



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2445

Appeal MA08-218

Town of Amherstburg



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NATURE OF THE APPEAL:

The Town of Amherstburg (the Town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a sewer back up at a specified address (the subject property). The requester, a lawyer acting on behalf of the home owner's insurance company, was seeking access to:

copies of all documentation [the Town has in its] possession, power and control relating to the sewer back up, ... including building inspection, maintenance and service records, from 1980 to present, along with any documentation relating to the connection of the existing sewer system to the new development.

The Town responded initially by advising the requester that it was extending the time for response by 30 days to determine the existence of the records, whether any third party should be notified of the request pursuant to section 21 of the *Act*, and whether the records would be subject to any exemptions. The Town also provided a fee estimate of \$977.92 at that time.

The Town subsequently issued a revised fee estimate by email, advising the requester that the fee estimate had been reduced to \$500.00. The requester paid this fee.

Next, the Town issued its final decision, granting access to some records related to the sewer back up. However, the Town denied access to other records said to have been created on or after the date of the back up, and indicated that it was doing so on the basis of advice received from legal counsel.

The requester, now the appellant, appealed the Town's decision to this office. The appellant took issue with the Town's failure to itemize or explain the fee or to claim any exemptions as the basis of denying access to the remaining records.

A mediator was appointed by this office to try to resolve matters between the parties. During mediation, the Town issued a revised decision letter to the appellant, in which it clarified that it was relying on sections 11(c) and 11(d) (valuable government information) of the *Act* to withhold all of the responsive records, except one. The Town indicated that it was denying access to one record – a building inspection report for the subject property - pursuant to sections 8(1)(a) (law enforcement matter) and 14(1) (personal privacy) of the *Act*.

With the revised decision letter, the Town also provided a breakdown of the fee and confirmed that the final fee was lower than the estimate. The appellant received a refund in the amount of \$350.89. The clarification of the basis for the \$149.11 fee, combined with the refund, satisfied the appellant. Accordingly, the issue of the Town's fee was removed from the scope of the appeal.

As a mediated resolution of this appeal was not possible, it was transferred to the adjudication stage, where it was assigned to me to conduct an inquiry.

Initially, the Town claimed reliance on the personal privacy exemption in section 14(1) of the *Act* only in relation to the building inspection report noted previously. On my review of the records during the preparation of the Notice of Inquiry to send to the Town, however, I noted that there also appeared to be information about other individuals in other records (identified in the index, below) that may qualify as their personal information. Since section 14(1) of the *Act* is a mandatory exemption, I decided to seek representations from the Town on the possible application of section 14(1) to these records in addition to the one record for which the exemption was initially claimed.

I sent a Notice of Inquiry outlining the facts and issues to the Town, seeking representations, which I subsequently received from the Town's legal representative. In its submissions, the Town advised that it was withdrawing its section 8(1)(a) exemption claim for the building inspection report. Accordingly, the law enforcement exemption will not be addressed in this order.

Issues related to the sharing of the Town's representations with the appellant were resolved through informal discussion between staff from this office and the Town's legal representative. As a result, I sent a modified Notice of Inquiry, along with a complete copy of the Town's representations, to the appellant, seeking representations on the issues, which I received.

RECORDS:

Record Number	Description	Exemptions Claimed [Raised at Adjudication]
1	Report to Town Council by Manager of Public Services, dated March 8, 2007, with attachments, including list of affected properties (7 pages)	Section 11(c) & (d) <i>Section 14(1)</i>
2	Site photos taken on April 19, 2007 (21 pages)	Section 11(c) & (d)
3	Email to Town Public Works inspector with photos attached, dated April 23, 2007 (3 pages)	Section 11(c) & (d)
4	Environment Canada Daily Data Reports for March 2007 (5 pages)	Section 11(c) & (d)
5	Email from Town Public Works inspector, dated March 19, 2007 (1 page)	Section 11(c) & (d)
6	List of Homeowners reporting damage, March 2, 2007 (1 page) – <i>duplicate of p. 3 of R1</i>	Section 11(c) & (d) <i>Section 14(1)</i>
7	Site photos taken March 1-3, 2007 (13 pages)	Section 11(c) & (d)
8	Subdivision development site map (1 page, 11"X14")	Section 11(c) & (d)
9	Statement by Manager of Public Services, dated March 8, 2007 (3 pages)	Section 11(c) & (d)
10	Site map showing affected properties (1 page, 11"X14") – <i>similar to p. 4 of R1</i>	Section 11(c) & (d) <i>Section 14(1)</i>
11	Email between Town Staff and third party, dated January 24, 2007 (2 pages)	Section 11(c) & (d)
12	Email from Manager of Public Services [internal], dated March 2, 2007 (2 pages) - <i>duplicate of p. 7 of R1</i>	Section 11(c) & (d)

Record Number	Description	Exemptions Claimed [Raised at Adjudication]
13	Email between Town staff and third party, dated February 23, 2007 (2 pages)	Section 11(c) & (d)
14	Letter to subdivision residents, dated February 23, 2007 (2 pages)	Section 11(c) & (d)
15	Email from Ontario Clean Water Agency staff to Town staff, dated March 1, 2007 (2 pages)	Section 11(c) & (d)
16	Town Water work order forms (6 pages)	Section 11(c) & (d)
17	Letter from Town to subdivision resident, dated March 2, 2007 (1 page)	Section 11(c) & (d) <i>Section 14(1)</i>
18	Town Water computer dispatch reports & service request form, March 2, 2007 (4 pages)	Section 11(c) & (d) <i>Section 14(1)</i>
19	Notice of Subdivision Agreement, part (1 page)	Section 11(c) & (d)
20	Email from Ontario Clean Water Agency staff to Town staff, dated March 2, 2007 (1 page)	Section 11(c) & (d)
21	Site photos [related to Record 7 photos] from March 2007 (6 pages)	Section 11(c) & (d)
22	Site photos [also related to Record 7 photos], from March 3, 2007 (3 pages)	Section 11(c) & (d)
23	Buildings Department Inspection Report for subject property, dated 2003 - 2004 (4 pages)	Section 14(1)

DISCUSSION:

PRELIMINARY MATTER – DUPLICATION & RESPONSIVENESS

The one-page record identified above as Record 6 is a duplicate of page 3 of Record 1, and identical exemption claims are raised with respect to both records. In the circumstances, it is unnecessary to review both copies of this document and I will simply consider the possible exemption of the list of homeowners where it appears in Record 1. Accordingly, Record 6 is removed from the scope of the appeal.

Similarly, the two-page email identified as Record 12 in the index is a duplicate of page 7 of Record 1. The second page of Record 12 contains no text other than the last line of the sender's "email signature," which consists of the Town's website address. I find that page 7 of Record 1 and pages 59 and 60, which comprise Record 12, are identical. In this way, Record 12 is also removed from the scope of the appeal.

Finally, there is a "P.S." to the email described in the preceding paragraph that, in my view, does not form part of the Manager of Public Service's discussion of the sewer back up in question, but rather relates to events at a different location. In my view, it is clear from the appellant's correspondence and representations that he is specifically seeking records related to the sewer back up of March 1-2, 2007 at the subject property, and other records related to that property. Because of this, I am satisfied that the "P.S." portion of page 7 of Record 1 is not responsive to the appellant's request and may be excluded from the scope of the appeal. It is not, therefore,

necessary to determine whether this specific portion of Record 1 may be released under the *Act*.

PERSONAL INFORMATION

In order to determine whether the mandatory personal privacy exemption in section 14(1) may apply, it is first necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) of the *Act*, and states, in part:

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

- (d) the address, telephone number, fingerprints or blood type of the individual, ...
- (h) the individual’s name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The 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 and 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 and MO-2344].

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.)].

Respecting this issue, the Town submits that disclosure of Records 1, 17 and 18 “must be refused because the records contain information about individuals, which information would reasonably be expected to identify those individuals.” The Town refers to the information in those records as consisting of names, addresses and telephone numbers. The Town offers no submissions in relation to the presence of “personal information” in Record 23.

The appellant’s representations do not specifically address this issue.

Findings

I have reviewed each of the records at issue in this appeal. Having done so, I find that Records 1, 10, 16, 17 and 18 contain the personal information of identifiable individuals. Specifically, I find that each of these records contains addresses and, in some instances (page 3 of Record 1, as well as Records 17 and 18), telephone numbers (paragraph (d) of the definition), along with the names and other information (paragraph (h)) of more than two dozen individuals whose homes were affected by the sewer back up, as well as Town Water employees.

As stated, the list of individuals whose homes were affected by the sewer back up at page 3 of Record 1 contains personal information about them, according to paragraphs (d) and (h) of the definition. However, my finding with respect to page 4 of Record 1 and Record 10 (its near-equivalent), as well as Record 16, requires some elaboration. The site maps showing affected properties on page 4 of Record 1 and on Record 10 do not, on their face, contain anything other than the addresses of those affected properties (paragraph (d)). Similarly, the Town Water work orders comprising Record 16 contain only the addresses of the same affected properties. In my view, however, it would be possible to use a publicly available source of information to connect the affected property addresses with identifiable individuals such that these records would reveal information similar to the list of homeowners on page 3 of Record 1. In the specific circumstances of this appeal, therefore, I find that page 4 of Record 1, Record 10 and Record 16 contain information that qualifies as personal information according to the definition in section 2(1).

In addition, the building inspection report referred to as Record 23, contains various entries dated between November 2003 and January 2004 and is identified solely by the street address of the subject property. I find that it does not contain the personal information of any identifiable individual. Accordingly, it does not qualify for exemption under section 14(1). Moreover, as no other exemptions were claimed in relation to it, I will order it disclosed to the appellant.

I will now review the application of section 14(1) of the *Act* to Records 1, 10, 16, 17 and 18.

PERSONAL PRIVACY

Where a requester seeks the 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.

The section 14(1)(a) to (e) exceptions are relatively straightforward. The section 14(1)(f) exception is more complex, and requires a consideration of additional parts of section 14. 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).

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]. In the present appeal, the Town has not argued that any of the presumptions against disclosure in section 14(3) are relevant, and I find that none of them apply. Similarly, neither the Town nor the appellant has argued that any of the exceptions in section 14(4), or the public interest override in section 16, apply, and I find that they do not.

The relevant parts of section 14(1) state:

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

- (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
- (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Section 14(1)(a) Representations

In its decision letter, the Town referred to section 14(1)(a) as the basis for denying access to Record 23. When I sought representations from the Town, I advised that section 14(1)(a) is not an exemption, but rather is an exception to the exemption and cannot be relied upon to deny access. I asked the Town to clarify its position on section 14(1)(a) to the record. However, given my findings above, under Personal Information, and the fact that Record 23 is no longer at issue, the clarification provided by the Town applies only to the other records remaining at issue for which the personal privacy exemption is raised, namely Records 1, 10, 16, 17 and 18.

In response to my request that the Town clarify if the consent of the owner of the subject property of this request was sought, the Town advised that it did not seek the consent of the homeowner in question, or others, because it took the view that section 11 applied to exempt the information.

The appellant asserts that the Town’s position as to whether the specified homeowner’s personal information is exempt under the *Act* is unclear. The appellant’s representations were accompanied by a consent signed by the homeowner of the subject property, and its wording mirrors the language of the access request. Specifically, the “Direction and Authorization” authorizes the Town to forward to the appellant, “or to whom they may direct, all documentation and information in your possession, control and power in connection with a sewer back-up that occurred on or about March 2, 2007 at our home located at [specified address] including, but not limited to, all records from 1980 to present...” The form is signed by the specified homeowner and dated July 30, 2008, which coincides roughly with the appeal of the Town’s decision to this office.

Findings

As previously stated, where a requester seeks the personal information of another individual, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies. Section 14(1)(a) provides that one such exception is when there is the prior written consent of the individual to whom the information relates, if the record is one to which the individual is entitled to have access. For section 14(1)(a) to apply, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request [see Order PO-1723].

Although it is not clear to me whether the written consent of this individual homeowner, which was submitted to this office by the appellant, was ever provided to the Town, I am nevertheless satisfied that it fulfills the requirements of section 14(1)(a). Accordingly, I find that section 14(1)(a) applies to this individual's personal information in Record 1. Accordingly, this specific information is not exempt under section 14(1).

Section 14(1)(f) Representations

With respect to the personal information of other identifiable individuals in Records 1, 10, 16, 17 and 18, the Town submits that:

Upon consideration of the provisions contained within subsection 14(2)(a) to (h) it is concluded that such information is confidential, fitting squarely within the definition of "personal information" and, as such, the disclosure would be an unjustified invasion of personal privacy.

Respecting the exception in section 14(1)(f), the appellant submits that the consideration in section 14(2)(a) "would dictate in favour of disclosing" the information relating to "other persons who may have been affected by the sewer back up" since none of the presumptions against disclosure in section 14(3) apply.

Analysis and Findings

As stated, none of the exceptions in paragraphs (a) through (e) of section 14(1), or any of the presumptions in section 14(3), apply to the personal information of individuals (other than the consenting homeowner). Accordingly, I must review the considerations in section 14(2) to determine whether disclosure would or would not be an unjustified invasion of personal privacy according to the exception in section 14(1)(f). For the reasons to follow, I find that section 14(1) applies to exempt the personal information of all of the other individuals in Records 1, 10, 16, 17 and 18.

The appellant referred to the consideration in section 14(2)(a) but did not elaborate or provide evidence in support of the assertion that it may be relevant in the circumstances of this appeal. This section provides that the head, "in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether, ... the disclosure is desirable for the purpose of subjecting the

activities of the institution to public scrutiny.” Previous orders of this office have established that in order to support a finding that section 14(2)(a) applies, two points must be established: first, that the activities of the institution have been called into question publicly; and second, that disclosure of the personal information must be desirable in order to subject the activities of the institution to public scrutiny [Orders PO-2657 and PO-2789]. In the absence of sufficient evidence to establish the relevance of this factor, I find that it does not apply in the circumstances of this appeal.

The Town’s representations on the factors in section 14(2) allude to confidentiality respecting the personal information of other individuals in the records, which may suggest the application of the factor in section 14(2)(h). The relevance of this consideration is determined by an evaluation of whether the personal information was supplied by the individual to whom the information relates in confidence [Order MO-2415]. However, I have not been provided with any evidence as to the expectations of confidentiality homeowners may have had in reporting damage to their homes as a consequence of the back up. Accordingly, a finding of the relevance of the factor in section 14(2)(h) is not supported in this appeal.

The evidence before me does not support a finding that any of the factors weighing in favour of disclosure of the personal information of the identifiable individuals, other than the homeowner who provided consent, are relevant. Accordingly, I find that the personal information of other identifiable individuals in the records does not fall under the exception in section 14(1)(f) and that its disclosure would, therefore, constitute an unjustified invasion of personal privacy. I find that the personal information of other identifiable individuals in Records 1, 10, 16, 17 and 18 is exempt under the mandatory exemption in section 14(1) of the *Act*.

I note that section 4(2) of the *Act* obliges the Town to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. Past orders of this office have established that the key question raised by section 4(2) is one of reasonableness. In other words, if severing the exempt information from the record would result in disclosure of only “disconnected snippets”, or “worthless”, “meaningless” or “misleading” information, the record should not be severed under section 4(2) [Order MO-2197]. Having carefully reviewed the records, I find that it would not be reasonably possible to sever the exempt personal information of the identifiable individuals from the site map at page 4 of Record 1 or in Record 10 in order to disclose the consenting homeowner’s personal information without creating a “meaningless” form of each record.

With respect to the personal information of identifiable individuals on page 3 of Record 1, and in Records 16, 17 and 18, I am satisfied that it can reasonably be severed and the remaining portions disclosed, subject to my findings regarding section 11, below.

ECONOMIC AND OTHER INTERESTS

The Town submits that the exemptions in sections 11(c) and (d) of the *Act* apply to the records at issue. These provisions 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;
- (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

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 (d) to apply, the Town must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the Town is required to 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.)].

Representations

According to the Town, disclosure of all of the records would prejudice its economic interests and would also be injurious to the financial interests of the Town. The Town explains its position in the following manner:

Subsequent to the flooding of these properties, the Town notified its insurer, as it was contractually obliged to do. As a result, following the subject request for information being made, the Town sought consent from its insurer to disclose the documents requested as any claim which may be made as a result of the flooding, would be subrogated to the Town's insurer. The insurer did not consent to the disclosure of information. Any disclosure made by the Town, contrary to the instructions of its insurer would be prejudicial to the Town's economic interests

and injurious to the Town's financial interests, in that it would be in breach of its insurance contract and, thus, potentially liable for any damages and legal defence in connection with any claim that may be made.

The Town provides no further argument respecting the application of sections 11(c) and/or (d), and merely assert that it properly exercised its discretion in refusing to disclose the records under the exemption.

In responding to the Town's representations, the appellant contends that the exemption claim under sections 11(c) and (d) must fail because the Town has not provided "any evidence" to support its claim of economic harm or financial injury with disclosure of the information at issue. The appellant states:

Further, the case law states that *evidence amounting to speculation of possible harm is not sufficient to satisfy the test of economic harm or financial injury*. The Town's position is that the disclosure of the requested documents would be in breach of its insurance contract which *could* make the Town *potentially liable* for damages, etc. There is no evidence to establish a reasonable expectation of harm [emphasis in original].

Analysis and Findings

The Town has denied access to the records on the basis that the exemptions in sections 11(c) and (d) of the *Act* apply to them in their entirety. Under section 42 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution. The onus of proving that the records at issue fall within the exemptions in sections 11(c) or (d) of the *Act*, therefore, rests with the Town.

Previous orders of this office have established that the purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. Section 11(c) 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]. To establish a valid exemption claim under section 11(d), an institution must demonstrate a reasonable expectation of injury to its financial interests.

Having carefully considered the representations submitted by the Town, I find that the Town has failed to provide the requisite "detailed and convincing" evidence to establish a reasonable expectation of the harms in sections 11(c) or (d) resulting from disclosure of these records. Indeed, I agree with the appellant that the arguments presented by the Town respecting possible compromise to its relationship with its insurer, and possible liability related to future claims that the Town might be required to defend on its own if the records are disclosed, are speculative at best. Furthermore, on my review of the records remaining at issue for which the sections 11(c) and (d) claims are made, I note that some of these records appear to be public in nature, including the subdivision map that is Record 8 and the federal government website printouts at

Record 4. In the circumstances, and in the absence of representations other than those made by the Town set out above, which were apparently intended to apply generically to all of these records, I find that I have not been provided with sufficiently detailed and convincing evidence to support a finding that sections 11(c) and (d) apply.

As an additional matter, it is puzzling that the Town appears to have based its decision regarding disclosure in response to the access request on the consent of its insurer when it is the Town that has the statutory obligations and responsibilities under the *Act* with regard to records under its custody or control. It is worth emphasizing that these are records created or generated by Town staff, not the insurer. Moreover, as I understand the Town's position, it appears to have considered its insurer's lack of consent as binding on the Town in making its decision under the *Act* not to disclose the records. In my view, if the representations quoted above accurately reflect the Town's rationale for denying access under section 11, it suggests an improper fettering of the Town's discretion. As an aside, had I upheld the Town's section 11 exemption claim, even in part, the Town's acknowledged acquiescence to the insurer's withholding of consent would, in my view, have been a factor to consider in the review of the Town's exercise of discretion under section 11.

As already stated, however, I find that the Town's claim for exemption of the records under section 11 is not supported by sufficiently "detailed and convincing" evidence and is based on speculation of possible harm, which is not adequate to meet the requirements of sections 11(c) or (d) [*Ontario (Workers' Compensation Board)*, cited above]. In the circumstances, I find that sections 11(c) and (d) do not apply. As no other exemptions have been claimed to deny access, I will order the records disclosed to the appellant, subject to the severance of the information that is exempt under section 14(1).

ORDER:

1. I order the Town to disclose the responsive portions of the records that are not exempt under section 14(1) of the *Act* by **September 14, 2009** but not before **September 9, 2009**.

For the sake of clarity, I have marked the non-responsive and exempt portions of Records 1, 16, 17 and 18 that should **not** be disclosed to the appellant on the Town's copy of those records enclosed with this Order.

2. In order to verify compliance with this Order, I reserve the right to require that a copy of the information disclosed by the Town pursuant to order provision 1 be provided to me.

Original signed by: _____
Daphne Loukidelis
Adjudicator

August 7, 2009