Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2954

Appeal MA11-557

Township of Seguin

September 27, 2013

Summary: The appellant submitted a request to the town under the *Act* for a copy of a complaint letter regarding a floating dock. The town denied access to the record on the basis of section 8(1)(d) (confidential source). During mediation, sections 38(a) (discretion to refuse requester's own information) and (b) (personal privacy) were added as issues on appeal by the mediator. In this order, the adjudicator finds that sections 8(1)(d) and 38(a) do not apply to the record. After weighing the presumption at section 14(3)(b) and an unlisted factor favouring disclosure, she finds that disclosure of portions of the record would not constitute an unjustified invasion pursuant to section 38(b). The adjudicator ordered the town to disclose these portions of the record.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) definition of personal information, 8(1)(d), 14, 38(a) and 38(b).

OVERVIEW:

[1] The appellant submitted a request to the Township of Seguin (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of a complaint letter regarding a floating dock at a specified address that was sent to the town's building department sometime in July or August, 2011.

The town located a responsive record and issued a decision to the appellant denying access to it under section 8 (law enforcement) of the *Act*.

[2] The appellant appealed the town's decision.

[3] During the mediation stage of the appeal, the appellant explained that he was notified by the town that it received a complaint regarding the floating dock on his property. The appellant further explained that he requested access to the letter to understand what issues the complainant (the affected party) had with his floating dock. The appellant also provided a copy of a letter prepared by a planner on behalf of the affected party. In this letter, which appears to have been made public during a public meeting of the town, there are several references to a letter written by the affected party regarding her complaints to the town.

[4] Also during mediation, the town indicated that the affected party was assured by its building department that the letter could be submitted anonymously and that the affected party's identity would be kept confidential. The town also clarified that it is relying specifically on section 8(1)(d) (confidential source) of the *Act* to withhold the record as this matter is currently under investigation by the town.

[5] The mediator notified the affected party of this request, to seek consent to disclose the record to the appellant. The affected party did not provide consent. The affected party indicated that disclosure of the records would result in an unjustified invasion of her personal privacy, thereby implicitly raising the mandatory exemption in section 14(1) of the *Act*.

[6] Finally, during mediation, the mediator noted that the record at issue may contain information that relates to the appellant and therefore raised the possible application of sections 38(a) and (b) of the *Act*.

[7] No issues were resolved at mediation and the appeal was forwarded to the inquiry stage of the appeal process. I sought representations from the town and the affected party, initially. The town submitted brief representations in response, indicating that it relies on communications it had with the mediator during the mediation stage of the appeal process. Although the affected party was given several opportunities to submit representations, none were provided.

[8] In addition to seeking representations from the town and affected party, I sought representations from the Ministry of Government Services (the ministry) even though the ministry is not a party to the appeal. In the letter I sent to the ministry, I set out the background to this appeal as noted above, and identified the issue that I wished the ministry to make representations on as follows:

In the appeal, the discretionary exemption at section 38(b) of the *Act* has been raised. In this case, it appears that the presumption at section 14(3)(b) (information compiled and identifiable as part of an investigation into a possible violation of law) would apply as the matter pertains to a by-law complaint.

As you are aware, 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. This office has in the past determined, based on the decision in *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.), that 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. Although *John Doe* concerned the application of the mandatory exemption at section 14(1) of the *Act*, this office has applied the reasoning to both section 14(1) and section 38(b) claims. Thus, where a presumption is established, the information is exempt from disclosure, whether under section 14(1) or section 38(b), without regard to whether there may be factors favouring disclosure.

I am considering revisiting this approach in a case where a requester is seeking his own personal information. The personal privacy discussion in the current appeal is conducted under the discretionary exemption at section 38(b) of the *Act*. In *Grant v. Cropley* [2001] O.J. 749, the Divisional Court said the Commissioner could:

> . . . consider the criteria mentioned in s.21(3)(b) [the equivalent provision in the provincial *Act* to section 14(3)(b)] in determining, under s. 49(b) [which is equivalent to section 38(b)], whether disclosure . . . would constitute an unjustified invasion of [a third party's] personal privacy.

The above decision suggests that *John Doe* may not apply in a case where section 38(b) is the governing privacy exemption, not section 14(1). As a potential change in direction will have a significant impact on the manner in which section 38(b) cases will be analyzed, I am requesting that your office provide submissions on the issue in addition to those I might receive from the institution and affected party.

[9] I sent similar letters to the town and the affected party. Neither the town nor the affected party responded to this letter. The ministry provided representations that did not directly address the issue identified in the letter. Rather, the ministry argued that:

> In these circumstances we are of the view that it is appropriate for the Commission to determine how the law described in *John Doe v. Ontario (Information and Privacy Commissioner* (1993), 13 O.R. (3d) 767 (Div. Ct.) should be applied to the exercise of discretion under section 38(b).
>
> However, in the event the Commission determines that a head has discretion under section 38(b) to disclose information that is described in subsection 14(3), we are of the view that the head should, when exercising discretion, consider the policy basis informing the selection by the Legislature of information placed in subsection 14(3) – information which is presumed to constitute an unjustified invasion of personal privacy if disclosed.
>
> Accordingly the head should consider that this information, as a class, is very sensitive and harm might well flow from disclosure, when exercising his or her discretion to disclose personal information under s. 38(b) of MFIPPA.

[10] After reviewing the submissions made by the town, the ministry, the record at issue and the information provided by the appellant during the mediation stage of this appeal, I decided that it was not necessary to seek representations from the appellant.

[11] Before proceeding with the issues on appeal, I note that the town has asked that all of its representations remain confidential as they contain or reveal the contents of a legal opinion that it requested on receiving the appellant's request. It is not possible to completely withhold the contents of the legal opinion as they form the basis for the town's access decision. Indeed, identifying that the town relies on section 8 of the *Act*, in effect, discloses a portion of the legal opinion. Nevertheless, I have attempted to avoid reference to the contents of the legal opinion in the discussion set out below.

[12] In this order, I find that sections 8(1)(d) and 38(a) do not apply. I find further that the discretionary exemption at section 38(b) applies to certain portions of the record, but not others.

RECORD:

[13] The record is identified as a one page "Letter of complaint" dated August 18, 2011.[1]

[1] See the discussion under Preliminary Matter for a description of the record at issue.

ISSUES:

A: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B: Does the discretionary exemption at section 38(a) in conjunction with the section 8(1)(d) exemption apply to the information at issue?

C: Does the discretionary exemption at section 38(b) apply to the information at issue?

DISCUSSION:

Preliminary Matter: What is the record at issue?

[14] As I noted above, the record is a one-page letter. This letter contains several distinct pieces of information: the affected party's name, home and cottage addresses and telephone numbers; information about her own personal activities; the complaint, the impact the situation is having on the affected party and a concluding sentence relating to her expectations.

[15] In his letter of appeal, the appellant states that he does not seek the affected party's name. He states further:

> …I do intend to proceed with an Application for Minor Variance with Seguin Township in order to enlarge the existing dock area and I would like to know exactly what the neighbour's complaints are in order to attempt to address these concerns in my future application.

[16] Relying on his letter of appeal as a clarification of the information he is seeking, I find that only the complaint and the impact the situation is having on the affected party are at issue in this appeal. The remaining portions of the letter fall outside the scope of the appeal.

[17] Typically, having made this finding, I would not consider the remaining portions further in the order. However, I have decided to include the record, in its entirety, in the personal information and section 38(b) analyses below, in order to provide a complete context for the discussion.

A: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[18] 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) as follows:

> "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 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;

[19] 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.[2]

[20] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.
>
> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[21] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[3]

[22] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[4]

[23] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[5]

[24] The town did not address this issue directly in its representations. As I indicated above, during a conversation between the mediator and the affected party, the affected party objected to disclosure of the record at issue because it contained her personal information.

[25] Having reviewed the record at issue, I find that it contains the affected party's personal information, including her name, along with home and cottage addresses and telephone numbers and information about her own activities and concerns. The record

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[2] Order 11.
[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[4] Orders P-1409, R-980015, PO-2225 and MO-2344.
[5] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

also contains the affected party's complaint about the appellant's property and the actions he has taken in regard to it, which qualifies as the appellant's personal information. Accordingly, I find that the record contains the personal information of the appellant and the affected party.

B: Does the discretionary exemption at section 38(a) in conjunction with the section 8(1)(d) exemption apply to the information at issue?

[26] 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.

[27] Section 38(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[28] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[6]

[29] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[30] In this case, although the town did not claim the application of section 38(a) in its decision, it has acknowledged that section 38(a) should be considered in conjunction with section 8(1)(d).

Section 8(1)(d)

Section 8(1)(d) states:

> (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (d) disclose the identity of a confidential source of information in respect of a law enforcement matter,

[6] Order M-352.

> or disclose information furnished only by the confidential source.

[31] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
>
> (c) the conduct of proceedings referred to in clause (b)

[32] The term "law enforcement" has been found to apply to a municipality's investigation into a possible violation of a municipal by-law.[7]

[33] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[8]

[34] Except in the case of section 8(1)(e), where section 8 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[9]

[35] It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption.[10]

Section 8(1)(d): confidential source

[36] The institution must establish a reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances.[11]

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[7] Orders M-16, MO-1245.
[8] *Ontario (Attorney General) v. Fineberg (1994)*, 19 O.R. (3d) 197 (Div. Ct.).
[9] Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[10] Order PO-2040; *Ontario (Attorney General) v. Fineberg.*
[11] Order MO-1416.

[37] The town relies on the legal opinion referred to above. Having reviewed this document, I note that it does not provide any rationale for claiming the exemption at section 8(1)(d) apart from the fact that the section exists and absent consent of the affected party, it can be claimed. I note that during mediation, the town indicated that when the affected party submitted her complaint, she was assured that she could make the complaint anonymously. In her discussions with the mediator, the affected party referred to her understanding that she could make her complaint anonymously.

[38] In the Notice of Inquiry that I sent to the town and affected party I asked them to comment on the information relating to the dispute between the affected party and the appellant that has already been made public, and the impact this has on the application of the exemption.

[39] The affected party did not respond to this question. The town simply states that the appellant has been notified about the by-law issues and therefore has no need to know what is written in the letter of complaint. It notes further that the appellant has submitted an application for a minor variance and this application is currently before the Ontario Municipal Board.

[40] As I indicated above, complaints made about by-law infractions qualify as law enforcement matters, and where an individual who makes a complaint had a reasonable expectation that her identity would remain confidential, the exemption at section 8(1)(d) would apply. I accept that, at the time the affected party submitted her complaint, she had a reasonable expectation that her identity would remain anonymous.[12]

[41] However, previous orders have found that where a requester already knows the identity of the source, the section 8(1)(d) exemption will not apply.[13] Where the source consents to the disclosure of her identity and the information she provided, the exemption will not apply.[14]

[42] In my view, the letter prepared by a planner on behalf of the affected party is highly relevant to whether section 8(1)(d) applies in the circumstances of this appeal. As I indicated above, the letter appears to have been made public during a public meeting of the town, and a copy was provided to the appellant. The letter clearly identifies that the author is writing as an agent of the affected party, who is named in

[12] See, for example: Order MO-2238.
[13] Order P-1125.
[14] Order P-323.

the letter. In addition, there are several references to a letter written by the affected party regarding her complaints to the town.[15]

[43] In this case, the affected party has not consented to disclosure of her personal information. Nevertheless, by responding to the appellant's variance application, the affected party has made her identity known to him. Moreover, by way of the planner's letter, the affected party has made her complaint public. In these circumstances, I find that section 38(a), in conjunction with section 8(1)(d) does not apply to exempt the record at issue from disclosure.

PERSONAL PRIVACY

C: Does the discretionary exemption at section 38(b) apply to the information at issue?

[44] As I indicated above, section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[45] If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This approach involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

[46] It has previously been held by this office that sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. In particular, these orders have held that if the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under sections 14 or 38(b). Similarly, if any paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 14 or 38(b). These two provisions are relatively straightforward.

[47] The more complex analyses under sections 14 and 38(b) in previous orders have been conducted under sections 14(2) and (3). In both cases, previous orders have found that if any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the

[15] I note that in the planner's letter, he refers to the affected party's letter of "July 18, 2011." In fact, the letter was written on August 18, 2011 as a"brief" follow-up to the affected party's in-person meeting with the town on July 18, 2011. The planner's letter goes into greater detail with respect to the affected party's complaint.

information is presumed to be an unjustified invasion of personal privacy under either section 14(1) or section 38(b). Relying on the decision in *John Doe v. Ontario (Information and Privacy Commissioner),*[16] these orders have held that 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. Previous orders have also determined that if no section 14(3) presumption applies and the exception in section 14(4) does not apply, the various factors listed in section 14(2) or unlisted may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 38(b).[17]

[48] It is important to note that following the decision of the Divisional Court in *John Doe*, the early orders of adjudicators with this office assumed that the presumption at section 14(3)[18] would automatically apply in determining the outcome of the unjustified invasion of privacy analysis under section 38(b) without offering any analysis on the issue.[19]

[49] In my view, the approach previously taken by this office is at odds with the purpose and the wording of the *Act*, where the individual's right of access to their own personal information is at issue. The approach used in the past has incorporated wholesale the statutory language and analysis under the general right of access provisions at Part I of the *Act*, which the language of section 38(b)[20] does not mandate. As I explain below, the result of this approach has been to dictate that, in the case of certain types of records, neither the head of an institution nor the Commissioner's office on appeal can engage in a weighing of all relevant factors in the circumstances of a given case in determining whether disclosure would constitute an unjustified invasion of personal privacy of an affected party relative to the interests of the requester to whom the same information also relates.

[50] The adherence to the application of presumptions at section 14(3) under Part I of the *Act*, which are not found under the provision of Part II at issue here, has produced this outcome. The result has been that the balancing of the competing privacy interests at stake has not occurred where it should: at the stage of determining whether an exemption applies. Instead, this balancing of competing interests in the right of access versus non-disclosure has occurred at the second stage of the analysis for a discretionary exemption, where the head is obliged to exercise their discretion and determine whether to disclose a record despite the fact that the section 38(b) exemption applies.

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[16] (1993), 13 O.R. (3d) 767 (Div.Ct.).
[17] Orders P-239 and P-99.
[18] See also: section 21(3) of the provincial *Act*.
[19] See also: section 49(b) of the provincial *Act*. See, for example, Orders M-170 and P-548.
[20] Section 38(b) is found in Part II of the *Act*.

[51] In my view, this result is unsatisfactory for two closely-related reasons:

- It fails to account for the significant and equally important privacy interest individuals have in access to their own information and the need to examine and balance the competing privacy interests at the exemption stage of the analysis, and not at the limited review stage available to the Commissioner at the discretionary stage once the exemption has already been found to apply.

- It removes this balancing exercise from the independent reviewing authority of the Commissioner's office, which the legislature considered sufficiently important to be enshrined in the purpose of the legislation at section 1.

[52] In effect, the routine and mechanical application of *John Doe* whenever a presumption is found to apply limits the Commissioner's role to examining whether the head's discretion was properly exercised and, if not, to requiring the head to re-exercise their discretion in considering all relevant factors and excluding irrelevant ones. The Commissioner is constrained from weighing those factors and substituting her discretion for that of the head. Yet, as the Court of Appeal said in *Ontario (Ministry of Health)*,[21] this weighing of the competing privacy interests at stake and the determination of where the balance is properly struck lies at the heart of the Commissioner's area of specialized expertise. The Court stated further that this expertise extends to interpreting the provisions of the statute which, like section 38(b), incorporate an unjustified invasion of privacy test governing the circumstances in which the head is constrained from exercising discretion.

[53] Except where the legislature has plainly stated at section 14(3) that a particular disclosure under the general access provision of the statute would be presumed to constitute an unjustified invasion of personal privacy, it has left it to the Commissioner to make this determination after considering all relevant factors. In choosing not to refer specifically to section 14 at section 38 of the *Act*, or to directly incorporate all or part of that provision as a stand-alone exemption as it did at section 38(a), the legislature cannot be taken to have intended that the presumptions favouring privacy at section 14(3) should automatically apply.

[54] Accordingly, I have decided to revisit this approach in a case where a requester is seeking his own personal information, and the personal privacy analysis is being conducted under the discretionary exemption at section 38(b) of the *Act*.

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[21] *Ontario (Ministry of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner),* [2004] O.J. No. 4813 at paras. 28-38 and 41-48.

Does the reasoning in *John Doe* apply to an exemption claim made pursuant to section 38(b) of the *Act*?

[55] In revisiting this issue, it is important to frame the issue within the context of the purposes of the *Act* as set out in section 1:

[56] The purposes of this Act are,

> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
> (ii) necessary exemptions from the right of access should be limited and specific, and
> (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions *and to provide individuals with a right of access to that information*.

[57] In considering this issue, I have taken into account the comments made by former Assistant Commissioner Tom Mitchinson in Order PO-1715 and the decision in *Grant v. Cropley.*[22] I have also taken into consideration the comments made by the ministry, in which it argues that the analysis should be undertaken only in the context of the institution's exercise of discretion.

[58] In Order PO-1715, former Assistant Commissioner Mitchinson provided some very thoughtful comments on the decision in *John Doe,* the principle of *stare decisis* and the different considerations to be given to the presumptions at section 21(3) and the factors in section 21(2).[23] This discussion examines the impact of *John Doe* on the application of the mandatory exemption at section 21(1)[24] in considerable detail, and I have set out below significant portions of the former Assistant Commissioner's comments:

> **THE <u>JOHN DOE</u> DECISION**
>
> In certain circumstances, the presence of listed and/or unlisted factors under section 21(2) might indicate that disclosure of a record would not constitute an unjustified invasion of personal privacy. However, the

[22] *Grant v. Cropley* [2001] O.J. 749.
[23] The provincial *Act* equivalent to sections 14(3) and 14(2).
[24] The provincial *Act* equivalent to section 14(1).

Divisional Court's decision in the John Doe case (see page 2 of this order for a complete citation) states that factors under section 21(2) cannot rebut a presumption under section 21(3) once its application has been established.

By way of background, the John Doe decision was issued in a judicial review application that arose from an order made by this Office in 1991 (Order P-237). The appeal that led to Order P-237 concerned a request for access to records relating to an investigation undertaken by the Ontario Provincial Police into certain criminal activity. After considering representations from the Ministry of the Solicitor General, the requester and certain affected parties, former Commissioner Tom Wright [found that section 21(3)(b) applied in the circumstances of that appeal].

After discussing the particular and unusual fact situation surrounding the records and the appeal, the former Commissioner went on to consider the possible relevance of factors which might favour disclosure, including section 21(2)(a) (subjecting the activities of an institution to public scrutiny). He then concluded:

> Having carefully considered all of the circumstances of this appeal I find that the presumption contained in subsection 21(3)(b) has been rebutted. In my view, any invasion of the privacy of the four affected parties is outweighed by the desirability of subjecting the institution to public scrutiny and ensuring public confidence in the integrity of the institution. Although the disclosure of the information is, to a degree, an invasion of the four affected parties' privacy, in the unusual circumstances of this case I find that it is a justified, rather than an unjustified invasion. It is always a difficult task to balance the right of access with the right to privacy. In the circumstances of this appeal, I believe that the appropriate balance is in favour of access.

The affected parties applied for a judicial review of this decision to the Divisional Court.

In its decision on this judicial review, the majority of the Divisional Court overturned Commissioner Wright's order. One aspect of the decision concerned the relationship between sections 21(3) and 21(2), and the impact of a finding that one of the presumptions in section 21(3) was present. On this point, the court stated:

> Having found an unjustified invasion of personal privacy pursuant to s. 21(3)(b), and having concluded that none of the circumstances set out in s. 21(4) existed so as to rebut that presumption, the Commissioner considered both enumerated and unenumerated factors under s. 21(2) in order to rebut the presumption created by s. 21(3).
>
> The words of the statute are clear. There is nothing in the section to confuse the presumption in s.21(3) with the balancing process in s. 21(2). There is no other provision in the Act and nothing in the words of the section to collapse into one process, the two distinct and alternative processes set out in s. 21. Once the presumption has been established pursuant to s. 21(3), it may only be rebutted by the criteria set out in s. 21(4) or by the "compelling public interest" override in s. 23. There is no ambiguity in the Act and no need to resort to complex rules of statutory interpretation. The Commissioner fundamentally misconstrued the scheme of the Act. His interpretation of the statute is one the legislation may not reasonably be considered to bear. In purporting to exercise a discretion in the form of a balancing exercise, he gave himself a power not granted by the legislation and thereby committed a jurisdictional error.

Mr. Justice Southey, who issued dissenting reasons in John Doe on this issue, commented as follows at page 795:

> In my opinion, it is not clear whether the presumption raised under section 21(3) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (the "Act"), is rebuttable, or whether it can be overridden by the application of s. 21(4) or some other express provision of the Act. I am satisfied that the interpretation given to s. 21 by the Information and Privacy Commissioner (the "commissioner") in the order under review is one that the words of the section can reasonably bear, although I am not certain that it is the correct interpretation. The order should not be interfered with because of that interpretation.

The decision of the Divisional Court was not appealed.

STARE DECISIS **AND ITS APPLICATION TO JOHN DOE**

> The majority position in the John Doe decision has been followed in many appeals and orders of this Office since 1993. During this period, strong views have been expressed by many appellants that the Act should permit the consideration of factors which favour disclosure under section 21(2), even when the requirements of the section 21(3)(b) presumption have been established. To date, this Office has followed the approach that, because of the findings of the Divisional Court in John Doe, it is precluded from considering listed or unlisted factors favouring disclosure under section 21(2) in order to rebut a section 21(3) presumption.
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> In an effort to provide clarity on this controversial issue, I decided to seek representations in this appeal from a wide range of parties who have been impacted by the John Doe decision and the approach taken by this Office since it was issued by the Divisional Court in 1993. Unfortunately, none of these parties chose to submit representations, other than the Attorney General, who provided extensive representations.
>
> The parties were asked to provide representations on the question of whether the doctrine of *stare decisis* applies to administrative tribunals so as to require them to follow court decisions on point, and whether I am required to follow the Divisional Court's decision in John Doe.

[59] The Assistant Commissioner went on to discuss the case law relating to the issue of *stare decisis* and whether administrative tribunals are bound by court precedents. He noted at one point:

> The case law dealing with whether or when the doctrine of *stare decisis* applies to render higher court decisions binding on administrative tribunals is surprisingly limited. I would have expected that, given the overwhelming view that tribunals are not bound by their own decisions because of the importance of retaining unfettered discretion, this issue might have been considered more explicitly and in more detail. However, the Dairy Producers and Partagec cases cited by me in the Notice of Inquiry, and the Frontenac case referred to by the Attorney General, appear to be the three cases most directly on point. It is striking that none of the decisions appears to have involved any extensive review of the law on this point, and none of them provides clear authority for tribunals to follow.

[60] After considering the case law and arguments put forth by the parties in that appeal, the Assistant Commissioner concluded that "there is no definitive answer to the question of whether and when administrative tribunals are bound by the doctrine of

stare decisis to follow decisions of supervisory courts." Although he recognized that it may be necessary for this Office to revisit this issue, he determined that it was not necessary for him to do so in that appeal.

[61] The Assistant Commissioner then went on to weigh the factors in section 21(2) and balance the interests of the parties in a situation where family members were seeking information about a deceased relative. In doing so, the Assistant Commissioner stated:

> There are some listed and unlisted section 21(2) factors favouring disclosure of the son's personal information to his family members. The question I am addressing in this discussion is not whether these factors are sufficient to outweigh other factors favouring privacy protection under section 21(2). Rather, assuming for the moment that presumptions in section 21(3) are rebuttable, the question is whether the section 21(2) factors present in this appeal could outweigh the presumption in section 21(3)(b).
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> Former Commissioner Sidney B. Linden discussed the weight given to presumptions in Order 20, one of the early orders of the Office issued in 1988:
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> > Subsection 21(3) of the Act sets out a list of the types of personal information, the disclosure of which is to be presumed to constitute an unjustified invasion of personal privacy. Clearly subsection 21(3) is very important in terms of the privacy protection portion of the Act. It specifically creates a presumption of unjustified invasion of personal privacy and in so doing delineates a list of types of personal information which were clearly intended by the legislature not to be disclosed to someone other than the person to whom they relate without an extremely strong and compelling reason.
> > ...
> >
> > It could be that in an unusual case, a combination of the circumstances set out in subsection 21(2) might be so compelling as to outweigh a presumption under subsection 21(3). However, in my view such a case would be extremely unusual.
>
> The approach of the former Commissioner is consistent with the discussion of the personal privacy exemption found in Volume 2 of the Report of the Commission on Freedom of Information and Individual

Privacy/1980 (the Williams Commission report). This report formed the foundation for Ontario's freedom of information and privacy legislation. The Williams Commission recognized the need for an exemption to cover personal privacy, and discussed various models for implementing it. The report concluded that a "balancing" test should be embodied in this exemption, described as follows at page 326:

> In order to provide clearer guidance than is afforded in the [U.S.] 'unwarranted invasion of privacy' test, we propose that the test adopted in the statute meet these requirements:
>
> > the statute should, to the greatest extent possible, identify clearly situations in which there is an undeniably compelling interest in access;
> >
> > for those cases not resolved by such explicit provisions, a general balancing test should be stated with some indication of the factors to be weighed in an application of the test to a particular document;
> >
> > as part of the criteria set forth for the application of the balancing test, personal information which is generally regarded as **particularly sensitive** should be identified in the statute and made the subject of a presumption of confidentiality. [emphasis added]

In my view, whether presumptions created by section 21(3) are conclusive or rebuttable, the fact that the legislature chose to clothe the kinds of information listed in this section in the language of presumptions indicates that it considers these types of information to be in need of particular protection, though of course the individual circumstances of each case must be taken into account….

[62] After balancing all of the factors and the presumption, the former Assistant Commissioner determined that the section 21(2) factors were not sufficient to rebut the presumption in section 21(3)(b) in the particular circumstances of that appeal. He went on to make an "absurd result" finding to certain portions of the records and found that the remaining records were exempt under section 21(1).

[63] It should be noted that this decision, issued on September 17, 1999, was made before the amendments to the *Act* that included section 21(4)(d)[25] (compassionate reasons) and the decision in *Grant v. Cropley*. In addition, as I noted above, Order PO-1715 considered the personal privacy exemption under section 21(1) rather than under section 49(b).[26] Section 14(4)(c) is not at issue in this appeal; nor is section 14(1). Rather, the issues in this appeal are being analyzed under section 38(b), and the decision in *Grant v. Cropley* is relevant to this issue.

[64] In *Grant v. Cropley,* the Divisional Court reviewed my decision to uphold the Ministry of the Environment's decision to withhold the name of a complainant who had complained to that ministry that a company represented by the appellant was drawing large quantities of water from a lake.

[65] The record at issue in that appeal was an occurrence report that contained the name of the complainant, information about the complaint and the owner/representative of the named company. In Order PO-1706, I found that the record did not contain the appellant's (the owner of the company) personal information as he was identified in his professional capacity.

[66] Although the court disagreed with this finding, it upheld my decision stating:

> The Commissioner may have been wrong in finding that the occurrence report does not contain "personal information" of the applicant within the meaning of FIPPA because the report notes "private resident Peter Grant taking water without permit". However, this apparent error would not affect the Commissioner's decision that the applicant is not entitled to disclosure of the informant's name.

[67] The court then went on to discuss my analysis of the personal privacy exemption under sections 49(b) and 21(1):

> The applicant submits that the Commissioner should have found that the occurrence report contained personal information of the applicant and, therefore, the Commissioner should have considered the applicant's request for disclosure of the full, unedited occurrence report under Part III of FIPPA. The applicant submits that s. 47 in Part III gives the applicant a right of access to his own personal information. That would have led the Commissioner to the question of whether the informant's name is solely the applicant's personal information. The informant's written submission to the Commissioner consisted of a firm objection to disclosure of her/his name. The informant's objection would have been

[25] The provincial *Act* equivalent to section 14(4)(c).
[26] The provincial *Act* equivalent to section 38(b).

relevant to this question. The Commissioner would have been required to consider s. 49, which states in part:

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

We are satisfied that the informant's name, taken in conjunction with the fact of her/his complaint, constituted personal information of the informant. Since the refusal to disclose the informant's name was the issue under appeal, the Commissioner's determination of the issue in s. 49(b) would no doubt have been to refuse disclosure under Part III.

The Commissioner in fact determined that disclosure of the informant's name would constitute an unjustified invasion of the informant's personal privacy. The Commissioner did so pursuant to s. 21(2) FIPPA, which states in part:

> 21.(2) A head, in determining whether disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all relevant circumstances, including whether,
>
> …
>
> (f) The personal information is highly sensitive;
>
> …
>
> (h) The personal information had been supplied by the individual to whom the information relates in confidence;
>
> …

The Commissioner found that the facts came within clauses (f) and (h). That finding, in our view, was entirely reasonable.

In our opinion, the Commissioner's conclusion that disclosure of the informant's name would constitute an unjustified invasion of the informant's personal privacy would have been no different if it had been made under s. 49(b). The burden of proof, and the differing presumptions under Part II and Part III of FIPPA make little, if any difference when the facts respecting the potential invasion of the informant's personal privacy were as few and as clear as they were before the Commissioner.

In any event, the Commissioner's conclusion that the occurrence report did not contain the applicant's personal information was not unreasonable in the circumstances, even though the Commissioner may have been wrong. It was open to the Commissioner to conclude that the complaint was in fact about the company and not about the applicant personally, based on the Minister's submissions. The Commissioner considered the distinction between the company and the applicant and accepted that it was the company which was referred to in the occurrence report, and which was the subject of investigation. The Commissioner engaged in a rational analysis of the information before her and applied prior relevant decisions.

In concluding that disclosure of the informant's name would constitute an unjustified invasion of the informant's personal privacy, the Commissioner also relied on s. 21(3)(b) FIPPA which states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> …
>
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that the disclosure is necessary to prosecute the violation or to continue the investigation;
>
> …

If the Commissioner's analysis should have taken place pursuant to Part III, it would have been neither incorrect nor unreasonable for the Commissioner to consider the criteria mentioned in s. 21(3)(b) in determining, under s. 49(b), whether disclosure of the informant's name

> *would constitute an unjustified invasion of the informant's personal privacy.*[27]

[68] After considering former Assistant Commissioner Mitchinson's analysis and findings in Order PO-1715 and the comments made by the Divisional Court in *Grant v. Cropley*, for the reasons set out below, I find that it is not necessary to determine whether administrative tribunals are bound by *stare decisis*, because the decision in *John Doe* was decided under section 21(1). In my view, it is clear that, although, the Divisional Court has recognized a relationship between sections 14(1) and 38(b), it also recognizes that there is a distinction between the two personal privacy provisions, which exist in two distinct parts of the *Act* (parts II and III) of the provincial *Act* and parts I and II of the *Act*.

[69] Further, I am not persuaded that the only distinction between these two exemptions lies in the exercise of discretion as this aspect of the section 38(b) exemption only takes place once a finding has been made that disclosure of the personal information in the record would constitute an unjustified invasion. Following the ministry's reasoning, there would be no weighing of the interests of the parties in situations where a presumption has been found to apply. The ministry's argument addresses only the discretionary aspect of the exemption, but does not take into account the different wording of the section 14(1) and 38(b) exemptions.

[70] Many orders of this office have found a clear distinction between section 14(1) claims and section 38(b) claims. Of particular note is the wording used in each exemption.

[71] Section 14(1)(f) states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

[72] Whereas section 38(b) provides:

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

[27] My emphasis.

[73] It is significant that section 38(b) does not specifically incorporate section 14 or the presumption at section 14(3) by reference. Instead, the legislature chose to use general language of "an unjustified invasion of personal privacy" which does not automatically import the structure and substances of section 14.

[74] Moreover, it is apparent that the mandatory and prohibitive nature of section 14(1) is intended to create a very high hurdle for a requester to obtain the personal information of another identifiable individual where the record does not also contain the requester's own information. On the other hand, section 38(b) is discretionary and permissive in nature, which, in my view, reflects the intention of the legislature that careful balancing of the privacy rights versus the right to access one's own personal information is required in cases where a requester is seeking his own personal information.

[75] This distinction does not necessarily mean that a serious consideration of all of the factors and presumptions in section 14 should not be undertaken when applying section 38(b), as suggested above by the Divisional Court in *Grant*, where the court said that the Commissioner could:

> . . . consider the criteria mentioned in s.21(3)(b) [the equivalent provision in the provincial *Act* to section 14(3)(b)] in determining, under s. 49(b) [which is equivalent to section 38(b)], whether disclosure . . . would constitute an unjustified invasion of [a third party's] personal privacy.

[76] In my view, in order to make the distinction between sections 14(1) and 38(b) a distinction of substance, the approach taken under section 38(b) in assessing whether disclosure of the personal information in the record would constitute an unjustified invasion of privacy must involve a full balancing of the two competing interests, taking into consideration the factors and presumptions in sections 14(2) and (3) as part of that analysis. Applying the court's analysis and findings in *John Doe* effectively defeats this balancing of interests. In my view, this result is inconsistent with the legislature's intent in creating a separate, discretionary exemption claim that makes a distinction between an individual seeking another individual's personal information and an individual seeking his own personal information.

[77] A number of previous orders of this office have spoken about the unique aspect of section 38 where there is a question whether withholding the personal information in a record would lead to an absurd result.

[78] Order M-444 was one of the earliest orders to articulate this principle. In this case, former Adjudicator John Higgins found that non-disclosure of information which the appellant provided to the Metropolitan Toronto Police in the first place would contradict one of the primary purposes of the *Act*, which is to allow individuals to have access to records containing their own personal information unless there is a compelling

reason for non-disclosure. This reasoning has been applied in a number of subsequent similar orders of this Office and has been extended to include, not only information which the appellant provided, but information which was obtained in the appellant's presence or of which the appellant is clearly aware.[28]

[79] In Order MO-1323, I noted that this principle has been applied in circumstances where the institution has claimed the application of the personal privacy exemption in section 38(b) (or section 49(b) of the provincial *Act*). I also pointed out that the reasoning in Order M-444 has also been applied in circumstances where other exemptions (for example, section 9(1)(d) (relations with government) of the *Act* and section 14(2)(a) (law enforcement report) of the provincial *Act*) have been claimed for records which contain the appellant's personal information.[29] After reviewing the application of the "absurd result principle" in previous orders, I stated:

> In my view, it is the "higher" right of an individual to obtain his or her own personal information that underlies the reasoning in Order M-444 which related to information actually supplied by the requester. Subsequent orders have expanded on the circumstances in which an absurdity may be found, for example, in a case where a requester was present while a statement was given by another individual to the Police (Order P-1414) or where information on a record would **clearly** be known to the individual, such as where the requester already had a copy of the record (Order PO-1679) or where the requester was an intended recipient of the record (PO-1708).

[80] In Order MO-1323, I considered whether this principle should be applied in circumstances where the record (a tape recording from the appellant's deceased son's answering machine) did not contain the appellant's personal information, although she stated that she had heard the tape recording prior to the police taking it into evidence during their investigation into his death. After considering the rationale for the application of the absurd result principle, I concluded that it did not apply in the circumstances for the following reasons:

> In all cases, the "absurd result" has been applied **only** where the record contains the appellant's personal information. In these cases, it is the contradiction of this higher right of access which results from the application of an exemption to the information. In my view, to expand the application of the "absurd result" in personal information appeals beyond the clearest of cases risks contradicting an equally fundamental principle of the *Act*, the protection of personal privacy. In general, I find that the fact that a record does not contain the appellant's personal information weighs significantly against the application of the "absurd

[28] See, for example: Orders MO-1196, P-1414 and PO-1679.
[29] Orders PO-1708 and MO-1288.

> result" to the record. However, as I indicated above, all of the circumstances must be considered in determining whether this is one of those "clear cases" in which the absurdity outweighs the privacy protection principles.

[81] In the circumstances of that appeal, I found that having indirect knowledge about the contents of the cassette was very different from having listened to it first-hand. Consequently I did not apply the principle in that case.

[82] In Order MO-1449, I also had occasion to consider the absurd result principle in a situation where a family member was seeking information about the investigation into her brother's death. After considering the orders identified above, I observed that:

> The privacy rights of individuals other than the appellant are without question of fundamental importance. However, the withholding of personal information of others in certain circumstances, particularly where it is intertwined with that of the requesting party, would also be contrary to another of the fundamental principles of the *Act*: the right of access to information about oneself. Each case must be considered on its own facts and all of the circumstances carefully weighed in order to arrive at a conclusion that, in these circumstances, withholding the personal information would result in an absurdity.

[83] In that case, I determined that it would result in an absurdity to withhold information that the appellant provided to the police or was clearly aware of. However, I found that the evidence was unclear whether the appellant would have known other portions of the information at issue, and I was not prepared to find that withholding the information would result in an absurdity in those circumstances.

[84] In my view, the rationale for the manner in which the absurd result has been applied supports a determination that the exemptions found in Part II of the *Act,* under the heading "right of individuals to whom personal information relates to access and correction," requires a different approach and analysis to those listed in the general access provisions under Part I of the *Act*.

[85] Accordingly, I find, in determining whether the disclosure of the personal information in the record at issue in the current appeal would constitute an unjustified invasion of personal privacy under section 38(b) of the *Act,* that I am not bound by the decision in *John Doe*, which addressed only the application of section 14. Because *John Doe* and the current appeal are distinguishable on their facts, I find that it is not necessary for me to consider the question of whether and when administrative tribunals are bound by the doctrine of *stare decisis* to follow decisions of supervisory courts.

[86] As a result, I will consider, and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would constitute an unjustified invasion of personal privacy pursuant to section 38(b).

Section 38(b): personal privacy

[87] The town does not address this exemption in its representations, nor is it referred to directly in the legal opinion, although it clearly acknowledges that the request is for personal information.

[88] After reviewing all of the circumstances in this appeal, I find that the presumption at section 14(3)(b), which favours privacy protection and one unlisted factor, which favours disclosure, are applicable.

Section 14(3)(b): personal information compiled and identifiable as part of a law enforcement investigation

[89] Section 14(3)(b) states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[90] The presumption at section 14(3)(b) can apply to a variety of investigations, including those relating to by-law enforcement.[30]

[91] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.[31] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[32]

[92] Section 14(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.[33]

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[30] Order MO-2147.
[31] Orders P-242 and MO-2235.
[32] Orders MO-2213, PO-1849 and PO-2608.
[33] Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

[93] As I noted above, the record at issue is a letter of complaint regarding a possible by-law infraction. The town indicates that it contacted the appellant about the by-law infractions and he corrected the problem and then submitted an application for a variance. I am satisfied that the record was provided to the town as part of the by-law enforcement process and that it is identifiable as such. Accordingly, I find that the presumption at section 14(3)(b) applies to the record. In the following discussion, I will consider the weight to give this presumption, recognizing that, while the appellant is seeking his own personal information, the types of information set out in section 14(3) are generally regarded as particularly sensitive.

[94] As I noted above, the letter contains several distinct pieces of information: the affected party's name, addresses and telephone numbers; information about her own personal activities; the complaint, the impact the situation is having on the affected party and a concluding statement and request for a response from the town.

[95] The appellant has indicated that he does not seek the affected party's name. Since the appellant clearly knows the identity of the affected party, removing her name and disclosing the rest of the record is not a realistic option in the circumstances. Nevertheless, I find that the personal privacy interests of the affected party in maintaining her name, along with her addresses and telephone numbers in confidence is significant, as I noted in Order M-1146:

> **Privacy concerns relating to address information**
>
> I have considered the rationale for protecting the address of an individual. One of the fundamental purposes of the Act is to protect the privacy of individuals with respect to personal information about themselves held by institutions (section 1(b)).
>
> In my view, there are significant privacy concerns which result from disclosure of an individual's name and address. Together, they provide sufficient information to enable a requester to identify and locate the individual, whether that person wants to be located or not. This, in turn, may have serious consequences for an individual's control of his or her own life, as well as his or her personal safety. This potential result of disclosure, in my view, weighs heavily in favour of privacy protection under the Act.
>
> This is not to say that this kind of information should never be disclosed under the Act. However, before a decision is made to disclose an individual's name and address together to a requester, there must, in my view, exist cogent factors or circumstances to shift the balance in favour of disclosure.

[96] I find that the concerns identified in Order M-1146 are present in the current appeal. Accordingly, I give considerable weight to the presumption at section 14(3)(b) insofar as it would identify the affected party's name and her addresses and telephone numbers in the context of law enforcement, particularly.

[97] The appellant has made it clear that he only seeks to understand what issues the affected party had with his floating dock. A portion of the record contains information about the affected party's personal activities and concluding information regarding a response from the town. These have nothing to do with the content of her complaint about the appellant's dock. In my view, these portions of the record simply provide context in which the affected party writes the letter of complaint and her own personal communications with the town. As such, I find that the presumption at section 14(3)(b) weighs heavily in favour of privacy protection for this information.

[98] The remaining portions of the record contain the affected party's complaint and the impact of the situation on the affected party. As I noted above under section 8(1)(d), the affected party has, through her own actions, identified herself and has had her concerns made public through the planner's letter in response to the appellant's variance application. For the reasons outlined above in the section 8(1)(d) discussion, I do not give the section 14(3)(b) presumption much weight with respect to these portions of the record.

[99] I accept the ministry's position that information referred to in the presumption at section 14(3) "as a class, is very sensitive," and I am aware that important privacy interests are at stake in the by-law enforcement context, as evidenced by the inclusion of this type of information in section 14(3)(b) of the *Act*. In this case, however, the affected party has taken a public position which now impacts the appellant's interests in proceeding with his application. I find that the affected party's own actions have reduced her privacy interest, and thus the weight to be given to the presumption at section 14(3)(b) with respect to the nature and content of her complaint.

Unlisted factor favouring disclosure

[100] The town believes that since the appellant already knows about the complaint, there is no reason for him to require access to the actual letter. I do not agree with the town. The affected party's position has been defined and described by the planner in the context of the variance application, which has been tendered for the purpose of defeating the appellant's application. However, understanding the particulars of her position as it was contained in the complaint provides added context in the appellant's application process and his ability to reply to the affected party's public challenge.

[101] I find that withholding the exact nature and content of the complaint in the circumstances of this appeal effectively hinders the appellant's ability to pursue the avenues available to him, which may include addressing the affected party's concerns.

I am not persuaded that the *Act* should be used in a way that prevents individuals from exercising their legal rights. In my view, this is an unlisted factor favouring disclosure, but only with respect to the complaint and the impact the situation is having on the affected party. In the circumstances of this appeal, I give significant weight to this unlisted factor, particularly where the affected party has referred to it in challenging the appellant's application for a variance.

Does section 38(b) apply in the circumstances?

[102] As I noted above, one of the fundamental purposes of the *Act* as set out in section 1(a) is to:

> provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
> (ii) necessary exemptions from the right of access should be limited and specific, and
> (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information;

[103] Further, section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38(b) permits an institution to refuse to disclose the appellant's information where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy.

[104] Taken together, these sections of the *Act* require a meaningful assessment of the interests at stake. The town has provided only vague statements that barely go beyond the wording of the sections that it claims and the affected party did not respond to the Notice of Inquiry, although given several opportunities to do so. The circumstances of this appeal are somewhat unique in that the affected party has elevated her by-law complaint into a public objection to the appellant's variance application.

[105] After considering all of the circumstances of this appeal, including the importance of protecting personal information in the law enforcement context, I find that disclosure of information pertaining to the complaint and the impact the situation has had on the affected party would not constitute an unjustified invasion of the affected party's personal information under section 38(b), and it should be disclosed to the appellant. I have highlighted the information that should be disclosed on the copy of the record that I am sending to the town with this order.

[106] Because of the findings I have made in this order, it is not necessary for me to consider the issues that arise regarding the town's failure to exercise its discretion under section 38(a) and (b).

ORDER:

1. I order the town to provide the appellant with the highlighted portions of the record by **November 4, 2013** but not before **October 29, 2013**.

2. I uphold the town's decision to withhold the remaining portions of the record.

3. In order to verify compliance with this order, I reserve the right to require the town to provide me with a copy of the record disclosed to the appellant pursuant to order provision 1.

Original signed by: September 27, 2013
Laurel Cropley
Adjudicator