Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2698

Appeal MA11-82

City of Woodstock

February 24, 2012

Summary: The appellant filed an access request to obtain records relating to an incident involving himself, which resulted in two city employees complaining to management about him. The city located responsive records and provided the appellant with access to most of the records. The city claims that the withheld records are excluded from the scope of the *Act* under section 52(3)3. In the alternative, the city argues that the withheld records are exempt under sections 38(a) and (b). The records are found to be within the scope of the *Act* and the city is ordered to disclose most of the withheld information. Small portions of the records are found exempt under section 38(a) in conjunction with sections 6(1)(b) and 7(1). In addition, disclosure of the information which constitutes an employee's personal information is found to constitute an unjustified invasion of personal privacy under section 38(b) in conjunction with 14(1). The city's search for responsive records is upheld as reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1) definition of "personal information", 6(1)(b), 7(1), 12, 14(1), 17, 38(a) and (b).

Orders and Investigation Reports Considered: Order M-1147.

OVERVIEW:

[1] The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Woodstock (the city) for all records, including investigative notes, statements, email correspondence, video and audio

recordings, relating to an incident which resulted in two city employees making a complaint against the appellant.

[2] The city issued a decision letter to the appellant advising that it does not have custody or control of any investigative notes, audio recordings or video recordings relating to the incident. However, the city located some internal correspondence which it claims is excluded from the scope of the *Act* under section 52(3)3.

[3] The appellant appealed the city's decision to this office and a mediator was assigned to the appeal.

[4] During mediation, the appellant confirmed that he believed that additional records should exist and the city issued two supplemental decision letters.

[5] In its second decision letter, the city advised that in addition to its claim that the records are excluded from the scope of the *Act*, it claims that the records are exempt under sections 6(1)(b) (closed meeting), 8(1) (law enforcement), 12 (solicitor-client privilege) and 14(1) (personal privacy) of the *Act*.

[6] The city also wrote to the appellant advising that no audio recordings exist relating to the incident in question. The city enclosed an affidavit with its letter to the appellant.

[7] In its third decision letter, the city advised the appellant that it undertook a further search and found additional records (pages 47-71). The city released these records in full to the appellant, with the exception of pages 65, 68-71, which it released in part. The city claims that portions of these records are not responsive to the request and that the disclosure of the remaining portions would constitute an unjustified invasion of personal privacy under section 14(1) of the *Act*.

[8] At the end of mediation, the appellant advised the mediator that he continues to seek access to pages 1, 2, 3, 6, 7, 8, 9, 10, 22 and 23. The appellant also advised that he continues to believe that additional responsive records exist.

[9] The mediator raised the possible application of section 38(a) and (b) to the records, which would make the city's access decision regarding the application of the exemptions under sections 6(1)(b), 7(1), 8(1), 12 and 14(1) a discretionary decision under Part II of the *Act*. Sections 38(a) and (b) of the *Act* recognize the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information [Order M-352].

[10] The issues remaining in dispute at the end of mediation were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry

under the *Act*. During the inquiry into this appeal, I sought and received representations from the city and the appellant. The city's representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction Number 7*.

[11] In this order I make the following findings:

- The records are not excluded from the scope of the *Act* under section 52(3)3;
- The records contain the personal information of the appellant, his child and two other individuals;
- The discretionary exemptions at section 38(a) in conjunction with sections 6(1)(b) (closed meeting) and 8(1)(a) (law enforcement) do not apply;
- The discretionary exemptions at section 38(a) in conjunction with sections 7(1) (advice and recommendations) and 12(solicitor-client privilege) apply to a small amount of information;
- Disclosure of the personal information of the two other individuals would constitute an unjustified invasion of personal privacy under section 38(b) in conjunction with section 14(1) but disclosure of the appellant's own information to himself would not; and
- The city's search for responsive records was reasonable.

RECORDS:

[12] The following chart identifies the records at issue.

Page No.	Record	Claims
1,2	Workplace Violence and Harassment Reporting Form dated November 6, 2010	52(3)3; 38(a)/ 7(1) & 8(1)(a); 38(b)/ 14(1)
3	Internal email, dated November 6, 2010	52(3)3; 38(a)/ 7(1) & 8(1)(a); 38(b)/ 14(1)
6	Internal email, dated November 7, 2010	52(3)3; 38(a)/ 8(1)(a)
7,8	Internal email, dated November 8, 2010	52(3)3; 38(a)/ 8(1)(a) 38(b)/14(1)
9,10	Internal email, dated November 8, 2010	52(3)3; 38(a)/ 8(1)(a); 38(b)/14(1)
22,23	Internal correspondence, dated January 13, 2011	52(3)3 38(a)/ 6(1)(b), 7(1), & 12 38(b)/14(1)

ISSUES:

A. Are the records excluded from the scope of the *Act* under section 52(3)3?

B. Do the records contain "personal information" as defined in section 2(1)?

C. Does the discretionary exemption at section 38(a) in conjunction with section 6(1)(b) apply to pages 22 and 23?

D. Does the discretionary exemption at section 38(a) in conjunction with section 7(1) apply to pages 1, 2, 3, 22 and 23?

E. Does the discretionary exemption at section 38(a) in conjunction with section 8(1)(a) apply to pages 1, 2, 3, 6, 7, 8, 9 and 10?

F. Does the discretionary exemption at section 38(a) in conjunction with section 12 apply to paragraph 3 on page 23?

G. Does the discretionary exemption at section 38(b) in conjunction with section 14(1) apply to pages 1, 2, 3, 7, 8, 9, 10, 22 and 23?

H. Did the city properly exercise its discretion?

I. Did the city conduct a reasonable search for responsive records?

DISCUSSION:

A. Are the records excluded from the scope of the *Act* under section 52(3)3?

[13] Section 52(3)3 states:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[14] If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

[15] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable

to conclude that there is "some connection" between them. [Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).]

[16] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

[17] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

[18] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

[19] For section 52(3)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[20] The appellant argues that the records do not relate to employment matters. Instead, the records contain information about what city employees said about him.

[21] The city's representations state:

> These records were prepared and collected by the City of Woodstock because they deal with "employment-related matters". The incident that originally generated these records …along with follow-up communications among staff, should be considered part of an employment-related matter because they relate to the City's duty to maintain a safe working

> environment for its employees and were created in the course of addressing that duty.
>
> In the City's relationship with its employees, the City has a legal obligation under the *Occupational Health and Safety Act* to ensure that its employees are not subject to violence and harassment in the workplace.

[22] The *Occupational Health and Safety Act* was recently amended to provide additional protections to workers from violence and harassment in workplaces. The Ministry of Labour issued a press release on December 9, 2009 , which states:

> The new protections will require employers to:
>
> - Develop and communicate workplace violence and harassment prevention policies and programs to workers;
> - Assess the risks of workplace violence, and take reasonable precautions to protect workers from possible domestic violence in the workplace; and
> - Allow workers to remove themselves from harmful situations if they have reason to believe that they are at risk of imminent danger due to workplace violence.

Part 1: collected, prepared, maintained or used

[23] The records comprise of a complaint form, emails and correspondence prepared by city employees or the appellant. I am satisfied that these records were collected, prepared, maintained or used by the city and find that part one of the three requirements for the application of section 52(3)3 has been met.

Part 2: meetings, consultations, discussions or communications

[24] I am also satisfied that the collection, preparation, maintenance or usage of the information contained in the records directly relate to meetings, consultations, discussions or communications arising from the city's response to the complaint filed against the appellant. Accordingly, I find that part two of the three requirements for the application of section 52(3)3 has been met.

Part 3: labour relations or employment-related matters in which the institution has an interest

[25] The city has claimed that its collection, preparation, maintenance or usage of the records at issue was in relation to discussions about employment-related matters, not labour relations matters.

[26] Previous decisions from this office have consistently held that records relating to the investigation of complaints about employees by an employer are employment-related, as they could result in disciplinary action against the employee.[1] In this appeal, the appellant is not an employee, but a member of the public seeking access to records relating to a complaint made against him by city employees. Though employees concerns about the appellant are set out in the records, the records do not contain information which review, assess or investigate city employees' responses, actions or conduct. In addition, the records do not contain the employer's replies to the employees who complained about the appellant. Having regard to the contents of the record, I am satisfied that they do not contain any information which allege employee misconduct.

[27] I have considered the city's submission that it has an obligation under the *Occupational Health and Safety Act* to protect its workers from violence and harassment in workplaces. However, I do not accept the city's position that any records relating to a complaint of violence and harassment in the workplace automatically removes such records from the scope of the *Act*. In my view, the information in the records and the specific circumstances of the incident described therein must be reviewed to determine whether the records contain information relating to the employment of a person or employment-related matters. The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

[28] Having regard to the contents of the records, I find that the records do not contain information relating to any human resources or staff relations issues between the city and the two employees who complained about the appellant. Instead, the records describe staff observations about the appellant, who is not a city employee, and is not in an employment-like relationship with the city.

[29] Having regard to the above, I find that any meetings, consultations, discussions or communications that the city had relating to their use of the records does not relate to an "employment-related matter". Accordingly, I find that the third requirement for the application of section 52(3)3 has not been met and as such the records are subject to the application of the *Act*. As a result of my finding, I will go on to determine whether the records are exempt under sections 38(a) and (b) of the *Act*.

[1] See for example, Orders MO-1635, MO-1723, PO-2748 and PO-2809.

B. Do the records contain "personal information" as defined in section 2(1)?

[30] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

[31] The appellant submits that the requested information relates to him and what has been said about him.

[32] The city also acknowledges that the records contain the personal information of the appellant.

[33] I have carefully reviewed the records and find that the records contain the personal information of the appellant and his child. The records contain information about the appellant's personal opinions or views [paragraph (e) of the definition of "personal information" in section 2(1)]. In addition, the appellant's name appears with other personal information relating to him and his child [paragraph (h)], including the appellant's email address [paragraph (d)]. Finally, the records contain the views and opinions of other individuals about the appellant [paragraph (g)].

[34] I also find that the pages 7, 8, 9 and 10 contain the name of another individual, who is a private citizen, along with other personal information relating to this individual [paragraph (h)]. However, I have decided to remove this individual's information from the scope of appeal as the appellant did not request this information and the information does not contain the personal information of the appellant. The remaining individuals referred to in the records are an unidentified woman, the mayor, named city staff members and a member of the Woodstock Police Services. Except for the employee who submitted the Workplace Violence and Harassment Reporting Form, the city does not claim that the records contain the personal information of any other identifiable individual.

[35] With respect to the employee who submitted a formal complaint, the city submits that the information this individual provided constitutes his personal information as defined in paragraph (e) (personal opinions or views of the individual) of section 2(1). The portions of the records which contain information identifying this individual are found on pages 1, 2, 3 and 22. These records consist of the Workplace Violence and Harassment Reporting Form (pages 1 and 2), email (page 3) and one of the pages of the report to council (page 22).

[36] In my view, the remaining portions of the records which refer to this individual by name or generally discuss employee concerns about the appellant does not constitute the personal information of this individual or other employee, who also complained about the appellant, but did not file a formal complaint. I also find that the

portions of the records which refer to other city staff members, city councilors and the mayor do not constitute these individual's personal information. 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].

[37] However, there are instances where information which relates to an individual in a professional, official or business capacity, 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]. I will now determine whether the portions of the record which contain information identifying the employee who filed a formal complaint along with the content of the formal complaint constitute this individual's personal information. For this information to qualify as personal information, it must be about the individual in a personal capacity. Following the analysis set forth in Order PO-2225, the first question I must ask is: "*In what context do the names of the individuals appear*?" The second question I must ask is: "*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual* ?"

[38] With respect to the first question, I am satisfied that the information contained in pages 1, 2, 3 and 22 of the records appears in a professional or business context. The information at issue was compiled in the course of the individual's professional duties with the city.

[39] As a result of this finding, the next question I must ask is whether there is anything about the information at issue which, if disclosed, would reveal something of a personal nature about the employee.

[40] I have carefully reviewed pages 1, 2, 3 and 22 and find that the majority of the information provided by the employee who filed a formal complaint, comprises of his narrative of the incident along with his recommendation about the suggested course of action. In my view, this information was provided and generated in the normal course of this individual's job duties. Accordingly, I find that if this information was disclosed, it would not reveal something of a personal nature of this employee.

[41] However, I find that there are two instances contained on pages 1 and 22 which describe how the incident personally impacted the employee. This information comprises of the employee's opinions and views and thus constitutes his personal information as defined in paragraphs (e) and (g) as defined in section 2(1). I also find that this information also constitutes the personal information of the appellant.

[42] As I have found that the records contain the personal information of the appellant, and in two instances, the personal information of an employee as well. I will

go on to determine whether the records qualify for exemption under sections 38(a) and (b) of the *Act*.

C. Does the discretionary exemption at section 38(a) in conjunction with section 6(1)(b) apply to pages 22 and 23?

[43] Pages 22 and 23 is a report prepared by the city's Acting Chief Administrative Officer (CAO) addressed to the mayor and members of city council. Though the report refers to attachments, the attachments are not at issue.

[44] The city claims that the report is exempt under section 38(a) in conjunction with 6(1)(b). Section 6(1)(b) states:

> A head may refuse to disclose a record,
>
> > that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[45] For this exemption to apply, the institution must establish that:

> 1. a council, board, commission or other body, or a committee of one of them, held a meeting
>
> 2. a statute authorizes the holding of the meeting in the absence of the public, and
>
> 3. disclosure of the record would reveal the actual substance of the deliberations of the meeting
>
> [Orders M-64, M-102, MO-1248]

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

Parts 1 and 2 – council held a meeting authorized by statute to be held in the absence of the public

[47] The city submits that municipal council met on January 13, 2011 and that the meeting was held in camera in accordance with section 239(2)(b) of the *Municipal Act* which states:

> A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
>
> > (b) personal matters about an identifiable individual, including municipal or local board employees

[48] In support of its position, the city provided a copy of a closed meeting investigation report prepared by a consultant who reviewed whether the January 13, 2011 was properly held in camera. The consultant found that the in camera meeting addressed "personal matters about identifiable individuals".

[49] Having regard to the record itself and the representations of the parties, I find that the city council held a meeting on January 13, 2011 and was authorized by section 239(2)(b) of the *Municipal Act* to hold the meeting in the absence of the public to discuss the issues relating to the incident involving the appellant. Accordingly, I find that parts one and two of the three part test have been met.

Part 3 - disclosure of the record would reveal the actual substance of the deliberations of the meeting

[50] The city's representations state:

> The meeting was held with a view towards making a decision. [The report reveals] not only the subject matter of the meeting, but also the factual background for the issue to be discussed, steps that had been taken to date to address the issue, advice that had been received in this regard and a recommendation for how to deal with the issue. Council considered the recommendation set out in this record in the context of the other information provided in the record. The records therefore reveal the "substance" of deliberations and ought to be exempt from disclosure. Furthermore, the subject matter of the deliberations has not been considered in a meeting open to the public and the exception in section 6(2)(b) therefore does not apply.

[51] Previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision [Order M-184]; and
- "substance" generally means more than just the subject of the meeting [Orders M-703, MO-1344].

[52] With respect to the third requirement set out above, the wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption

under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution's *in camera* meeting, not merely the subject of the deliberations (Orders MO-1344, MO-2389 and MO-2499-I).

[53] Having regard to the records itself and the representations of the city, I am not satisfied that disclosure of the report would reveal the substance of council's deliberations. The majority of the report contains factual and background information including staff's observations and concerns about the incident. The report also set out the "steps that had been taken to date to address the issue", along with legal advice and staff recommendations. Though I am satisfied that the city's evidence establishes that the incident involving the appellant was discussed in an in camera meeting, I am not satisfied that disclosure of the report would reveal the actual substance of the deliberations. In my view, the city has not adduced sufficient evidence to demonstrate that disclosure of the report would reveal the actual substance of the deliberations that took place at the meeting. In fact, there is no evidence in the record itself as to what actual discussions took place or whether any discussions took place. Accordingly, I find that that third part of the three-part test has not been met and dismiss the city's claim that section 6(1)(b) applies to the report. I will go on to determine whether this report qualifies for exemption under any of the other exemptions claimed by the city.

D. Does the discretionary exemption at section 38(a) in conjunction with section 7(1) apply to pages 1, 2, 3, 22 and 23?

[54] The city claims that pages 1, 2, 3, 22 and 23 are exempt under section 38(b) in conjunction with section 7(1). Section 7(1) states:

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

[55] The city submits that portions of the Workplace Violence and Harassment Reporting Form and email sent by the employee who filed a formal complaint (pages 1, 2 and 3) along with the report submitted to council (pages 22 and 23) contain advice and recommendations of staff. In particular, the city claims that the reporting form and email contains advice and recommendations from an employee to management; and the report to council contains advice and recommendations from staff to the mayor and council. The city's representations state:

> Although the advice or recommendations in these records are located at specific parts of the records, the City submits that the exemption should apply to the entirety of the records and that revealing other portions of the records would have the effect of allowing one to accurately infer the

> advice or recommendations given, contrary to the purpose of section 7, particularly as the advice/recommendations are inextricably intertwined with any factual material in these records. The City has considered whether the records could reasonably be severed and has concluded that they cannot on the grounds outlined above.
>
> …
>
> [Pages] 1, 2, 3, 22, and 23 meet the test that records must contain advice from an officer or employee of an institution in order to be considered as recommendations under Section 7 of the *Act*. The statement contained in records [pages] 1, 2, 3, can be considered advice because the employee suggests a particular course of action to management. The recommendation in record [pages] 22-23 is confidential advice because management provides a formal recommendation to Council in a closed setting, as part of the deliberative process. The advice provided suggests a course of action that will ultimately be accepted or rejected by the person being advised.
>
> Releasing any of these records could constrain the flow of advice or recommendations in future situations of a similar nature, thus affecting the ability of staff to make uninhibited recommendations or of employees to raise troubling issues to their superiors. The City of Woodstock has developed a Zero Tolerance to Violence and Vandalism policy in order to protect its employees. If employees feel that reporting an incident involving a member of the public could be released, they may curtail [the] reporting of such incidents to their employers in the basis of avoiding public reprisal. The City strives to make the workplace as safe as possible and this goal cannot be fulfilled if employees of the City believe that advice or recommendations they provide will be made public.

[56] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised.[2] Advice or recommendations may be revealed in two ways:[3]

- the information itself consists of advice or recommendations

[2] See Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

[3] See Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above).

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

[57] Examples of the types of information that have been found *not* to qualify as advice or recommendations include:[4]

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

[58] I have carefully reviewed the records along with the city's representations and find that only a small portion of the information at issue qualifies for exemption under section 7(1). In addition, I find that this information can be severed from the remaining information I find comprises of factual or background information.

[59] As stated previously, the majority of the information contained on the Workplace Violence and Harassment Reporting Form (pages 1 and 2) and report to council (pages 22 and 23) contain a narrative of the incident involving the appellant. In my view, the only portion of this form which contains information which could be described as advice and recommendations is the employee's suggested course of action found under the heading "Complainant's corrective action suggestion(s)". This information also appears verbatim on the first page of the report to council (page 22). The employee's suggestions are also the subject matter of the email he sent to his supervisor (page 3).

[60] The only other portion of the records which I find can be described as containing advice and recommendations is the city's recommendation to council found on the second page of the report to council (page 23). This information is found under the heading "Recommendation".

[61] I have carefully reviewed the records and am satisfied that portions of pages 2, 22, 23 and page 3 contain information that suggest a course of action that will ultimately be accepted or rejected by the person being advised. However, I do not share the city's view that this information is inextricably intertwined with factual and

[4] See Orders P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above); Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above).

background information contained in the records. Accordingly, I find that only the portions of pages 2, 22, 23 and page 3 containing advice and recommendations qualify for exemption under section 7(1). For the sake of clarity, a highlighted copy of the portions of pages 2, 22 and 23 which qualify for exemption under section 7(1) will be provided to the city with its copy of this order.

[62] I will now go on to determine whether remaining information contained on pages 2, 22 and 23 qualify for exemption under the other exemptions claimed by the city.

E. Does the discretionary exemption at section 38(a) in conjunction with section 8(1)(a) apply to pages 1, 2, 6, 7, 8, 9 and 10?

[63] The city takes the position that pages 1, 2, 6, 7, 8, 9 and 10 are exempt under section 38(a) in conjunction with section 8(1)(a). Section 8(1)(a) states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to interfere with a law enforcement matter.

[64] In support of its position that disclosure of the information at issue could reasonably be expected to interfere with a law enforcement matter, the city submits that there is a possibility for future law enforcement involvement and "further investigation into this matter by the Ministry of Labour and potential for Tribunal proceedings". However, this office has determined that the exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters [Orders PO-2085, MO-1578]. In addition, the matter in question must be ongoing or in existence [Order PO-2657].

[65] Even if the city established that an ongoing or in existence law enforcement matter existed in connection with the incident in question, I find that the city's evidence lacks the specificity required to establish a "reasonable expectation of harm" should the information at issue be disclosed. Evidence amounting to speculation of possible harm is not sufficient.[5]

[66] Accordingly, I find that this exemption has no application to the circumstances of this appeal. As the city has not claimed that any other exemption applies to page 6, I will order the city to disclose this record to the appellant.

[67] I will go on to determine whether pages 1, 2, 7, 8, 9 and 10 qualify for exemption under the remaining two exemptions claimed by the city.

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[5] Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

F. Does the discretionary exemption at section 38(a) in conjunction with section 12 apply to paragraph 3 on page 23?

[68] 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.

[69] Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[70] The city claims that both branches of 1 and 2 of the communication privilege apply. In support of its position, the city submits that the legal advice its City Solicitor provided staff is contained in the third paragraph found on the last page of the report to council (page 23).

Solicitor-client communication privilege under Branch 1

[71] 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 [Orders PO-2441, MO-2166 and MO-1925]. 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.)].

[72] Having regard to the representations of the city and the record itself, I find that the last two sentences contained in the third paragraph found on page 23 contain solicitor-client communication privileged information.

[73] Though the report was prepared by the city's Acting Chief Administrative Officer for council, I am satisfied that the information at issue refers to the legal advice the City Solicitor provided the city. Previous decisions from this office have found that communications between non-legal staff that refer directly to legal advice originally provided by legal counsel to other staff would reveal solicitor-client privileged communications.[6] In making my decision, I note that the information at issue refers to a document which was prepared by the City Solicitor. The context in which the

[6] Orders PO-2087-I, PO-2223, PO-2370 and PO-2624.

document is referred to leaves no doubt that the City Solicitor's advice and preparation of the document was in response to the city's request for legal advice. Accordingly, I am satisfied that the reference in the report to the City's Solicitor's advice forms part of the "continuum of communications" recognized in *Balabel* as falling within the solicitor-client communication privilege in branch 1. As, there is no evidence before me suggesting that the city has waived its privilege, I accept the city's evidence that the information at issue was intended and expected to be treated confidentially. Accordingly, I find that the information at issue qualifies for exemption under branch 1.

[74] Under the circumstances, it is not necessary for me to consider whether branch 2 also applies.

G. Does the discretionary exemption at section 38(b) in conjunction with section 14(1) apply to pages 1, 2, 7, 8, 9, 10, 22 and 23?

[75] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right. Section 38(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and another individual. Earlier in this order, I found that the remaining information at issue contains the personal information of the appellant. In addition, I found that portions of pages 1 and 22 contain the personal information of the employee who filed a formal complaint against the appellant. In this case, the city must look at the information and weigh the appellant's right of access to his own personal information against the employee's right to the protection of their privacy. If the city determines that release of the information would constitute an unjustified invasion of an identifiable individual's personal privacy, then section 38(b) gives the city the discretion to deny access to the appellant's personal information.

[76] In determining whether the exemption in section 38(b) applies, sections 14(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the affected person's personal privacy. Section 14(2) provides some criteria for the city to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. The parties have not claimed that any of the exclusions in section 14(4) apply and I am satisfied that none apply.

[77] Section 38(b) states:

> A head may refuse to disclose to the individual to whom the information relates personal information where the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[78] The city claims that disclosure of the remaining information at issue would constitute an unjustified invasion of personal privacy under section 38(b) taking into account the factors at sections 14(2) (e), (f) and (h). The appellant did not make specific reference to the factors favouring disclosure in section 14(2). However, the appellant takes the position that the city should be held accountable for its decision to ban him from one of its facilities. The appellant also claims that he requires the information at issue to "defend" himself. In my view, the appellant's submissions raise the possible application of the factors at sections 14(a) and (d). Sections 14(2)(a), (d), (e), (f) and (h) state:

> 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;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive; and
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence.

14(2)(a): public scrutiny

[79] This section contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny [Order P-1134]. The appellant's representations state:

> Our justice system in Canada is based on the principle of "innocent until proven guilty". In order to prove guilt and take punitive action against a person that person must be given full disclosure of the allegation and be given an opportunity to present a defense to it. If organizations like the City of Woodstock are allowed to hide behind their interpretations of the exemptions to the FOIA, what is to prevent this from happening to me or someone else again? Any employee could then lodge a false allegation against anyone with no accountability for the truthfulness of their allegation. I believe that everyone knows that if they make a serious allegation against someone, as in this case, that as part of the

> investigative process, disclosure of the allegation will be made to the defendant.

[80] The personal information at issue comprises of a narrative of the incident, correspondence the appellant sent to the city and a city employee's description of how the incident impacted him. In my view, disclosure of these portions of the records would not subject the city's activities to public scrutiny. Accordingly, I find that the factor at section 14(2)(a) has no application to this appeal.

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

[81] Throughout his representations, the appellant submits that he requires access to the information at issue to "defend himself". The appellant also indicates that disclosure of the withheld information would reveal the truth of what had occurred on the day of the incident. 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.)].

[82] In my view, the appellant failed to adduce sufficient evidence to establish that the personal information at issue is required to prepare for a specific proceeding or to ensure an impartial hearing. Accordingly, I find that the factor at section 14(2)(d) has no application to the circumstances to this appeal.

14(2)(e): pecuniary or other harm

[83] In support of its position that disclosure of the employee's personal information would expose him to unfair harm, the city refers to Order M-1147 which found that the factor at section 14(2)(e) applied. The city's representations state:

> Should this information be released, the individuals' whose personal information is included in the records (consisting of their personal views, opinions and experiences) would be exposed unfairly to emotional and physical harm and harassment, potentially by the appellant who has a history of such conduct.

[84] In order for this section to apply, the evidence must demonstrate that the damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved.

[85] I have carefully considered the city's representations, along with the records and am not satisfied that the city has adduced sufficient evidence to demonstrate that the factor at section 14(2)(e) applies in the circumstances of this appeal. In making my decision, I considered the type of evidence that was presented in Order M-1147. In that order, the institution adduced evidence establishing that the individual seeking access to information about a teacher had been involved in eleven trespass incidents and was convicted of one. In addition, the institution adduced evidence demonstrating that the individual seeking access to the teacher's information was being sued by the teacher in civil court.

[86] In my view, Adjudicator Laurel Cropley's findings in Order M-1147 are not applicable to the circumstances in this appeal. In Order M-1147 the institution established a direct connection between the information at issue and the individual the institution claimed would be subject to unfair harm. In support of its position, the institution provided evidence demonstrating that there was a current dispute between the individual seeking access to the information and the individual whose personal information was contained in the record. Having regard to the evidence before her, Adjudicator Cropley concluded that the requester had a personal agenda and concluded that it was reasonable to expect that disclosure would lead to unwanted contact.

[87] This is not the situation in this appeal. In my view, the city has not provided sufficient evidence to establish that the appellant has a personal agenda against the employee who filed a complaint against him. In addition, the city failed to adduce evidence to establish that there exists a history of animosity or current dispute between the appellant and the employee. Finally, I have carefully reviewed the records and am not satisfied that there is sufficient evidence to conclude that the appellant has a history of "emotional and physical harm and harassment" and that disclosure of the records would result in the employee being subjected to the alleged harm.

[88] Having regard to the above, I find that the factor at section 14(2)(e) does not apply in the circumstances of this appeal.

14(2)(f): highly sensitive

[89] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed [Orders PO-2518, PO-2617, MO-2262 and MO-2344]. Having regard to the confidential representations of the city and the portions of the records I found contains the employee's personal information, I am satisfied that the factor at section 14(2)(f) applies in the circumstances of this appeal. In making my decision, I carefully reviewed the personal information at issue and am satisfied that it is reasonable to expect that disclosure of information about how the incident personally impacted the employee to the appellant would result in significant personal distress to the employee.

14(2)(h): supplied in confidence

[90] The city's representations state:

> When a Violence and Harassment Reporting Form is filed by an employee of the City concerning a member of the public, it is assumed by the employee that the form will not be shared or released to the respondent. Although the rules differ for filing a violence and harassment form against another employee, there is an expectation of confidentiality when filing against a member of the public because the City possesses no substantial recourse in this instance. The City possesses no disciplinary means of ensuring that a member of the public will behave appropriately after a report form is disclosed. An employee who feels threatened or abused by a member of the public should have the assurance of knowing that their concerns will be kept private by the employer. Without this expectation, employees may hesitate when sharing their thoughts or personal fears with their employers, thus jeopardizing safety in the workplace.

[91] This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation [Order PO-1670].

[92] The assurances of confidence the city claim exist between itself and the employee are implicit, the Workplace Violence and Harassment Reporting Form does not contain an explicit confidentiality clause. The appellant takes the position that a diminished expectation of privacy exist when an individual makes a serious allegation against a member of the public. The city submits that given its ability to discipline its

employees, a different expectation of privacy exists when employees complain about one another.

[93] Though I am not satisfied that the city has adduced sufficient evidence to demonstrate that any information an employee provides in the course of completing its Workplace Violence and Harassment Reporting Form is supplied in confidence, I am satisfied that the portions of the form in which the employee describes how the incident personally impacted him were supplied in confidence. In my view, the employee had a reasonable expectation that this information would be treated confidentially as the nature of this information is quite different from the remaining information I found mostly comprises the employee's narrative of the incident. Accordingly, I find that the factor at section 14(2)(h) applies to this information.

[94] In summary, I find that the factors favouring disclosure at sections 14(2)(a) and (d) raised by the appellant do not apply to this appeal. As I have found that only the factors favouring non-disclosure are relevant, I will go on to determine whether disclosure of the personal information at issue would constitute an unjustified invasion of personal privacy under section 38(b), if disclosed to the appellant.

Decision and Analysis

[95] With respect to information contained on pages 1 and 2 which describes how the incident impacted the employee's feelings about the incident on pages 1 and 22, I find that disclosure of this information to the appellant would constitute an unjustified invasion of personal privacy under section 38(b), taking into consideration the factors at section 14(2)(e) and (h). For the sake of clarity, highlighted copies of pages 1 and 22 will be provided to the city with its copy of this order. I will also provide the city with highlighted copies of pages 7, 8, 9 and 10 which contain the name of private citizen whose information I found constitutes "personal information" but was removed from the scope of this appeal.

[96] The remaining personal information contained in the record relates to the appellant and his child. In my view, disclosure of this information to the appellant would not constitute an unjustified invasion of personal privacy under section 38(b). As the city does not claim that any further exemptions apply to the remaining information, I will order the city to disclose it to the appellant.

J. Did the city properly exercise its discretion?

[97] In this order I find that portions of pages 2, 3, 22 and 23 contain advice and recommendations and thus are exempt under section 38(a) in conjunction with section 7(1). In addition, I find that a portion of page 23 contains solicitor-client privileged information and is exempt under section 38(a) in conjunction with section 12. Finally, I find that disclosure of the employee's personal information contained on pages 1 and

22 would constitute an unjustified invasion of personal privacy and thus qualifies for exemption under section 38(b) in conjunction with section 14(1).

[98] The section 38(a) and 38(b) exemptions are 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.

[99] 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.

[100] 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)].

[101] The appellant did not make representations specifically addressing this issue. The city submits that it exercised its discretion properly by taking into consideration the nature of the information and the extent to which it is significant and/or sensitive to the city, the appellant and the employee who filed a complaint. The city also submits that it considered the purposes of the *Act*, including the principles that individuals should have a right of access to their own personal information and that exemptions from the right of access should be limited and specific. The city advises in seeking to address the latter principle, it disclosed most of the records to the appellant.

[102] In my view, the city's evidence demonstrates that it properly exercised its discretion and in doing so took into account relevant considerations such as the sensitive nature of the withheld information and the significance and sensitivity attached to it. I am satisfied that the city did not exercise its discretion in bad faith or for an improper purpose, nor is there any evidence that it took into account irrelevant considerations.

[103] In making my decision, I note that the legal advice contained in one of the records is a privileged communication, and the purpose of the solicitor-client communication privilege is to protect such communication. Similarly, the purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.

[104] I am also satisfied that the city considered that one of the purposes of the *Act* includes the principle that requesters should have a right to access their own information. However, in my view, the nature of the personal information at issue that relates to the employee and the sensitivity of it outweigh this principle, taking into consideration that additional information informing the appellant about the incident has been ordered disclosed.

[105] Accordingly, I conclude that the city properly exercised its discretion to withhold the records I found exempt under section 38(a) and (b).

K. Did the city conduct a reasonable search for responsive records?

[106] 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 and 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.

[107] 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 [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

[108] During mediation, the city conducted a further search and provided additional explanations to address the appellant's belief that additional records exist. At the end of mediation, the appellant indicated that he still believed that additional records such as witness statements, investigative notes, emails between councilors and a video recording existed. However, during the inquiry process the appellant only questioned the reasonableness of the city's search for the video recording of the incident.

[109] 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 [Order MO-2246]. Given that the appellant did not provide evidence in support of his position that witness statements, investigative notes and emails between councilors should exist, I find that the appellant has failed to provide a reasonable basis for concluding that these records exist. In any event, I accept the city's evidence that though additional meetings or discussions may have taken place, these discussions were verbal and did not result in the creation of witness statements, investigative notes or additional emails between councilors.

[110] With respect to the video recording, I am satisfied that the appellant has established a reasonable basis to conclude that this record existed. The appellant

advises that shortly after the incident occurred he requested a meeting with management so that they could view the video surveillance recordings together. The appellant advises that his request was denied and as a result he filed an access request for the recording. In his representations, the appellant states:

> The City of Woodstock stated there was a video recording of the incident from the beginning, but refused to let me see it. Then they claim the video recording did not exist once they received [my appeal]. It is my position that either they were not honest in the claim of existence of the video from the start or they are intentionally trying to withhold the video because it supports my position on the matter. Their claim is that it was accidently erased does not have merit. Their recording equipment is digital video and as such, even if recorded over, the digital images remain on the hard drive of the system, unless they were intentionally erased by a computer technician complete with a forensic type of audit of their computer hard drive.

[111] The city addressed the issue of the missing video recording shortly after it was notified by this office that the appellant had filed an appeal. When the city replied to this office's Request for Documentation it provided this office with an affidavit prepared by its Information Technology (IT) Manager. The IT Manager advises that he was asked by the Acting CAO to copy the video footage of the incident involving the appellant. He also advises that within a couple of weeks of the incident, he attended the city facility where the incident occurred with another IT Manager and a Human Resources Manager and viewed the video footage with the facilities Secretary and the Director of Community Services. At that time, the video footage was copied onto a DVD. He goes on to state:

> We recorded what we thought were the correct files on to DVD disk and left the DVR recording device as is. The DVR device has retention (space) for about a month of Data, at which point hard drives get overwritten automatically.
>
> When [the Acting CAO] asked to confirm the existence of the copied DVD recordings [approximately 3 months later], both [the Acting CAO] and I checked the DVD disk to realize that the files that had been copied did not show the captured footage files required. At which point, I returned to the Community Complex to capture [the] footage again, however I found that the original video footage for the month [when the incident occurred had] been overwritten.

[112] Having carefully reviewed the representations of the parties, I find that the city conducted a reasonable search for the video recording. I am satisfied that the search was conducted by experienced employees knowledgeable in the subject matter of the

request. I am also satisfied that the IT Manager's return to the facility to attempt to re-record the incident demonstrates that the city has made a reasonable effort to locate the recording. I accept the city's advice that the recording no longer exists and can not be copied from the equipment which recorded the incident.

[113] Though I appreciate the appellant's disappointment that a DVD of the video footage no longer exists as a result of human error, I am satisfied that this record no longer exists in the form it was requested. Accordingly, I uphold the city's search as reasonable.

ORDER:

1. I order the city to disclose pages 1, 2, 5, 7, 8, 9, 10, 22 and 23 to the appellant by **March 30, 2012** but not before **March 23, 2012**. For the sake of clarity, in the copy of records enclosed with the city's order, I have highlighted the portions of pages 1, 7, 8, 9, 10, 22 and 23 which **should not** be disclosed to the appellant.

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

Orginial signed by: February 24, 2012
Jennifer James
Adjudicator