendering process and tax sale relating to the subject property to “satisfy his allegations that the sale of land was not conducted in accordance to Statute”. Though I agree with the appellant’s view that individuals should be able to scrutinize the tax sales, I am not satisfied that disclosure of the names and contact information of the successful bidder and other bidders would meet this purpose.

Further, I have ordered the Town to provide the appellant with the portions of the “Realtax” records which do not qualify for exemption under section 14(1) of the *Act*, which, in addition, to the information already in his possession, places the appellant in a position to carefully scrutinize the tendering process and tax sale relating to the subject property. In my opinion, withholding

the names and contact information of bidders in Records 2(a), (b), 3(e), (f) and (g) would not impair his ability to do so.

I conclude that section 14(2)(a) has no application to the present appeal. The disclosure of the names and contact information of the other bidders would not serve to subject the activities of the Town to public scrutiny.

***14(2)(c): purchase of goods and services***

The appellant's representations state that disclosure of the information at issue would:

...promote the informed choice in the purchase of goods and services, by enabling the general public to verify that the Tax Sale is being conducted in accordance with Statute will allow the correct bidder to object to a failure to comply with statute and allow for the purchase of a good being the property subject to the sale.

In my view, this factor is not relevant in the circumstances of this appeal as disclosure of the names and contact information of bidders would not promote an informed choice in the purchase of goods, as the information at issue does not reveal any information about the Town's obligations relating to tax sales.

***14(2)(d): fair determination of rights***

The appellant submits that the information at issue is relevant to a fair determination of his rights relating to the civil claim he filed against the Town. For section 14(2)(d) to apply, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing

[Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)].



Throughout the inquiry process, the appellant has maintained that the information requested in his sixteen-part request is relevant to the fair determination of his civil claim against the Town. The fact that the appellant filed a civil claim against the Town and sought damages demonstrates that he is seeking to enforce a legal, as opposed to a moral right which remains ongoing. However, I am not satisfied that disclosure of the names and contact information of bidders has any bearing on the determination of the appellant's legal right. The appellant has not provided me with evidence to support a finding that the disclosure of this information has some bearing on or is significant to the determination of his legal right. Accordingly, I am not persuaded that disclosure of this information is required to ensure an impartial hearing.

Having regard to the above, I find that this factor has no application to the circumstances of this appeal.

As I have found that none of the factors raised by the appellant apply to the information remaining at issue, I uphold the Town's decision to withhold the names and contact information of bidders contained in Records 2(a) and (b) and 3(e), (f) and (g) from the appellant.

## **PUBLIC INTEREST OVERRIDE**

The appellant has not specifically raised the possible application of the public interest override in section 16 of the *Act*. However, the appellant's submissions regarding the need for more public accountability relating to tax sales conducted by the Town appear to raise the possible application of section 16.

Section 16 states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (application for leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and 19 of the provincial *Act*, which are equivalent to sections 8 and 12 of the *Act*, are to be "read in" as exemptions that may be overridden by section 23, the provincial equivalent to section 16 of the *Act*. On behalf of the majority, Justice LaForme stated at paragraphs 25 and 97 of the decision:

In my view s. 23 of the *Act* infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. It is also my view that this infringement cannot be justified under s. 1 of the *Charter*. ... I would read the words "14 and 19" into s. 23 of the *Act*.

For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*’s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984]. The word “compelling” has been defined in previous orders as “rousing strong interest or attention” [Order P-984].

In my view, there is no relationship between disclosure of the information I found exempt under sections 12 and 14(1) and the *Act*’s central purpose of shedding light on the Town’s activities. I find that disclosure of this information would not assist the appellant, or the public, in shedding light on the Town’s activities relating to tendering processes and tax sales. In any event, any public interest that may exist will be satisfied as a result of disclosure of the portions of the records I found not exempt under section 14(1) of the *Act*.

Having regard to the above, I find that section 16 is not applicable to those portions of the records I found exempt under sections 12 and 14(1).

### **REASONABLENESS OF SEARCH/SCOPE OF REQUEST**

The appellant believes that records should exist that are responsive to parts 1, 5, 8 and 10(f) of his request and that additional records should exist that are responsive to parts 12 and 13 of his request. Parts 1, 5, 8, 10(f), 12 and 13 of the appellant’s request seek access to copies of:

- “... letters that have been sent to the other tenderers rejecting their tenders.” (Part 1 of the Request)
- “...all communication between [the successful bidder] and Kingsville, whether by fax, letter or email.” (Part 5 of the Request)
- “... a copy of the land transfer cheque for [an identified amount].” (Part 8 of the Request)
- “... Form 4” (Part 10(f) of the Request)
- “... all emails between myself and Kingsville.” (Part 12 of the Request)
- “...faxes between myself and Kingsville.” (Part 13 of the Request)

Further, parts 6, 7 and 14 of the appellant’s request were phrased as questions, which the Town claims does not constitute requests for records under the *Act*. Parts 6, 7 and 14 of the appellant’s request state:

- “Please advise as to who the signature belongs on [the successful bidder’s] Notice to higher tenderer” (Part 6 of the request)
- “Please advise as to who the handwriting on both [the successful bidder’s] deposit cheque for [an identified amount] and for [the successful bidder’s] final cheque for [an identified amount] with regard to the Realtax file 02-12 is.” (Part 7 of the request)
- “Please ask [a named individual] to provide the name and contact details of the person at the ministry he spoke with who advised [a named individual] he was under no obligation to show the winning tender.” (Part 14 of the request)

### ***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.

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].

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

In the original Notice of Inquiry the institution was asked to provide a written summary of all steps taken in response to the request. In particular, the institution was asked to respond to the following:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the institution did not contact the requester to clarify the request, did it:
  - (a) choose to respond literally to the request?
  - (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did

the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.
4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

### ***Representations of the parties***

The Town submits that it conducted a reasonable search for records and states:

The Town also maintains its position on the parts requested by the appellant numbered 1, 5, 8 and 10(f) that no records exist in our files. Municipal staff has conducted a search of the records and have found that no records exist pertaining to the parts requested by the appellant. The municipality is prepared to provide an affidavit to that effect to the Adjudicator, sworn by persons who have conducted the search.

However, when this office requested that the Town provide detailed additional information regarding its search efforts, the Town declined to provide a written summary of all the steps it took in response to the request.

Though the appellant advised the mediator that he believed additional records responsive to parts 12 and 13 of his request exist (copies of emails and faxes between the appellant and the Town), his representations did not provide any evidence in support of this position. Rather, the appellant's representations submit that records responsive to parts 1, 5, 8 and 10(f) of his request should exist for the following reasons:

- The *Municipal Tax Sale Rules* requires that the Town return to every rejected tenderer their tender together with the tenderer's deposit, if any, and a statement of the reason for rejection;
- It is reasonable to believe that communication between the Town and the successful tenderer had to occur for the property disposition purposes;
- The land transfer cheque, or a copy of it, should be available as it would have been returned to the Town after being deposited; and

- The Form 4 is a statutory declaration required under the *Municipal Act* for the completion of a tax sale.

Throughout his representations, the appellant states that he seeks access to the records relating to the transfer of the subject property. In particular, part 16 of the appellant's request sought access to "...all communication between Kingsville's lawyer and [the successful bidder] regarding the property transfer." Few records of this nature, however, were located by the Town and those located were found in the Town's legal file relating to its defence of the appellant's civil claim.

### *Analysis and Decision*

Based on the evidence presented by the parties, I find that the Town has provided insufficient evidence upon which to conclude that it conducted a reasonable search for records responsive to parts 1, 5, 8 and 10(f) of the appellant's request. Accordingly, I will order the Town to conduct subsequent searches for these records. In making my decision, I reviewed the relevant provisions of the *Municipal Act* and *Municipal Tax Sale Rules* and agree with the appellant that there is a reasonable basis to conclude that correspondence from the Town to the rejected tenderers and a completed Form 4 relating to the subject property should exist.

In particular, section 379(2)(a) of the *Municipal Act* provides that the Town must make a statutory declaration stating the names and addresses of persons receiving notice of land being offered for public sale, if at the end of the one-year period following the date of the registration of the tax arrears certificate, the cancellation price remains unpaid. Section 4(4) of the *Municipal Tax Sale Rules* specifies that the statutory declaration must be in Form 4. With respect to correspondence from the Town to rejected tenders, section 9(5) of the *Municipal Tax Sale Rules* provides that "every rejected tender shall be returned to the tenderer together with the tenderer's deposit, if any, and a statement of the reason for rejection."

I am also not satisfied that the Town has conducted a reasonable search for records responsive to part 5 and 8 of the appellant's request. In making my decision, I took into account the fact that the Town declined to provide further details about its search efforts to locate these records or respond to the appellant's representations that these records should exist.

Finally, taking into consideration the few records the Town located in relation to the transfer of the subject property I am not satisfied that the Town has conducted a reasonable search for these records contained in its files. In making my decision, I note that the Town did not locate its file relating to the transfer of land which would appear to be responsive to part 16 of the appellant's request. Further, I am not satisfied that the only copies of Form 5 in the Town's possession, which is responsive to part 10(g) of the appellant's request, are the versions attached to correspondence the Town's lawyer provided to the Town.

In fact, there is no evidence before me which suggests that the Town conducted a search for a copy of Form 5, which was filed in court. The Town has not, in my view, conducted a search for this record in other locations, such as its Treasurer's or Tax Collector's files.

In summary, I find that the Town has failed to conduct a reasonable search for records responsive to the parts 1, 5, 8, 10(f), (g) and 16 of the appellant's request and I will order the Town to search its paper and electronic record holdings for the requested information.

I have not made a finding that the Town should also conduct an additional search for records responsive to parts 12 and 13 of the appellant's request as there is insufficient evidence before me supporting a finding that these records exist.

### *Form of Request*

As stated previously, the Town takes the position that parts 6, 7 and 14 of the appellant's request are not requests for recorded information, as they are in the form of a question. The Town's representations state:

The fact that they are phrased by the requester as questions would indicate that no records exist in our file that can be substantiated. The municipality did not contact the appellant to clarify his requests and felt that the mediator acting as a third party would be able to bring any clarity required by the appellant for these three issues.

The Reply Notice of Inquiry sent to the Town asked the Town to consider its obligation under the *Act* to identify records that may address the questions posed by the appellant. The Town did not provide representations on this issue.

### *Analysis and Findings*

This office recently considered an institution's submission that a request in the form of questions was not a proper request under the *Act* in Order MO-2285. In that Order, Senior Adjudicator John Higgins reviewed previous orders from this office dealing with institution's resistance to treat questions as a request for recorded information and stated:

Where a request is framed as a question or series of questions, the institution must determine whether its record holdings contain information that would answer the question(s) asked.

...

In short, institutions that receive a request for access that is in the form of a question or series of questions must determine what records they have that may be responsive to the questions and provide an access decision based on those records. This duty is the same regardless of the nature of the information sought.

I agree with Adjudicator Higgins reasoning and adopt it for the purposes of this appeal. Accordingly, I am of the view that in the circumstances of this appeal, the Town has failed to

conduct a search for records responsive to the questions set out in parts 6, 7 and 14 of the appellant's request. As a result of my finding, I will order the Town to conduct a search for records responsive to these parts of the appellant's request as well.

Should the Town require additional information from the appellant to identify records responsive to parts 6, 7 and 14 of the appellant's request, the Town is to contact the appellant and seek clarification as contemplated under section 17(2) of the *Act*.

**ORDER:**

1. I uphold the Town's decision to withhold access to the portions of the records I found exempt under section 12 and 14(1) of the *Act*.
2. I order the Town to disclose the remaining portions of the records to the appellant no later than **July 2, 2008**. For the sake of clarity, I have highlighted the portions of these records that should **not** be disclosed in the copy of the records enclosed with this Order to the Town.
3. I order the Town to conduct a search for records responsive to parts 1, 5, 6, 7, 8, 10(f) and (g), 14 and 16 of the request and to issue an access decision to the appellant, with a copy to me, in accordance with sections 19, 21 and 22 of the *Act*, treating the date of this Order as the date of the request.
4. In order to verify compliance with this Order, I reserve the right to require a copy of the information disclosed by the Town pursuant to order provision 2.

Original signed by: \_\_\_\_\_  
Jennifer James  
Adjudicator

\_\_\_\_\_ May 30, 2008