

Information and Privacy Commissioner,  
Ontario, Canada



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

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## **ORDER MO-2901**

Appeal MA12-210

Town of Petrolia

June 20, 2013

**Summary:** The appellant sought access to records relating to two properties. The town identified certain responsive records and granted access to them. After the appellant appealed the decision, the town identified 19 additional responsive records or categories of records, and granted access to 14 of them. Access to the remaining 5 records or categories of records was denied on the basis of the exemptions in sections 7(1) (advice or recommendations), 8(1)(a), (b) and 8(2)(a) (law enforcement), 12 (solicitor-client privilege), 13 (danger to safety or health) and 38(a) (discretion to refuse requester's own information). The appellant also raised the issue of whether the town's search for records was reasonable. This order upholds the city's decision that the records qualify for exemption under sections 13 and/or 38(a). It also determines that the town's search was 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), 13, 17, 38(a).

**Orders and Investigation Reports Considered:** PO-1940, PO-2642.

**Cases Considered:** *Ontario (Minister of Labour) v. Big Canoe* [1999] O.J. No. 4560 (Ont. C.A.).

## **OVERVIEW:**

[1] The Town of Petrolia (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records relating to two properties owned by the appellant, dating back to certain defined dates.

[2] In response, the town issued a decision providing access to documents relating to the assessment roll file information for the two properties. The appellant appealed the town's decision.

[3] The town subsequently issued a second decision, providing access to 14 additional responsive records or categories of records. The town also indicated that access was denied to 5 records or categories of records on the basis of the exemptions in sections 7(1) (advice or recommendations), 8 (law enforcement), 12 (solicitor-client privilege) and 13 (danger to safety or health) of the *Act*.

[4] During mediation, the town issued a further supplementary decision to the appellant. In that decision, the town clarified that the specific section 8 exemptions it was claiming were sections 8(1)(a), 8(1)(b) and 8(2)(a). The town also indicated that the exemption in section 13 was being applied to all of the records at issue. In addition, the town advised that because the records contain the personal information of the appellant, section 38(a) (discretion to refuse requester's own information) also applied to the records.

[5] After receiving the supplementary decisions, the appellant confirmed that he was appealing the town's decision to deny access to the withheld records. He also took the position that additional records responsive to his request should exist. As a result, the reasonableness of the town's search was identified as an issue in this appeal.

[6] Mediation did not resolve the issues, and this file was transferred to the inquiry stage of the process. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the town, initially, and received representations in response.

[7] After reviewing the town's representations, I decided that, in the circumstances of this appeal, I would only be seeking the appellant's representations on the possible application of the section 13 exemption (in conjunction with section 38(a) of the *Act*), and the search issue. As a result, I sent a modified Notice of Inquiry, together with a copy of the non-confidential portions of the town's representations that apply to those issues, to the appellant.

[8] The appellant provided brief representations in response.

## **RECORDS:**

[9] The records remaining at issue are the five records or categories of records to which access was denied, identified in the town's decision as:

- two legal opinions prepared by outside counsel;
- internal reports, emails, recommendations and draft documents from a by-law enforcement file relating to one of the properties referenced in the request;
- an internal memorandum dated in October, 2005;
- an internal memorandum relating to an in-camera meeting concerning one of the properties; and
- an internal memorandum relating to an in-camera meeting about a property standards issue.

## **ISSUES:**

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Does the information in the records qualify for exemption under section 13 and/or 38(a) in conjunction with section 13 of the *Act*?
- C. Did the town conduct a reasonable search for records?

## **DISCUSSION:**

### **Issue A. Do the records contain "personal information" as defined in section 2(1)?**

[10] 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. That term is defined in section 2(1). That section reads:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of

the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[11] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>1</sup>

[12] The town's representations state that the records contain the personal information of the appellant and other identifiable individuals. The appellant does not address this issue.

[13] This appeal arises from a request for information about two properties owned by the appellant. As indicated above, the records remaining at issue include legal opinions, internal town documents and memoranda. On my review of the records remaining at issue in this appeal, I find that a number of them contain the personal information of the appellant, as they contain his name as well as other personal information relating to him (paragraph (h) of the definition). Some of the records do not contain the personal information of the appellant; however, because of my findings below, it is not necessary for me to identify exactly which records do or do not contain the personal information of the appellant.

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<sup>1</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[14] I also note that some portions of the records also contain the personal information of other identifiable individuals. Again, however, as a result of my findings below, for the purposes of this appeal it is not necessary for me to identify precisely which information relates to other individuals.

**Issue B. Does the information in the records qualify for exemption under section 13 and/or 38(a) in conjunction with section 13 of the Act?**

[15] Section 36(1) 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.

[16] Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

[17] In this case, the town relies on section 13 and/or 38(a) read in conjunction with section 13. Section 13 reads:

A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[18] For the section 13 exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated.<sup>2</sup>

[19] An individual's subjective fear, while relevant, may not be sufficient to establish the application of the exemption.<sup>3</sup>

[20] The term "individual" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization.<sup>4</sup>

***Representations***

[21] With respect to the application of the section 13 exemption, the town refers to previous orders of this office which have applied this exemption, or the similar

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<sup>2</sup> *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.).

<sup>3</sup> Order PO-2003

<sup>4</sup> Order PO-1817-R

exemptions found in sections 20 and 14(1)(e) of the *Freedom of Information and Protection of Privacy Act*. It states:

The Town submits that the word "individual" within section 13 of [the *Act*] should be broadly interpreted which was done by [the IPC] when it examined a similar provision found in section 14(1)(e) of the *Freedom of Information and Protection of Privacy Act*. In [Order PO-1817, the IPC] found that the word "person" in section 14(1)(e) was not necessarily confined to a particular identified person. In that instance, [the IPC] gave a broad definition for the word for "person" to include an identifiable group or organization or represented by it.

The Ontario Court of Appeal has held that where there is a reasonable basis for believing that a person's safety will be endangered by disclosure of a record, the holder of the record may properly refuse to disclose it.<sup>5</sup> The Court of Appeal was dealing with the application of section 14(1)(e) of [the provincial *Act*]. However, it is submitted that the same interpretation should apply to section 13 of the *Act*.

[22] The town submits that the release of additional information "poses a significant risk to the town's officials and staff." It provides confidential representations in which it refers to certain incidents which it states supports the town's position. It also refers to specific information in the responsive records, including those dating from 2005, 2010, 2011 and 2012, which it believes support its decision that section 13 applies.

[23] In another part of its representations, the town refers to information in the records which reveals the concerns of certain town personnel for the safety of individuals working for or on behalf of the town, as well as the opinions of named individuals with respect to their safety concerns relating to possible interactions with the appellant. The town also provides additional confidential representations in support of its position that disclosure of the records could reasonably be expected to result in the harms identified in section 13. Although the town acknowledges it is not possible to predict, as a matter of probabilities, how the appellant would react if he is given access to the information remaining at issue, the town submits that its position is not frivolous or exaggerated.

[24] The appellant does not directly address this issue. He does, however, indicate that he has had "numerous meetings [and] discussions with town officials" and that he has "followed [their advice], wishes and kept within the rules and regulations as explained [to him]." His representations also suggest that he is interested in obtaining access to the records because of concerns about a lack of continuity of the town officials dealing with his issues and the properties, and that these officials may not be

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<sup>5</sup> *Ontario (Minister of Labour) v. Big Canoe* [1999] O.J. No. 4560 (Ont. C.A.).

aware of what other town officials told him. He states that he was told many things and followed the town's directions, but that "what's on paper may or may not reflect this." He also indicates his suspicions about the town's motives for denying him access to the records remaining at issue.

### ***Analysis and findings***

[25] In Order PO-1940, Adjudicator Laurel Cropley considered the wording of section 13,<sup>6</sup> and found that it applied to deny records to an appellant who was deemed to be "angry and potentially dangerous" after having engaged in a pattern of abusive and intimidating correspondence with the institution. In that order she stated:

[I]t is noteworthy to add (in response to the appellant's assertions that he would not physically attack anyone) that a threat to safety as contemplated by [section 13] is not restricted to an "actual" physical attack. Where an individual's behaviour is such that the recipient reasonably perceives it as a "threat" to his or her safety, the requirements of this section have been satisfied. As the Court of Appeal found in *Ontario (Ministry of Labour)*:

It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [sections 8(1)(e) or 20] to refuse disclosure.<sup>7</sup>

[26] Adjudicator Corban applied this approach when she upheld the application of the same section in Order PO-2642, in the context of an appeal involving Queen's University. She stated:

... based on the representations ... as well as on a review of the records themselves, I accept that the appellant has engaged in persistent and harassing behaviour towards the affected parties. As noted above, although there is no evidence before me that the appellant has been physically violent towards the affected parties or any other individuals, from their confidential representations, it is clear that the affected parties perceive that disclosure of this information could reasonably be expected to seriously threaten their health or safety. ...

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<sup>6</sup> This order was issued under the *Freedom of Information and Protection of Privacy Act*. The section at issue was section 20 of that Act, which is similar to section 13 at issue in this appeal. For clarity, I will refer to section 13 of the *Act* in my discussion about this section in this order.

<sup>7</sup> *Ontario (Minister of Labour) v. Big Canoe, supra*.

[27] I adopt the approach taken by Adjudicators Cropley and Corban, and the Court of Appeal in *Ontario (Ministry of Labour)* cited above, and find it applicable to the current appeal.

[28] Based on the representations submitted by the town, as well as on my review of the records themselves and the circumstances of this appeal, I am satisfied that there exists a reasonable basis for believing that the disclosure of the information in the records remaining at issue could reasonably be expected to seriously threaten the health or safety of the individuals named in the records. Although I have not been provided with evidence that the appellant has been physically violent towards any individuals, it is clear from the evidence before me that there exists a perception that disclosure of the information could reasonably be expected to seriously threaten their health or safety. Further, I find that this evidence is detailed and convincing and not “frivolous or exaggerated” in accordance with the guidance provided by the Ontario Court of Appeal in the *Ontario (Ministry of Labour)*.<sup>8</sup> As a result, I find that the requirements of section 13 have been met for the records remaining at issue.

[29] Accordingly, I am satisfied that the records remaining at issue that do not contain the personal information of the appellant qualify for exemption under section 13 of the *Act*. With respect to those records that contain the personal information of the appellant, I find that they qualify for exemption under section 38(a), read in conjunction with section 13. These findings are subject to my review of the town’s exercise of discretion, below.

### ***Exercise of Discretion***

[30] As noted above, sections 38(a) and 13 are discretionary exemptions. When a discretionary exemption has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the record at issue. On appeal, the Commissioner may determine whether the institution failed to do so.<sup>9</sup>

[31] 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 consideration,
- it fails to take into account relevant consideration.

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<sup>8</sup> *Supra*

<sup>9</sup> Orders PO-2129-F and MO-1629.



[32] In such circumstances, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>10</sup> This office, may not, however, substitute its own discretion for that of the institution.<sup>11</sup>

[33] The town confirms that it considered the fact that some records contain the personal information of the appellant when it was deciding whether the records should be released to him. It also states that it considered the following factors in exercising its discretion to deny access to the records:

- the nature of the record and the context of the information found within it;
- the relationship between the appellant and the town;
- information about the appellant documented over the years (referenced above); and
- the nature of the exemptions and the rights sought to be protected.

[34] It also states that it did not exercise its discretion in bad faith or for an improper purpose, took into account all the relevant factors and did not take into account any irrelevant factors.

[35] The appellant does not directly address this issue in his representations. As set out above, however, the appellant identifies the reasons why he is interested in obtaining access to all of the records, including his concerns about the town's motives for denying him access to the records.

[36] I have reviewed the circumstances of this appeal and the records at issue. I note that the town has provided the appellant with a significant number of records and categories of records, including the records originally identified as relating to the assessment roll file information, as well as 14 records or categories of records subsequently disclosed to him. The remaining records at issue are internal town documents including legal opinions, internal memoranda, and internal documents relating to the by-law enforcement matter. I have found that disclosure of the information contained in the records remaining at issue could reasonably be expected to result in the harms set out in section 13 of the *Act*, and qualify for exemption under section 38(a). Based on the nature of the information remaining at issue, and considering the circumstances of this appeal, I am satisfied that the town has not erred in exercising its discretion not to disclose to the appellant the remaining information contained in the records.

[37] As I have found that the information at issue is exempt under sections 13 and/or 38(a), it is not necessary for me to determine whether the other exemptions relied on by the town apply to the records or portions of the records.

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<sup>10</sup> Order MO-1573

<sup>11</sup> Section 43(2)

## **Issue C. Did the town conduct a reasonable search for records?**

### ***Introduction***

[38] In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether the town has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the town's decision will be upheld. If I am not satisfied, further searches may be ordered.

[39] A number of previous orders have identified the requirements in reasonable search appeals.<sup>12</sup> In Order PO-1744, Acting-Adjudicator Mumtaz Jiwan made the following statement with respect to the requirements of reasonable search appeals:

... the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

[40] I agree with Acting-Adjudicator Jiwan's statement.

[41] Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

[42] Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

[43] The town provides representations in support of its position that it conducted a reasonable search for records responsive to the request. It begins by stating that it did not contact the appellant to clarify the request, as it responded to the specific wording of the request. It also states that it attempted to locate all records responsive to the request, and that it put no limitations on the scope of the request.

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<sup>12</sup> See Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920.

[44] With respect to the specifics of the searches conducted, the town identifies the individuals who conducted the searches, and states that the searches were conducted of the town's internal files relating to the two identified properties owned by the appellant. The town also states that the searches conducted "revealed the documents which were produced [to the appellant] as well as those documents which were not produced which are the subject matter of this appeal."

[45] In his representations the appellant expresses frustration at the manner in which he believes the town has dealt with this appeal and other matters. He does not directly address the issue of the reasonableness of the town's searches for responsive records.

### ***Findings***

[46] As set out above, in appeals involving a claim that responsive records exist, the issue to be decided is whether the town has conducted a reasonable search for the records as required by section 17 of the *Act*. In this appeal, if I am satisfied that the town's search for responsive records was reasonable in the circumstances, the decision of the town will be upheld. If I am not satisfied, I may order that further searches be conducted.

[47] A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request.<sup>13</sup> In addition, in Order M-909, Adjudicator Laurel Cropley made the following finding with respect to the obligation of an institution to conduct a reasonable search for records. She found that:

In my view, an institution has met its obligations under the *Act* by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

[48] I adopt the approach taken in the above orders for the purposes of the present appeal.

[49] As identified above, in this appeal the town initially located certain records which it considered to be responsive to the request (the roll file information for the two properties). The town subsequently located 19 additional records or categories of records, comprising numerous additional pages of responsive records. After locating those additional records, the town issued a second decision, providing access to 14 of

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<sup>13</sup> Order M-909.

the additional records or categories of records, and denying access to the 5 records or categories of records which are at issue in this appeal.

[50] I have considered the representations of the parties. I note that the town has provided information about the searches conducted and the results of those searches. I also note that the appellant has not directly addressed the issue of whether the searches conducted are reasonable, nor has he provided information in support of the position that other responsive records might exist.

[51] In this appeal, the request for records is clear on its face, and the town has identified numerous responsive records. Although it seems clear that the town's initial searches for records were inadequate, the town subsequently conducted additional searches, located numerous additional records and issued access decisions on them.

[52] In the circumstances, based on the information provided by the town regarding the searches conducted, and because the appellant has not provided me with sufficient evidence to support a finding that additional searches ought to be conducted, I am satisfied that the town's search for records responsive to the request was reasonable, and I dismiss this aspect of the appeal.

**ORDER:**

I uphold the decision of the town and dismiss the appeal.

Original signed by: \_\_\_\_\_

Frank DeVries  
Adjudicator

\_\_\_\_\_ June 20, 2013