

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER MO-2727

Appeal MA10-386

Town of East Gwillimbury

April 30, 2012

**Summary:** The appellant seeks access to records relating to a tree-cutting incident involving two members of council. The town submits that the records are exempt under sections 6(1)(b) (closed meeting), 7(1) (advice and recommendations), 12 (solicitor-client privilege) and 14(1) (personal privacy). The appellant appealed the town's decision and the reasonableness of its fee to this office. Most of the records are found not exempt under the *Act* and the majority of the town's fee is disallowed. The town's decision to withhold four records under sections 7(1) and 12 are upheld. The remaining records are ordered to be disclosed to the appellant. Appeal upheld in part.

**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) and 45.

**Cases Considered:** *Ontario (Liquor Control Board) v. Magnotta Winery Corporation*, 2010 ONCA 681, 102 O.R. (3d) 545 (C.A.), affirming (2009) 97 O.R. (3d) 665 (Div. Ct.).

**Orders and Investigation Reports Considered:** MO-2609-I, MO-2624 and PO-3059-R

### OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Town of East Gwillimbury (the town) for records relating to the cutting down of trees on lands adjacent to the town's civic

centre. The incident was reported in newspapers in the GTA region. In this order, the owner of the adjacent lands will be referred to as the "opposing party".

[2] The town identified 24 responsive records, 9 of which the town agreed to release to the appellant in full upon payment of its fee. The town denied the appellant access to the remaining 15 records citing various mandatory and discretionary exemptions under the *Act*.

[3] The appellant appealed the town's decision to this office. During mediation, the town issued a supplemental decision letter to the appellant and provided some additional information regarding its search and fee. The town also raised additional discretionary exemptions to those set out in its initial decision letter. The additional discretionary exemptions were raised within the timeline set out in this office's Notice of Mediation.

[4] The town's revised position is that the withheld records qualify for exemption under section 6(1)(b) (closed meeting), section 7(1) (advice and recommendations), section 12 (solicitor-client privilege), and section 14(1) (personal privacy).

[5] At the end of the mediation process, the appellant confirmed that she believed that the public interest override at section 16 of the *Act* applied to the withheld records. She also indicated that she believes that the town's search and fee were unreasonable.

[6] 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*. The parties' representations were shared in accordance with the *IPC's Code of Procedure and Practice Direction 7*.

[7] In this order, I make the following findings:

- The town's fee is unreasonable;
- The discretionary exemption at section 7(1) applies to record 14 and the public interest override is found not to apply to this record;
- The discretionary exemption at section 12 applies to records 8, 11 and 13;
- Disclosure of the information I found constitutes the personal information of two individuals would not constitute an unjustified invasion of personal privacy under section 14(1);
- The town is ordered to disclose the information at issue in records 1 and 2 along with records 3, 4, 5, 6, 7, 9, 10 and 12 in their entirety.

## RECORDS:

[8] The following chart describes the 15 records at issue:

Records No.	Description of Record	Exemption Claimed
1	Invoice from external law firm	6(1)(b)
2	Invoice from external law firm	6(1)(b)
3	Correspondence from external law firm	6(1)(b)
4	Invoice from consultant	6(1)(b)
5	Invoice from consultant	6(1)(b)
6	Invoice from consultant	6(1)(b)
7	Invoice from consultant	6(1)(b)
8	Email and attachment exchanged between town's solicitor and staff	6(1)(b), 12 and 14(1)
9	Spreadsheet	6(1)(b), 12 and 14(1)
10	Agreement between members of council	6(1)(b)
11	Letter and full/final release from the opposing party's lawyer	12
12	Agreement between the town and the opposing party	12
13	Cheque Image	12
14	Consultant report	7(1)

## PRELIMINARY ISSUES:

### Is the town's search at issue in this appeal?

[9] In her representations, the appellant indicates that she does not question that the town conducted a thorough search. Instead, she questions the town's search methodology which she believes resulted in an unreasonable fee. Accordingly, I have removed reasonable search as an issue in this appeal. The appellant's concerns about the town's search methodology will be addressed in my discussion of whether the town's fee is reasonable.

### Is the billing information contained in the legal invoices at issue in this appeal?

[10] The appellant also advises that she is not seeking "every minutiae" of billing information contained in the legal invoices (records 1 and 2) issued by the city's lawyer. Accordingly, I have removed the dates and descriptions of services contained in records 1 and 2 from the scope of this appeal. The town has claimed that records 1 and 2 qualify for exemption under section 6(1)(b) of the *Act*. I will determine whether the remaining information, which describes the amount of fees charged to the town for legal services, GST and disbursements, qualifies for exemption under section 6(1)(b). I

will also determine whether the summary of hours and rates contained on the back of the invoices are also exempt under section 6(1)(b).

### **Should the town waive its fee?**

[11] The appellant's representations also raise questions as to whether the town should waive its fee on the basis that it is fair and equitable to do so taking into account the difficulty she had locating documents on the town's website. Given that the appellant did not request a fee waiver or raise this issue at mediation, I have determined that the issue is outside the scope of this appeal. In any event, the issue of a fee waiver is moot as I disallow most of the town's fee.

### **ISSUES:**

- A. Is the town's fee reasonable?
- B. Does the discretionary exemption at section 6(1)(b) apply to records 3, 4, 5, 6, 7, 8, 9, 10 and the information at issue in records 1 and 2?
- C. Does the discretionary exemption at section 7(1) apply to record 14?
- D. Does the discretionary exemption at section 12 apply to records 8, 9, 11, 12 and 13?
- E. Does the remaining information contain "personal information" as defined in section 2(1)?
- F. Would disclosure of personal information constitute an unjustified invasion of personal privacy under the mandatory exemption under section 14(1)?
- G. Did the town properly exercise its discretion in applying the discretionary exemption at section 7(1) and 12?
- H. Does the public interest override at section 16 apply to the record withheld under section 7(1)?

### **DISCUSSION:**

#### **A. Is the town's fee reasonable?**

[12] Where the fee is \$100 or more, the fee estimate may be based on either

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records [Order MO-1699].

[13] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access [Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699]. The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees [Order MO-1520-I]. In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Orders P-81 and MO-1614]. This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823, as set out below.

[14] In this case, the town did not provide the appellant a fee estimate. In its representations, the town states:

It did not seem reasonable to provide a fee until it was known what could be released, and this meant locating all records and determining what could be released.

[15] The town's decision letter requested payment of \$637.60 to obtain photocopies of the responsive records. The town advised the appellant that in the alternative, upon payment of \$615.00, she could examine the responsive records. The town calculated its fee, as follows:

Search	20.5 hours of search time at \$7.50 per 15 minutes	\$615.00
Photocopying	113 pages @ \$.20 per page	<u>22.60</u>
		637.60

[16] The town issued a subsequent decision letter during mediation. In that decision, the town states:

In terms of the fee imposed on your request, the staff time needed to determine if the [records] were subject to disclosure or subject to denial under confidential, in-camera discussions and solicitor-client privilege was 33.5 hours which exceeded the 20.5 hours [indicated on the first decision letter] and as such, any reduction in the fee had already been taken into account.

[17] Though the *Act* requires institutions to charge a fee for requests, it does not allow institutions to charge a fee for time spent deciding whether or not to claim an exemption [See orders P-4, M-376, P-1536].

[18] The town provided further explanations about how it calculated its fee in its representations. In its representations, the town advises that the 20.5 hours of search time charged to the appellant does not include the time it spent to review the records to determine whether any exemptions applied to the records. The town submits that it spent 13 hours to review the records, 2 hours to prepare the decision letter and .5 hour

to photocopy the paper records, which totals 15.5 hours which the appellant was not billed. With respect to the 20.5 hours billed to the appellant, the town states:

The first step in the search was to locate the banker boxes containing the records relating to the tree incident within the basement area. The actual amount of time spent to locate the relevant banker boxes within the basement area was 20 minutes.

Once the relevant banker boxes had been located and retrieved from the basement, the next step was to retrieve each paper record from the relevant box. Every paper record within those boxes was examined to determine if it was one of the items requested... When it was determined that the record was not contained as a paper record within the boxes, staff were required to conduct a search of the Town's electronic records and some of the records required the assistance of the Manager of Information Technology. The actual amount of time spent on this action was 20.5 hours.

[19] However, in another portion of the town's representations, the town suggests that, but for the 20 minutes to locate the banker boxes that contained the records, the remaining 20.5 hours was spent locating "records within those boxes that were relevant to the ... information request".

[20] The town also provided two affidavits in support of its position that the \$615.00 fee representing its search time was reasonable.

[21] The appellant takes the position that the town's manual search for paper records was "archaic" and resulted in "excessive and inappropriate" fees. The appellant's representations state:

The majority of documents and attachments requested were prepared using word processing software and modern computer equipment. Some were eventually uploaded from the [town's] database.

I contend that, in this age of technology, when the majority of materials used in decision-making are prepared/transmitted electronically, searching through banker's boxes in an archive is not a reasonable approach to a request for disclosure of information. The first search should have been through the electronic records, which would have had an immediate likelihood of success and reduced the total amount of time charged for.

I find it unreasonable that so much time was spent searching for records relating to one specific incident that, as the [town] acknowledges, was

high profile and discussed at numerous Council meetings over a specific period of time.

### ***Decision and Analysis***

[22] I have carefully reviewed the representations of the parties and I find that the only portion of the town's fee which is in accordance with the *Act* is its \$10.00 charge to locate banker boxes and \$22.60 charge for photocopies. Though I do not dispute that the town spent considerable time responding to the 7-page request, I am not satisfied that the town has provided sufficient evidence to support its position that the search fee is reasonable.

[23] The town submits that it charged the appellant \$615.00 at a rate of \$7.50 per 15 minutes as prescribed by Regulation 823, section 6.3 to manually search its hardcopy and electronic files to locate responsive records (section 45(1)(a)). However, other than its evidence that it took 20 minutes to retrieve the banker boxes containing responsive records stored in its basement, the town's evidence regarding how long it took to locate responsive records is too general. The town submits that its staff consulted one another but it is not clear whether some of these consultations included discussions about whether any exemptions apply to the records. Though the town's revised position is that its search fee does not include its time reviewing the records, I note that both of the affidavits submitted by the town indicate that the town's solicitor, law clerk, municipal clerk and freedom of information coordinator "met on several occasions ... to review the FOI letter and records in detail to determine which records could be granted". I also note that the affidavit evidence does not detail the time it took for staff to locate records other than those located in the banker box. For example, the individual who conducted the physical search for responsive records provided an affidavit indicating that she reviewed file boxes, council materials and insurance records on September 16, 17, 20, 22 and 23 without specifying how much time was spent locating records on these days. In my view, the town's representations and evidence do not contain sufficient detail to establish the reasonableness of its fee.

[24] Having regard to the above, I find that the town's search fee of \$615.00, representing 20.5 hours of search time, is not in accordance with the *Act*.

[25] However, I find that the portion of the town's fee to retrieve the banker boxes stored in its basement, which amounts to \$10.00 representing 20 minutes at a rate of \$7.50 per 15 minutes is in accordance with the *Act*. I also find that the town's \$22.60 photocopying charge calculated at a rate of \$.20 per page for 113 pages as prescribed by Regulation 823, section 6.1 is in accordance with the *Act*. As a result, the total amount of allowable fee is \$32.60.

**B. Does the discretionary exemption at section 6(1)(b) apply to records 3, 4, 5, 6, 7, 8, 9, 10 and the information at issue in records 1 and 2?**

[26] The town claims that records 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 are exempt under section 6(1)(b), which 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.

[27] The appellant did not provide evidence on this issue.

[28] For this exemption to apply, the town 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]

[29] 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***

[30] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera* (Order M-102). The town submits that it held 18 closed meetings during the period November 5, 2007 to September 17, 2009 in accordance with section 239(2)(e) and (f) 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,



- (e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board; and
- (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

[31] Having regard to the representations of the town, I am satisfied that the 18 closed meetings identified by the town, discussed aspects of the tree cutting incident. I am also satisfied that the meetings were authorized by sections 239(2)(e) and (f) of the *Municipal Act* to be held in the absence of the public. Accordingly, I find that parts 1 and 2 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***

[32] 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).

[33] 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].

[34] The town's representations state that disclosure of the information at issue:

... would reveal the actual substance of the deliberations of the meeting[s] as the purpose of the deliberations was for Council to make a decision on how to respond to the “litigation or potential litigation” in order to avoid a financial loss for the Town.

[35] The town also submits that disclosure of the records which describe the costs of legal and professional services incurred to respond to the incident would reveal the actual substance of the deliberations of the closed meetings. These records comprise

of legal accounts, invoices and an accounting ledger found at records 3, 4, 5, 6, 7, 8, 9 and the information at issue in records 1 and 2.

[36] However, it appears that the legal and professional services referred to in these records are the same services council identified during a public meeting held on November 12, 2007. The minutes of the November 12, 2007 public meeting reflect that a motion was passed to retain the following legal and professional services to assist with the tree cutting incident:

- legal services for the town;
- public relations for council;
- arborist assessment; and
- third party health and safety investigation report.

[37] The minutes also state that the costs to retain the above-referenced legal and professional services to respond to the incident should "be independently tracked and accounted for by the Treasurer".

[38] The only record which does not relate to council's decision to retain legal and professional services is the councillor's agreement at record 10. The town submits that this record:

... is a confidential settlement amongst Council. It was a product of solicitor-client privilege, having been prepared by counsel employed by the Town and spoken to by the solicitor, and then executed in confidence. Disclosure would reveal the actual substance of the deliberations.

[39] I have carefully reviewed the records along with the town's representations and am not satisfied that disclosure of records 3, 4, 5, 6, 7, 8, 9, 10 and the information at issue in records 1 and 2 would reveal the substance of council's deliberations. Though, I am satisfied that meetings were held in camera to discuss aspects of the incident which could result in a financial loss for the town, I find that the disclosure of the records would not reveal the actual deliberations that took place. In fact, records 1, 2, 3, 4, 5, 6, 7 and 8 are simply legal accounts, invoices or accounting ledgers relating to professional services the town and council retained to assist with its response to the incident. Council's deliberation as to whether it should retain such services occurred at a public meeting. In addition, record 9 appears to be the Treasurer's accounting ledger that track the various expenses related to the tree cutting incident, including legal and professional services and record 10 is an agreement between members of council addressing issues relating to the tree cutting incident. Though record 10 may reveal how council ultimately decided to respond to the incident, it does not discuss the actual considerations, debates or decisions that were deliberated on by council.

[40] Having regard to the above, I find that part 3 of the three-part test has not been met. I will go on to determine whether records 8 and 9 are exempt under sections 12 or 14(1). As the town has not claimed that any other exemptions apply to records 1, 2, 3, 4, 5, 6, 7 and 10 and no mandatory exemptions could apply, but for a small portion of record 10, I will order the city to disclose these records to the appellant. With respect to the sixth bullet point in record 10 which may contain the personal information of identifiable individuals, I will go on to determine whether disclosure of this information would constitute an unjustified invasion of personal privacy under the mandatory exemption under section 14(1).

**C. Does the discretionary exemption at section 7(1) apply to record 14?**

[41] Record 14 is a two-page report prepared by a consultant retained by the town and addressed to the town's Chief Administrative Officer (CAO). The town advises that it "asked the consultant to review the tree incident from the point of view of the *Occupational Health and Safety Act*". The town's position is that the report is exempt under section 7(1), which 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.

[42] The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.<sup>1</sup>

[43] Previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information [see Order PO-2681].

[44] "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.<sup>2</sup>

---

<sup>1</sup> Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.).

<sup>2</sup> 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].

[45] Advice or recommendations may be revealed in two ways:<sup>3</sup>

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

[46] The appellant argues that “there is no justification for broadly classifying consultant reports containing advice or recommendations”.

[47] I have carefully reviewed the report and am satisfied that it contains the consultant’s advice and recommendations to the town. The report contains information about the consultant’s information gathering processes along with his conclusions and eight recommendations. In my view, the recommendations suggest corrective actions which will ultimately be accepted or rejected by the town’s CAO. In my view, the report does not comprise of a coherent body of facts separate and distinct from the advice and recommendations the consultant provided to the town. Accordingly, I find that any factual information contained in the report is inextricably intertwined with the advice and recommendations the town received from its consultant.

[48] Having regard to the above, I find that the consultant’s report is exempt under section 7(1).

**D. Does the discretionary exemption at section 12 apply to records 8, 9, 11, 12 and 13?**

[49] 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.

[50] 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.

[51] In this case, the town takes the position that both branches apply. The town submits that records 8, 9, 11, 12 and 13 contain solicitor-client communication

---

<sup>3</sup> 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).

privileged information and that records 11, 12 and 13 also are subject to litigation privilege.

[52] I find that record 8 falls within the ambit of the solicitor-client communication privilege under branch 1 and that records 11, 12 and 13 fall within the ambit of litigation privilege under branch 2. Record 9 is found not to fall within the ambit of branch 1 or 2.

***Branch 2: statutory privileges***

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

*Statutory litigation privilege*

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

[55] Branch 2 has been found to include records prepared for use in the mediation or settlement of actual or contemplated litigation. [*Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.] The Court of Appeal in the *Magnotta* decision states:

Once litigation is understood to include mediation and settlement discussions, it is apparent that the Disputed Records -- both those prepared by Crown counsel and those prepared by Magnotta -- fall within the second branch and are exempt from disclosure. Nothing more need be said to explain why the materials prepared by Crown counsel fall within the second branch. As for the materials prepared by Magnotta and delivered to the Crown, in my view, they were "prepared for Crown counsel" because they were provided to Crown counsel for use in the mediation and settlement discussions. To limit the second branch to records prepared by, or at the behest or on behalf of, Crown counsel is contrary to the plain meaning of the language of the second branch.

[56] The *Magnotta* decision was recently applied in orders MO-2609-I, MO-2624 and PO-3059-R. In Order PO-3059-R, Adjudicator Catherine Corban states:

In light of the findings in the *Magnotta* decision, it is now clear that branch 2 of section 19 of the *Act* includes records prepared for use in the mediation or settlement of actual or contemplated litigation. Subsequent orders issued by this office have found that in order to conclude that

litigation was "contemplated," more than a vague or general apprehension of litigation is required.

The question of whether records were prepared for use in mediation or settlement of litigation or contemplated litigation, and/or whether litigation is reasonably in contemplation, is a question of fact that must be decided in the specific circumstances of each case.

[57] Accordingly, if records 11, 12 and 13 were prepared in the course of mediation or settlement discussions between the town and the opposing party they fall within the ambit of branch 2, even if they were prepared by the opposing party.

[58] The appellant's evidence does not dispute that litigation relating to the incident was contemplated. In fact, the appellant states in her representations that the records "were originally prepared in anticipation of litigation". The town's representations state:

Records 11, 12, and 13 would be subject to litigation privilege in that they were prepared for purposes of litigation, specifically settling the litigation.

...

The settlement with the [opposing party] settled that potential litigation.

...

Counsel employed by the Town was dealing with the potential litigation from the [opposing party], working with the Town's insurer to successfully achieve a settlement.

[59] Having regard to representations of the parties and the circumstances surrounding the creation of the records 11 and 13, I am satisfied that litigation relating to the incident was contemplated. However, I am not satisfied that record 12 was prepared for use in the settlement of the contemplated litigation.

[60] Record 11 is the full and final settlement and release which settled the contemplated litigation between the parties. Record 13 is the cheque image of the monies the opposing party received from the town's insurer in consideration of releasing the town of any claims and liabilities. I have carefully reviewed these records and find that they comprise of the full and final settlement of the contemplated litigation. Accordingly, I find that these records were prepared by or for counsel retained by the town or the town's insurer for use in the settlement of the contemplation litigation and are subject to the statutory litigation privilege under branch 2. Given that there is no evidence before me suggesting that the town waived its

privilege to these records, I find that they qualify for exemption under branch 2. Under the circumstances, it is not necessary for me to consider whether branch 1 also applies to records 11 and 13.

[61] Though the town submits that the partnership agreement (record 12) also forms part of the full and final settlement, I note that this record contains a provision which states that it is independent from any agreement or release between the town and/or the town's insurer. The partnership agreement also states that the opposing party's acceptance of any offer to settle the litigation is independent from the terms contained in the partnership agreement. In addition, I note that the partnership agreement was executed a month after the opposing party signed the full and final release. Having regard to the content of record 12, I am not satisfied that it was prepared for use in the settlement of the contemplation of litigation. Instead, it appears that the focus of the record is to establish future co-operative relations between the town and the opposing party. As this record did not settle the contemplated litigation, it falls outside the ambit of the statutory litigation privilege under branch 2. I will go on to determine whether the statutory solicitor-client communication privilege applies to this record.

*Statutory solicitor-client communication privilege*

[62] Branch 2 applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice". The town submits that records 8, 9, and 12 contain legal advice which was sought from or given by counsel employed by the town as well as its external counsel.

[63] The appellant questions whether "every pronouncement from legal services qualifies as privileged communication."

[64] Having carefully reviewed the records, I find that only record 8 falls within the ambit of solicitor-client communication privilege under branch 2.

[65] Record 8 is an email chain between the city's General Manager of Legal Services (town's solicitor) and city staff members. In the initial email, the town's solicitor sends an email to staff and receives a response including an attachment. I am satisfied that record 8 contains information which was exchanged between the town's solicitor and staff and that the information was prepared by or for use in giving legal advice.

[66] As mentioned earlier in this order, record 9 appears to be the Treasurer's accounting ledger which tracks various expenses related to the tree cutting incident. Record 9 was not attached to email found at record 8. It also was not referred to in record 8. I have carefully reviewed the record and though I note that it is marked "Private & Confidential", I am not satisfied that it contains solicitor-client communication privileged information. The town did not provide evidence establishing that the record was prepared for its solicitor or external lawyers for the purpose of obtaining legal

advice. Instead, the content of the record suggests that it was created to address council's direction to the Treasurer to track and account all expenses relating to the town's response to the incident.

[67] I also am not satisfied that record 12 falls within the ambit of the statutory solicitor-client communication privilege. As noted above, this record is the partnership agreement the town and the opposing party entered into this agreement after the contemplated litigation was settled. Having regard to the purpose and timing of the agreement, I find that it was not prepared by or for counsel for the purpose of obtaining legal advice.

[68] In summary, I find that record 8 falls within the ambit of the statutory solicitor-client communication privilege information. Given that there is no evidence before me suggesting that the town waived its privilege to this record, I find it qualifies for exemption under branch 2. Under the circumstances, it is not necessary for me to consider whether branch 1 also applies to this record. I will go on to determine whether branch 1 applies to records 9 and 12.

***Branch 1: common law privilege***

[69] Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4<sup>th</sup>) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

*Solicitor-client communication privilege*

[70] The town submits that records 9 and 12 are direct communications of a confidential nature between its solicitor and its employees. The town also submits that the communications are of a confidential nature, refer to settlement payments and were made for the purpose of obtaining and giving professional legal advice.

[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.)].

[72] 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].



[73] The privilege applies to “a continuum of communications” between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

[74] 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.)].

[75] I find that records 9 and 12 do not fall within the ambit of the common law solicitor-client communication privilege under branch 1 for similar reasons that I found that branch 2 did not apply. In my view, the town has failed to establish that records 9 and 12 were prepared by or for counsel employed or retained by it for use in giving legal advice. Instead, it appears that record 9 was prepared by the Treasurer for the purpose of keeping council informed and that the partnership agreement at record 12 was prepared for purposes not related to keeping the town’s in-house or external counsel informed.

[76] Accordingly, I find that these records do not fall within the ambit of the common law solicitor-client communication privilege under branch 2. I will go on to determine whether the common law litigation privilege applies.

### *Litigation privilege*

[77] The town submits that records 9 and 12 were “prepared for purposes of litigation, specifically settling the litigation.”

[78] Litigation privilege protects records created for the dominant purpose of litigation, actual or contemplated.<sup>4</sup> Though the appellant accepts and I found that the

---

<sup>4</sup> In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth’s: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

The “dominant purpose” test was enunciated [in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169] as follows:

A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

opposing party contemplated litigation against the town, I am not satisfied that records 9 and 12 were prepared for litigation purposes. As stated above, record 9 appears to have been prepared by the Treasurer for the purpose of keeping council informed and record 12 contains provisions which state that it does not form part of the full and final settlement of the contemplated litigation. Accordingly, for similar reasons I found that the statutory litigation privilege did not apply to these records, I find that the common law litigation privilege also does not apply.

[79] As the town has not claimed that any other exemption applies to record 12 and no mandatory exemption applies, I will order the town to disclose this record to the appellant. I will go on to determine whether record 9 contains personal information and if so, if it is exempt under section 14(1).

**E. Does the remaining information at issue contain “personal information” as defined in section 2(1)?**

[80] 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. The town claims that record 9 contains information which describes an individual’s liabilities and financial activities. Portions of record 9 refer to the amounts of monies the town received from or paid to two individuals, who at the time were council members. The sixth bullet point in record 10 also refers to the same information relating to these individuals. I sought and received the representations of the two individuals (affected parties). Both of the affected parties submit that the records contain personal information relating to financial transactions involving them. The affected parties requested that their representations be kept confidential.

[81] “Personal information” is defined, in part, under section 2(1) as follows:

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

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved

---

It is crucial to note that the “dominant purpose” can exist in the mind of either the author or the person ordering the document’s production, but it does not have to be both.

. . . . .

[For this privilege to apply], there must be more than a vague or general apprehension of litigation.

- (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

[82] 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].

[83] I have carefully reviewed the accounting ledger (record 9) and note that most of the amounts identified under the headings "expenses" and "funds received" referred to monies paid or received from consultants, lawyers, the opposing party and the town's reserve and insurer. In my view, this information does not relate to personal information of any identifiable individual. 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].

[84] The only portions of record 9 I find which could possibly contain personal information are three entries which refer to monies paid or received from the affected parties. These individuals were members of council and were involved in the tree cutting incident. As noted above, this information is also contained in the sixth bullet point in record 10.

[85] To qualify as personal information, this information must be about the individuals in a personal capacity. As stated above, generally 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]. However, information which relates to an individual in a professional, official or business capacity, may 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]. 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 individuals?*"

[86] With respect to the first question, I am satisfied that the references to the amounts of monies paid or received from the affected parties appears in a professional, official or business context. As noted above, the affected parties were members of council and the information at issue relates to their official duties.

[87] 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 affected parties. Previous decisions from this office have held that information about an individual in their professional or employment capacity does not constitute the individual's personal information, unless the information about the individual involves an evaluation of his or her performance as an employee or an investigation into his or her conduct (see Order MO-2197). Having regard to the circumstances of this appeal, including the fact that the town retained a consultant to prepare a health and safety investigation report relating to the tree cutting incident, I am satisfied that the information at issue relates to the affected parties in a personal capacity.

[88] Accordingly, I find that the three entries in record 9 and the information contained in the sixth bullet point in record 10 describe a financial transaction involving two named town officials. As a result, I find that this information constitutes the personal information of the affected parties, as defined in paragraphs (b) and (h) in section 2(1). I will go on to determine whether disclosure of this information would constitute an unjustified invasion of personal privacy under section 14(1).

**F. Would disclosure of the personal information constitute an unjustified invasion of personal privacy under the mandatory exemption under section 14(1)?**

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

[90] If the information fits within any of the paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14. The parties have not claimed that any of the exceptions apply to the circumstances of this appeal. In my view, the only exception that could apply is paragraph (f) (disclosure does not constitute an unjustified invasion of personal privacy).

[91] Sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Section 14(2) provides some criteria for the town 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.

[92] 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 (Div.Ct.)].

[93] The town claims that the presumption at section 14(3)(f) and the factors favouring non-disclosure at sections 14(2)(e) and (f) apply in the circumstances of this appeal. As noted above, the affected parties submitted representations supporting the town's representations. Their representations also raise the possible application of the factors at sections 14(2)(h) and (i). The appellant claims that the factor favouring disclosure at section 14(2)(a) applies. Sections 14(2)(a), (e), (f), (h), (i) and 14(3)(f) state:

(2) 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;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

**14(3)(f): finances**

[94] The town submits that the personal information at issue describes the affected parties liabilities and financial activities. One of the affected party's representations state:

The personal information in the documents would give insight to the reader with respect to my finances and with respect to potential liabilities as they existed at the time the documents were produced.

[95] Previous decisions from this office have consistently held that "one-time payments" or lump sum payments that are separate from an individual's salary have consistently been found not to fall within section 14(3)(f).<sup>5</sup> Though the lump sum payments considered in previous decisions from this office relate to the sums of monies former employees received from their employer, I find that the reasoning in these appeals apply to the circumstances of this appeal. In my view, the information at issue refers to one-time payments paid and received by the affected parties. Accordingly, disclosure of this information would not reveal information about the salary the affected parties received from the town. Similarly, I find that disclosure of the information at issue would not reveal information about their financial situation or creditworthiness, such as their income, assets, liabilities, net worth or bank balances. Having regard to the above, I find that the presumption at section 14(3)(f) does not apply in the circumstances of this appeal.

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

[96] 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 submits that disclosure of the information at issue would subject the activities of the town to public scrutiny. The appellant submits that the tree-cutting incident generated "a great deal of public interest" and was reported in the local newspaper and Toronto Star. The town's representations state:

There is an attraction to say such disclosure is always desirable.

In the circumstances here, much information has already been released. The reports of the Chief Administrative Officer and of the external legal counsel have been or are to be provided. The "what happened" has been documented. Follow-up has occurred. Scrutiny has been quite public and extensive.

---

<sup>5</sup> Orders M-173, MO-1184, MO-1469, MO-2174 and MO-2318.

[97] The representations submitted by the affected parties support the town's position.

[98] In order for this section to apply, it is not appropriate to require that the issues addressed in the records have been the subject of public debate; rather, this is a circumstance which, if present, would favour its application [Order PO-2905]. In my view, information regarding the amounts of monies the town paid or received from the affected parties would subject the activities of the town regarding the tree cutting incident to public scrutiny. Though it appears that quite a bit of information about the incident and the town's response was reported in the media, discussed in public meetings and became the subject of public reports, there is no evidence before me suggesting that the personal information at issue has been subject to public scrutiny. Having regard to the circumstances of the appeal and the desirability of subjecting the financial activities of government to public scrutiny, I find that this factor applies in the circumstances of this appeal.

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

[99] 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 individuals involved. The information remaining at issue describes the amount of monies the town paid to or received from the affected parties. The non-confidential portions of the town representations state:

The harm would be the release of information considered confidential...This would be unfair to the individuals, and unsettle the other [members of council].

...

[They] would lose confidence that confidentiality can be assured in settling complex issues governance.

Additionally, there would be harm to reputation. Again, this would be unfair to the individuals who had entered into the settlements based on confidentiality of the settlements, in good faith, and with legal support.

[100] One affected party submits that disclosure of the personal information at issue would expose him or her to conflict of interest litigation or other types of legal actions. The affected party explains that the tree cutting incident was resolved as a result of the affected parties declining to claim an interest in the matter. However, if the personal information at issue is disclosed they are now "placed in jeopardy of facing a law suit ... and will [have] to pay legal fees to defend [themselves].

[101] The appellant did not provide representations specifically addressing this issue. However, her representations question how "public funds spent to indemnify the unlawful actions of elected officials can be categorized as "personal information".

[102] I have carefully reviewed the town's representations, along with the information at issue and am not satisfied that the town or affected parties have adduced sufficient evidence to demonstrate that the factor at section 14(2)(e) applies in the circumstances of this appeal. I do not agree with the town's or affected parties reasoning that disclosure of the information at issue would result in an undue harm simply because it refers to one of the terms of settlement which resolved the dispute arising from the tree incident.

[103] Throughout their representations, the town and affected parties appear to take the position that the terms of any settlement agreement relating to the tree incident are not subject to disclosure because they contain a confidentiality clause. Though the existence of confidentiality provisions is a relevant factor in determining whether a particular exemption of the *Act* applies, the purpose of the *Act* must also be considered, particularly in circumstances such as in this appeal where public funds were expended to respond to an incident involving town officials. In my view, the mere existence of a confidentiality provision in the councillor's agreement (record 10) is not sufficient to override the principles that information should be available to the public and exemptions from the right of access should be limited and specific in the circumstances of this appeal. In any event, I am not satisfied that the town and affected parties have adduced sufficient evidence to demonstrate that disclosure of the amounts of monies the town received from or paid to the affected parties would cause undue harm to these individuals having regard to the nature of the information.

[104] For the reasons stated above, I find that section 14(2)(e) does not apply in the circumstances of this appeal.

***14(2)(f): highly sensitive***

[105] 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].

[106] In support of its position that disclosure of the information could reasonably be expected to cause significant personal distress, the town states:

The tree incident matter has been settled by the Town's Council and is now part of the Town's history. The division that it caused within Council, as evidenced by the fact that the Mayor and one Councillor had to declare an interest in any issue dealing with the [opposing party], and could not be present at any in-camera discussions in respect of that matter; and as



well, that the Mayor and [Councillor] were compelled to retain a lawyer to deal with the Town, while the Town retained its own outside counsel in addition to rely on counsel in-house, are now in the past. Because of that, the current Council is enabled to focus and provide community leadership on matters of current municipal governance and future growth.

To re-open and destabilize the current settled situation would be a matter of personal distress to the named individuals, and no doubt to Town governance generally.

[107] Both of the affected parties claim that disclosure of the personal information at issue would cause them significant personal distress.

[108] The appellant's representations questions the town's reluctance to disclose information relating to the expenditure of public funds to respond to the tree cutting incident.

[109] I have carefully reviewed the representations of the parties and find that the town and affected parties have failed to adduce sufficient evidence demonstrating that disclosure of the information at issue could reasonably be expected to cause the affected parties personal distress. In making my decision, I took into consideration the nature of the information at issue and find that the information is not highly sensitive as it only relates to one financial transaction related to their official duties. In addition, I find that the town's argument that disclosure of amounts of monies the affected parties paid or received could reasonably result in the "town" or affected parties experiencing significant personal distress is without merit. The *Act* does not operate to shield institutions or individuals from embarrassment or inconvenience.

[110] Having regard to the above, I find that the factor at section 14(2)(f) has no application in this appeal.

***14(2)(h): supplied in confidence***

[111] The affected party who raised this factor did not submit representations specifically addressing this issue. However, throughout his or her representations, this individual claims that the entire councillor's agreement (record 10) should be kept confidential. However, the only portion of this agreement remaining at issue is the information contained in the sixth bullet point.

[112] The factor at section 14(2)(h) 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].

[113] Having regard to the nature of the information at issue and the representations of the parties, I find that the factor at section 14(2)(h) does not apply to the circumstances of this appeal. I find that there is insufficient evidence demonstrating that the affected parties supplied the town the information at issue in exchange for the town's assurances of confidentiality. In fact, the town was not party to the agreement that referred to the amount of monies the affected parties paid or received.

[114] Accordingly, I find that the factor at section 14(2)(h) has no application in this appeal.

***14(2)(i): unfair damage to reputation***

[115] Both of the affected parties claim that disclosure of information describing the amounts of monies they paid or received from the town would unfairly damage their reputations. The applicability of this section is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved [Order P-256].

[116] One affected party states that disclosure of the personal information at issue has "the potential to harm my reputation, as well as other members of council depending on how the information is interpreted and shared". The other affected party submits that disclosure of the personal information at issue "could be or would be construed as an admission of guilt which could negatively affect me".

[117] I have carefully reviewed the representations of the affected parties and find that this factor has no application in the circumstances of this appeal. Though there is a possibility that disclosure of the personal information at issue may tarnish the affected party's reputations, there is insufficient evidence to suggest that this damage would be unfair. In making my decision, I took into consideration the CAO's public reports, dated December 12, 2007 and January 21, 2008 identifying the affected parties as the individuals responsible for the unauthorized removal of the trees on lands adjacent to the town's civic centre.

[118] In my view, disclosure of the amounts of monies the affected parties paid or received from the town in relation to the incident alone would not result in unfairly damaging their reputations.

[119] As a result, I find that the factor at section 14(2)(i) has no application in this appeal.

***Other factors/relevant circumstances***

[120] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under

section 14(2) [Order P-99]. In previous orders, relevant considerations that have found to apply include:

- inherent fairness issues [Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014];
- ensuring public confidence in an institution [Orders M-129, P-237, P-1014 and PO-2657];
- personal information about a deceased person [Orders M-50, PO-1717, PO-1923, PO-1936 and PO-2012-R]; and
- benefit to unknown heirs [Orders P-1493, PO-1717 and PO-2012-R].

[121] In support of its position that the information at issue should not be disclosed, the town submits that the following circumstances should be considered:

East Gwilimbury is a town of 24,000 growing to 150,000 pursuant to and mandated by Provincial and Regional growth plans. This creates equally tensions and positive challenges for both Town's council and its administration.

Municipal government is quite resilient and can absorb any number of diversions and crises while still delivering effective service to its businesses and residents.

But when it is consumed by a single negative issue, all service suffers.

The tree incident was disruptive to good governance. It resulted in months of diversion from the go forward business of the Town.

[122] In my view, the unlisted factor identified by the town raises the same concerns I found have no merit in my discussion of the possible application of section 14(2)(f). In my view, the town's evidence that the incident "disrupted" its normal business activities is not a relevant consideration.

[123] As I have found that only the factor favouring disclosure applies, I will order the town to disclose the information describing the amount of monies received or paid by the two affected parties contained in record 9 and 10.

**F. Did the town properly exercise its discretion in applying the discretionary exemptions at section 7(1) and 12?**

[124] The exemptions at sections 7(1) and 12 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.

[125] 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.

[126] 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)].

[127] The parties were not invited to provide representations specifically addressing the exercise of discretion issue. However, in my view, the town's representations in support of the application of sections 7(1) and 12 reflect the manner in which discretion was exercised. Having regard to the town's representations, I am satisfied that the town properly exercised its discretion and in doing so took into account the relevant considerations such as the confidential nature of the information I found exempt under sections 7(1) and 12 along with the significance and sensitivity attached to this information. I am also satisfied that the town did not exercise its discretion in bad faith or for an improper purpose, nor is there any evidence that it took into consideration irrelevant considerations.

[128] In making my decision, I note that records 8, 11 and 13 contain solicitor-client communication privileged information or are subject to litigation privilege. The purpose of the exemption at section 12 is to protect this type of information. I also note that consultant report (record 14) withheld under section 7(1) contains recommendations and that the purpose of section 7(1) 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.

[129] Having regard to the above, I find that the town properly exercised its discretion to withhold the records I found exempt under sections 7(1) and 12.

**G. Does the public interest override at section 16 apply to the record withheld under section 7(1)?**

[130] Section 16 states:

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

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

[132] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption. [Order P-244]

[133] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government [Orders P-984, PO-2607]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Orders P-984 and PO-2556]. The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

[134] The town's representations state:

The tree cutting incident was a significant event during the term of the previous Council that resulted in much public interest and scrutiny.

A number of documents and records were created. The two most significant and public documents [was] the ... report of the [Chief Administrative Officer], to which were attached a series of background reports and students, and the report of the external solicitor...

[135] However, the town takes the position that there is no public interest in the disclosure of the consultant report I found exempt under section 7(1) (record 14). The town's representations state that the report:

... is strongly related to good administrative management of the organization, and the recommendations have been implemented by the administration. There is no significant contribution to "enlightening the citizenry about their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

[136] The appellant's representations do not specifically address the issue as to whether the public interest override at section 16 applies to the consultant report found exempt under section 7(1). Instead, the appellant's representations question why documents that were posted on the town's website, can no longer be located on its website. In particular, the appellant raises concerns about one of the CAO's reports not being currently available on the town's website. However, I note that the town's initial decision letter identified this report as a responsive record. In addition, the town indicated that it was prepared to provide a copy of the report to the appellant upon payment of its fee. Accordingly, I find that the appellant's evidence in this regard does not support a finding that a compelling public interest in the consultant report exists.

[137] However, I will revisit the appellant's evidence in support of her position that the factor favouring disclosure at section 14(2)(a) applies in the circumstances of this appeal. In support of that position, the appellant submits that the tree-cutting incident generated "a great deal of public interest" and was reported in the local newspaper and Toronto Star.

[138] As stated above, the first question to ask in determining whether there is a compelling "public interest" is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government [Orders P-984, PO-2607]. Having regard to the representations of the parties, I am satisfied that disclosure of the consultant report would shed light on the town's operations. The parties do not dispute that the tree cutting incident roused strong interest or attention. In my view, the public interest in the incident extends to matters relating to the *Occupational Health and Safety* issues identified in the consultant's report. In addition, disclosure of the report would inform or enlighten the citizenry about health and safety issues arising from the incident, which could add to the information town residents have to use to express public opinion or make political choices. Accordingly, I find that there is a compelling "public interest" in the disclosure of the consultant's report.

[139] However, the existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances. An important consideration

in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.<sup>6</sup>

[140] As previously stated in this order, the purpose of the exemption at section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.<sup>7</sup>

[141] In my view, the public interest identified by the appellant does not outweigh the purpose of the exemption at section 7(1). Having regard to the amount of information that has already been disclosed or will be ordered disclosed, I find that the public interest in disclosure of the consultant's report does not clearly outweigh the purpose of the exemption. In making my decision, I also took into consideration that the consultant report contains recommendations which suggest corrective actions and one of the purposes of the exemption at section 7 is to preserve the town's ability to take actions and make decisions without unfair pressure. I also took into account that the consultant report was initiated by the town itself and thus was commissioned for the town's use as opposed to an external investigation. In my view, the compelling public interest in the report does not override the primary purpose of the exemption which is to ensure that the town's consultant is able to freely and frankly advise and make recommendations to the town.

[142] For the reasons stated above, I find that the public interest override does not apply to the report I found exempt under section 7.

## **ORDER:**

1. I order the city to disclose records 1, 2, 3, 4, 5, 6, 7, 9, 10 and 12, to the appellant by **June 6, 2012** but not before **June 1, 2012**. For the sake of clarity, in the copies of the record enclosed with the town's order, I have highlighted the portions of records 1 and 2 which **should not** be disclosed to the appellant.
2. I uphold the town's decision to withhold records 8, 11, 13 and 14.
3. The town's search fee of \$615.00 is disallowed. The total allowable fee the town may charge the appellant to process her request is \$32.60.

---

<sup>6</sup> Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).

<sup>7</sup> Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)

4. In order to verify compliance with order provisions 1 and 2, I reserve the right to require a copy of the records disclosed by the town to be provided to me.

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

\_\_\_\_\_ April 30, 2012