

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3086

Appeal MA13-163

Municipality of South Huron

August 22, 2014

Summary: The requester sought records under the *Municipal Freedom of Information and Protection of Privacy Act* related to specific addresses. The municipality advised that portions of the records would be withheld pursuant to sections 6(1)(b) (closed meeting), 10(1) (third party information), 12 (solicitor-client privilege) and 14(1) (personal privacy) of the *Act*. This order upholds the municipality's section 12 claim, partially upholds its sections 6(1)(b) and 14(1) claims, and does not uphold its section 10(1) claim. This order also upholds the municipality's search for responsive records.

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), 10(1), 6(1)(b), 12, 17, 14(1).

Orders and Investigation Reports Considered: Order MO-2221

OVERVIEW:

[1] The Municipality of South Huron (the municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for the following:

Property files and any other correspondence from owner, agent, lawyer, government official, general public etc. including orders, permits, etc.

[2] The requester listed a number of addresses for which he was seeking the above information. The requester also indicated that he wanted to examine the original records.

[3] The municipality then sent a fee estimate and decision regarding access to the requester. The municipality advised that portions of the records would be withheld pursuant to sections 10(1) (third party information), 12 (solicitor-client privilege) and 14(1) (personal privacy) of the *Act*.

[4] The requester (now the appellant) appealed the decision of the municipality. The requester also raised his concern that the municipality did not conduct a reasonable search for responsive records.

[5] During mediation, the mediator advised the appellant that the information that had been withheld under sections 10(1) and 14(1) of the *Act* was related to other individuals or organizations (affected parties) and could not be disclosed to him at the mediation stage without their consent. The appellant requested that the mediator notify the affected parties of the request.

[6] The mediator was able to contact two affected parties. One of the affected parties did not provide consent to disclose his information and the other did not respond. There were many other affected parties listed in the records that resided at the properties described in the request in the past years. The mediator was unable to contact these individuals as their current contact information was not available to her. The mediator discussed her attempts to contact the affected parties with the appellant. The appellant confirmed that he still wanted to pursue access to the records or parts of the records withheld pursuant to sections 10(1) and 14(1) of the *Act*.

[7] During mediation, the mediator also raised the possible application of sections 38(a) and (b) to those records that may contain the appellant's information. The municipality agreed with the application of sections 38(a) and/or (b) to those records that may contain the appellant's information.

[8] As a result of mediation, the municipality issued a revised decision to the appellant with an updated index. The municipality withdrew its reliance on section 12 of the *Act* to some of the records, and instead raised the application of section 6(1)(b) (closed meeting) to several of them. The municipality also applied section 38(a) of the *Act* to some of the records withheld pursuant to section 6(1)(b) (closed meeting). The municipality decided to disclose two records in full (Records 61 and 71) and one in part (Record 81). Accordingly, Records 61, 71 and part of 81 are no longer at issue.

[9] The appellant confirmed that he wanted to pursue access to all of the records or parts of the records that have been withheld by the municipality and advised that he disputed the late-raising of the discretionary exemption in section 6(1)(b) of the *Act* to the records. Accordingly, the application of the exemptions to the records and the late-raising of section 6(1)(b) of the *Act* are also at issue in this appeal.

[10] With respect to the adequacy of the search issue that more records should exist, the appellant explained that he expected to obtain records regarding notices and/or other correspondence with entities such as Tarion,¹ the Municipal Property Assessment Corporation, Huron County Planning and Health Unit, a conservation authority, the Ontario Provincial Police, the town's engineering, building, water and sewage, and treasury departments, the town's Chief Administrative Officer's office, the town's landfill manager, the town mayor's office and town councilors. In addition, the appellant indicated that more council meeting minutes about the properties should exist. The appellant indicated that some council meeting minutes are no longer available on the town's website.

[11] The municipality responded that it had conducted a thorough search of its property files related to the named addresses. The municipality submitted that if the organizations listed above had contacted the municipality, or vice versa, regarding any of the properties, this information would have been placed in the corresponding property file. As such, the municipality indicated that it had no reason to believe that records existed in any other department.

[12] The mediator shared the municipality's response about the search with the appellant. The appellant remained of the view that more records should exist. Accordingly, the reasonableness of the municipality's search remains at issue.

[13] No further mediation was possible. Accordingly, this file was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the municipality and the affected parties whose third party information is included in the records, as well as one affected person whose personal information may be contained in Records 77 and 81, seeking their representations.

[14] I received representations from the municipality. I also received consents from two affected parties consenting to the release of their information. These consents were forwarded to the municipality, with a request that it issue a supplementary decision letter. The municipality then issued two supplementary decision letters disclosing Records 2, 4, 8, 9, 10, 12, 13, 16, 62 and 63. Accordingly, these records are no longer at issue.

¹ Tarion administers the *Ontario New Home Warranties Plan Act*.

[15] The remaining affected parties that did respond to the Notice of Inquiry objected to the disclosure of their information in the records. None of these parties provided specific representations on the records that contain their information in response to the issues set out in the Notice of Inquiry.

[16] The appellant provided representations in response. I then sought and received reply representations from the municipality.

[17] In his representations, the appellant produced a copy of Record 35. Therefore, this record is no longer at issue.

[18] In this order, I uphold the municipality's section 12 claim, partially uphold its sections 6(1)(b) and 14(1) claims, and do not uphold its section 10(1) claim. I also uphold the municipality's search for responsive records.

RECORDS:

[19] The records remaining at issue consist of the withheld portions of the records found in the property files of 12 named addresses, more particularly described in the following table:²

Record Number	Property file address	Municipality's description of record	Exemptions applied by municipality
1	n/a	Letter from law firm dated December 19, 2012	12
3	Address#1	Internal email dated Sept. 11, 2012	10(1)
5	Address#2	Letter from law firm dated April 21, 2011	6(1)(b) & 38(a)
6	Address#2	Invoice dated 06/08/2011	10(1) and 12
7	Address#2	Statement	14(1)
11	Address#1	Statement	14(1)
14	Address#2	Report to Committee of the Whole dated January 28, 2013	6(1)(b) & 38(a)
15	Address#2	Agreement dated December 6, 2012	6(1)(b) & 38(a)
17	Address#2	Letter dated August 17, 2011	10(1)
18	Address#2	Email dated August 17, 2011	10(1)
19	Address#2	Letter dated August 28, 2001	10(1)

² Record 21 is a duplicate of Record 5. Record 22 is a duplicate of Record 6. As a result, I have removed Records 21 and 22 from this index.

Record Number	Property address	file	Municipality's description of record	Exemptions applied by municipality
20	Address#2		Agreement	6(1)(b) & 38(a)
23	Address#2		Letter dated March 31, 2009	6(1)(b) & 38(a)
24	Address#2		Letter dated October 6, 2008	12
25	Address#2		Invoice	12
26	Address#2		Invoice	12
27	Address#2		Invoice	12
28	Address#2		Invoice	12
29	Address#2		Invoice	12
30	Address#2		Invoice	12
31	Address#2		Letter dated June 2, 2011	12
32	Address#2		Invoice	12
33	Address#3		Letter dated October 4, 2012	10(1)
34	Address#3		Invoice	10(1)
36	Address#3		Letter dated December 5, 2011	10(1)
37	Address#3		Letter dated January 28, 2011	10(1)
38	Address#3		Letter dated January 28, 2011	10(1)
39	Address#4		Notice of Change of Ownership	14(1)
40	Address#4		Letter dated May 10, 2010	14(1)
41	Address#5		Letter dated July 13, 2006	14(1)
42	Address#6		Letter dated May 24, 2011	14(1)
43	Address#6		Court Order dated April 13, 2011	14(1)
44	Address#6		Committee of the Whole Closed Session dated March 7, 2011	6(1)(b)
45	Address#6		Letter from Law firm dated April 14, 2011	12
46	Address#6		Letter from Law firm dated March 30, 2011	12
47	Address#6		Letter from Law firm dated December 22, 2010	12
48	Address#6		Letter from Law firm dated November 25, 2010	6(1)(b)
49	Address#6		Court application record dated Nov. 2010	6(1)(b) & 38(a)
50	Address#6		Committee of the Whole Closed Session dated April 26, 2010	6(1)(b)
51	Address#6		email dated December 16, 2009	12
52	Address#6		Letter from Engineering Consultant dated December 10, 2009	10(1)

53	Address#6	email dated December 2, 2009	10(1)
54	Address#6	email dated December 3, 2009	10(1)
55	Address#6	letter from engineering Consultant dated November 30, 2009	10(1)
56	Address#6	Letter dated November 24, 2009	10(1)
57	Address#6	Property Standards Meeting Closed Session Minutes dated November 12, 2009	6(1)(b)
58	Address#6	email dated October 30, 2009	12
59	Address#6	email dated august 25, 2009	12
60	Address#6	Letter from Law firm dated August 17, 2009	12
64	Address#6	Council Closed Communication dated March 24, 2009	6(1)(b)
65	Address#6	Letter from Law firm dated February 24, 2009	12
66	Address#6	Council Meeting Closed session agenda, January 19, 2009	6(1)(b)
67	Address#6	Council Meeting Closed session Minutes, January 19, 2009	6(1)(b)
68	Address#6	Letter from Law firm dated March 4, 2008	12
69	Address#6	Closed session minutes, March 3, 2008	6(1)(b)
70	Address#6	Letter from Law firm dated January 8, 2008	12
72	Address#6	email dated June 25, 2008	6(1)(b) & 38(a)
73	Address#6	In camera minutes, December 17, 2007	6(1)(b) & 38(a)
74	Address#6	Letter from Law firm dated March 30, 2007	12
75	Address#6	Conditions of plea	12
76	Address#6	Letter from Law firm dated October 30, 2006	12
77	Address#7	email dated July 26, 2009	14(1) & 38(b)
78	Address#7	Letter dated December 14, 2009	14(1)
79	Address#7	Letter dated December 2, 2009	14(1)
80	Address#7	Notice of Change of Ownership	14(1)
81	Address#7	Memo	Partial/14(1) & 38(b)
82	Address#7	email dated January 5, 2009	14(1)
83	Address#7	Letter dated February 8, 2006	14(1)

84	Address#7	Notice of Change of Ownership	14(1)
85	Address#7	Letter dated February 6, 2006	14(1)
86	Address#8	letter dated April 4, 2007	14(1)
87	Address#8	Tax information	14(1)
88	Address#9	Notice of Change of Ownership	14(1)
89	Address#9	Letter dated March 12, 2012	14(1)
90	Address#9	Letter dated March 21, 2012	14(1)
91	Address#9	Fax dated March 21, 2012	14(1)
92	Address#10	Tax information	14(1)
93	Address#10	Fax dated July 8, 2002	14(1)
94	Address#10	Death Certificate	14(1)
95	Address#11	Letter dated November 11, 2012	14(1)
96	Address#11	Closed Session Report dated July 5, 2010	6(1)(b) & 38(a)
97	Address#11	Closed Session Meeting Minutes, May 17, 2010	6(1)(b) & 38(a)
98	Address#11	Closed Session Meeting Minutes, May 17, 2010	6(1)(b) & 38(a)
99	Address#11	Closed Session Meeting Minutes, May 3, 2010	6(1)(b) & 38(a)
100	Address#11	Closed Session Meeting Minutes, January 25, 2010	6(1)(b) & 38(a)
101	Address#11	Closed Session Meeting Minutes, January 15, 2010	6(1)(b) & 38(a)
102	Address#11	Note dated January 22, 2010	14(1)
103	Address#11	Note dated May 4, 2006	14(1)
104	Address#11	Letter dated April 8, 2002	14(1)
105	Address#11	Letter dated January 3, 2002	14(1)
106	Address#12	Email dated December 4, 2012	10(1) & 14(1)
107	Address#12	Letter dated August 23, 2012	10(1) & 14(1)
108	Address#12	Tax information	10(1) & 14(1)
109	Address#12	Fax Report dated August 28, 2012	10(1) & 14(1)
110	Address#12	Email dated August 3, 2011	10(1) & 14(1)
111	Address#12	Letter dated August 10, 2010	10(1) & 14(1)
112	Address#12	Letter dated August 18, 2008	10(1) & 14(1)
113	Address#12	Letter dated July 29, 2008	10(1) & 14(1)

[20] In addition, section 38(b) may apply to Records 77 and 81 as the personal information of the appellant and other identifiable individuals may be contained in these records.

ISSUES:

- A. Does the mandatory third party exemption at section 10(1) apply to the records?
- B. Should the municipality be allowed to raise the discretionary closed meeting exemption at section 6(1)(b) late?
- C. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- D. Does the discretionary closed meeting exemption at section 6(1)(b) apply to the information at issue?
- E. Does the discretionary solicitor-client privilege exemption at section 12 apply to the information at issue?
- F. Did the institution exercise its discretion under sections 6(1)(b) and 12? If so, should this office uphold the exercise of discretion?
- G. Does the mandatory personal privacy exemption at section 14(1) apply to the personal information at issue?
- H. Did the institution conduct a reasonable search for records?

DISCUSSION:

A. Does the mandatory third party exemption at section 10(1) apply to the records?

[21] Section 10(1) states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[22] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.³ Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.⁴

[23] For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

[24] In this order, I will first consider whether part 3 of the test has been met.

Part 3: harms

[25] To meet this part of the test, the institution and/or the third party must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient.⁵

³ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).

⁴ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

⁵ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

[26] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.⁶

[27] The need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 10(1).⁷

[28] Parties should not assume that harms under section 10(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.⁸

Analysis/Findings

[29] The municipality has claimed section 10(1) for Records 3, 6, 17-19, 33-38, 52-56, and 106-113.

[30] Records 3 and 18 are email chains. Records 17 and 19 are letters. The municipality did not provide representations on the application of section 10(1) to these records. It merely states that these records contain personal information of third parties that have not consented to the release of his information.

[31] Record 6 is an invoice from a law firm. Although the municipality has claimed both sections 10(1) and 12 for this invoice, it only provided representations on section 12. It states that:

This document was prepared for the Council by the solicitor for legal services related to address #2 and contains personal third party information.

[32] In the absence of representations about the application of section 10(1) to Records 3, 6, and 17-19, and based on my review of these records, I find that I do not have sufficient evidence to determine that section 10(1) applies to them.⁹ I will also consider below whether the solicitor-client privilege exemption in section 12 applies to Record 6. I will consider below whether the personal privacy exemption in section 14(1) applies to all these records.

⁶ Order PO-2020.

⁷ Order PO-2435.

⁸ Order PO-2435.

⁹ Order PO-2020.

[33] The affected party that is referred to in Records 33 to 36 only provided general representations and the only harm it was concerned about was that the appellant may use the information at issue for marketing purposes in competition with it.

[34] Record 33 is a cover letter from a law firm enclosing an invoice for legal services performed for the town. Record 33 consists of the cover letter only, not the invoice. The municipality states that:

This document contains third party information, including names, advice from a third party, and financial information. The third party has not provided consent to release the information.

[35] Record 34 is an invoice from an engineering firm to the municipality. The municipality states that this record contains third party information including names and financial information regarding a technical report by consulting engineers. I find that Record 34 does not contain any details about the contents of a report. It is merely a brief invoice indicating the time spent and amounts charged, as well as payment arrangements.

[36] Record 36 is a letter from an Ontario ministry to the municipality about stormwater management. The municipality states that this letter contains third party information including names and technical information provided in confidence by consulting engineers. The consulting engineers did not provide representations in response to the Notice of Inquiry sent to it. This letter was copied to four other organizations.

[37] Records 37 and 38 are copies of the same letter from a law firm to the municipality seeking information about clearances for a real estate closing. Record 37 includes a copy of the cheque for payment of the municipality's processing fees. The municipality states that this letter contains third party information and the third party has not consented to the release of his information.

[38] Record 52 and 55 are two letters from an engineering firm to the municipality. The municipality states that these letters contain third party information that includes technical and commercial information that was supplied in confidence and if released would result in similar information no longer being supplied to the municipality, when it is in the public interest that similar information be supplied. The engineering firm did not provide representations in response to the Notice of Inquiry sent to it.

[39] Record 53 is an email to the municipality from an affected party that consented to disclosure of its information in response to the Notice of Inquiry. Record 54 is an email to the municipality from an affected party that did not provide representations.

[40] The municipality states that Records 53 and 54 contain technical advice and financial information provided in confidence by a third party and consent to release has not been provided by the third party.

[41] Record 56 is a letter from the municipality to an affected party that did not provide representations in this appeal. The municipality states that this letter contains third party information including technical information about work to be completed by a professional engineer specific to a building's compliance with the Ontario Building Code. This information was required and requested by the municipality by way of requesting a letter of interest from engineering consultants.

[42] Record 106 and 110 are email chains. Record 106 has attachments. Records 107, 109, and 111 to 113 are letters to the municipality requesting a tax certificate for the same property. Record 108 is a tax certificate. The affected parties in these records objected to disclosure of their information in the records, but did not provide specific representations in response to the Notice of Inquiry.

[43] The municipality states that Record 106 and 110 contain technical information and that Records 107 to 109, and 111 and 113 contain financial information¹⁰ supplied in confidence and includes personal information of individuals that have not consented to the disclosure of the information.

[44] Based on my review of the representations I received and Records 33 to 38, 52 to 56, and 106 to 113, I find that I do not have sufficient information to find that disclosure could reasonably be expected to result in a reasonable expectation of harm to the third parties. In addition, I find that Records 33 to 38 do not contain information that could be used for marketing purposes as claimed by the affected party referred to therein.

[45] Therefore, I find that part 3 of the test under section 10(1) has not been met. Therefore, Records 33 to 38, 52 to 56, and 106 to 113 are not exempt under this section.

[46] As no other exemptions have been claimed for Records 33 to 38 and 52 to 56, and no other mandatory exemptions apply, I will order these records disclosed.

[47] I will consider below the application of the mandatory personal privacy exemption in section 14(1) to Records 106 to 113 and whether the discretionary exemption in section 12 applies to Record 6.

¹⁰ The municipality also states that Record 113 contains commercial information.

B. Should the municipality be allowed to raise the discretionary closed meeting exemption at section 6(1)(b) late?

[48] The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[49] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.¹¹

[50] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.¹² The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.¹³

[51] The parties were asked to consider the following:

1. Whether the appellant has been prejudiced in any way by the late raising of a discretionary exemption or exemptions. If so, how? If not, why not?
2. Whether the institution would be prejudiced in any way by not allowing it to apply an additional discretionary exemption or exemptions in the circumstances of this appeal. If so, how? If not, why not?

¹¹ *Ontario (Ministry of Consumer and Correctional Services v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

¹² Order PO-1832.

¹³ Orders PO-2113 and PO-2331.

3. By allowing the institution to claim an additional discretionary exemption or exemptions, would the integrity of the appeals process be compromised in any way? If so, how? If not, why not?

[52] The appellant states that he is against allowing the municipality the opportunity to rely upon additional exemptions. He points out that the municipality did not raise the issue of new exemptions until approximately four months after the period to raise them expired. He states that the late raising of exemptions is just one of a long list of delays.

[53] The appellant also points out that he did not receive a full index of records until the adjudication stage of his appeal and that some of the information requested was originally requested on October 29, 2009, which was never processed by the institution.

[54] Furthermore, the appellant states that a decision letter was not received by him and he was not made aware of his right to appeal. He also states that the municipality has not provided any evidence that it will be prejudiced if the exemptions are not allowed.

[55] In reply, the municipality disputes the appellant's allegations that the municipality has purposely delayed decisions. This issue has been addressed in numerous pieces of correspondence with the Information and Privacy Commissioner's office, noting both the broad scope and large scale of the requests, as well as numerous staffing issues that are outside the control of the municipal clerk. The freedom of information coordinator (the foic) also states that:

Many of the appellant's representations refer to documents that he has received. His representation states that he has received them but should have received them in 2013.

I have no way to change the date of release of these documents, this has not been identified as an issue in this inquiry and as such I have no comment.

Analysis/Findings

[56] As a result of mediation, the municipality issued a revised decision with an updated index and withdrew its reliance on section 12 of the *Act* to some of the records, instead raising the application of 6(1)(b) to some of them.

[57] Therefore, section 6(1)(b) was raised by the municipality before the adjudication stage of the appeal process and before the appellant had an opportunity to address the application of this exemption in his representations. In addition, the records that this exemption was applied to had already been claimed to be exempt under section 12.

[58] Although the appellant is upset with the municipality's processing of his request, he has not provided representations as to how he has been prejudiced by the late raising of section 6(1)(b).

[59] As the municipality has withdrawn its application of section 12 to the records at issue, I find that the municipality would be prejudiced if it is not allowed to apply section 6(1)(b) to these records, as not doing so would result in disclosure of the records, without consideration as to whether they are exempt.

[60] I find that in the circumstances of this appeal, the municipality should be allowed to raise the application of section 6(1)(b) late to the records at issue.

C. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[61] 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 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;

[62] 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.¹⁴

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

(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 (2.1) 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.

[64] 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.¹⁵

[65] 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.¹⁶

¹⁴ Order 11.

¹⁵ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

¹⁶ Orders P-1409, R-980015, PO-2225 and MO-2344.

[66] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.¹⁷

[67] The municipality did not provide specific representations on the personal information in the records.

[68] The appellant states that he has no interest in the actual personal information of other individuals and that this information can be redacted from the records. He does, however, state that he seeks access to the names of municipal employees, municipal contractors, as well as the professionals on documents that the consultants were hired to produce.

[69] The appellant further states that he is not interested in receiving information about private individuals, i.e. names, phone numbers, addresses etc., except where:

- the forms filled out by these individuals specifically state that this information is being collected and will be public, for example on a building permit application,
- or when consent was otherwise expressed,
- or when the information was given in a meeting open to the public or in an improperly held closed meeting.

Analysis/Findings

[70] The municipality has applied:

- section 38(a) to Records 5, 14, 15, 20, 21, 23, 49, 72, 73, and 96 to 101, thereby claiming that these records contain the personal information of the appellant,
- section 14(1) to Records 7, 11, 39 to 43, 77 to 95, and 102 to 113, thereby claiming that these records do not contain the personal information of the appellant, but do contain the personal information of other individuals, and
- section 38(b) to Records 77 and 81, thereby claiming that these records contain the personal information of the appellant and other individuals.¹⁸

¹⁷ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

¹⁸ For Records 77 and 81, the municipality has applied section 14(1) to part of these records and section 38(b) to other parts of these records.

[71] In addition, in its representations, the municipality states that Records 3, 6, 17 to 19, 25 to 32, and 51 contain the personal information of individuals other than the appellant.

[72] The municipality has stated with respect to the personal information in the records only that consent has not been provided.

[73] Based on my review of each record, I find that they do not contain the personal information of the appellant; therefore, section 38(b) cannot apply to them. I will review each record to determine whether they contain the personal information of other identifiable individuals.

[74] Record 3 is an internal email. Record 17 and 19 are letters containing information about an alleged complaint about a business owner's property condition. Record 18 is an email. Record 81 is a letter to a lawyer from the municipality. I find the information in these records is information about individuals in their business capacity, not their personal capacity. Therefore, the personal privacy exemption in sections 14(1) cannot apply. As no other mandatory exemptions apply to this information, I will order these records disclosed.

[75] Records 5 and 23 are letters from the municipality to an affected party that did not provide representations in this appeal. Record 14 is a report to council. Records 15 and 20 are agreements. Record 49 is an affidavit filed in court in support of an application under the *Building Code Act*. Record 72 is an internal email. Record 73 consists of in-camera meeting minutes. I find that the responsive information in these records is not the personal information of any other identifiable individuals, but is information about individuals in their business capacity. Therefore, the personal privacy exemption in section 14(1) cannot apply. I will consider below whether section 6(1)(b) applies to these records.

[76] Record 6 is an invoice for legal fees and Records 25 and 28 are invoices from the municipality, which are all addressed to an individual that is referred to in other records in his business capacity. As this individual has not provided representations in this appeal, I find that I do not have sufficient evidence to determine whether this record contains personal information. I will consider below whether section 12 applies to these records.

[77] Record 26, 27, 29, 30 and 32 are invoices from a law firm to the municipality about a company. Record 31 is a cover letter from the law firm enclosing invoices. Record 51 is an internal email. None of these records contain personal information. I will consider below whether section 12 applies to these records.

[78] Record 7 and 103 are internal statements. Record 102 is a letter from an individual in their personal capacity. These records contain views or opinions of individuals in their personal capacity in accordance with paragraphs (e) and (g) of the definition of personal information in section 2(1). These records do not contain the personal information of the appellant. I will consider below whether section 14(1) applies to them.

[79] Records 39 to 41, 78, 79, 80, 83 to 91, 93, 95, 104, 105, 107, 109, and 111 to 113 are letters from law firms to the municipality's tax, zoning and other departments related to property transfers. Record 92 and 108 are printouts of tax information. Record 77 is an email chain between the municipality and an individual about the appellant in his business capacity. Record 82 is an email between the municipality and an individual in their personal capacity about a property. The appellant has indicated that he is not interested in the personal information of the individuals listed in their personal capacity in these types of records. Once this information is severed from these records, the remainder of these records do not contain personal information. Therefore, the personal privacy exemption in section 14(1) cannot apply. As no other mandatory exemptions apply, I will order these records disclosed, less the personal information of the identifiable individuals which appear in their personal capacity.

[80] Record 42 is a cover letter to the municipality from a law firm and Record 43 is the enclosure to Record 42. This document is a publicly issued Court order with the municipality listed as the applicant and an individual listed as the respondent in both records. From my review of these records, I find that the respondent is listed in these records in a business capacity. Therefore, the personal privacy exemption in section 14(1) cannot apply. As no other mandatory exemptions apply, I will order Records 42 and 43 disclosed.

[81] Record 11 is an internal statement. Record 106 and 110 are email chains. I find the information in these records is information about individuals in their business capacity, not their personal capacity. Therefore, the personal privacy exemption in section 14(1) cannot apply. As no other mandatory exemptions apply, I will order these records disclosed.

[82] Record 94 is a proof of death certificate that was faxed to the municipality. Based on my review of the wording of the appellant's request, which sought property-related information, and my review of this record, I find that it is not responsive to the appellant's request. Therefore, I will order it withheld.

[83] Record 96 to 101 are reports to council and contain the name, contact and other personal information of identifiable individuals in their personal capacity. They do not contain the personal information of the appellant. I will consider below whether the mandatory personal privacy exemption in section 14(1) applies, as well as whether the

closed meeting exemption in section 6(1)(b) applies. In addition, a portion of Record 99 is not responsive to the appellant's request as it concerns a totally unrelated matter.

Conclusion

[84] I have found that the following records do not contain personal information and that no mandatory exemptions apply. I will order these records disclosed:

- Records 3, 11, 17 to 19, 42, 43, 81, 106, and 110.

[85] I have found that the following records do not contain personal information and I will consider below whether section 6(1)(b) applies to them:

- Records 5, 14, 15, 20, 23, 49, 72, and 73.

[86] I have found that the following records do not contain personal information and I will consider below whether section 12 applies to them:

- Records 6, 25 to 32, and 51.

[87] I have found that the following records contain personal information of other individuals and I will consider below whether section 14(1) applies to them:

- Records 7, and 96 to 103.

I will also consider whether section 6(1)(b) applies to Records 96 to 101.

[88] I have found that the following records are not exempt by reason of sections 14(1), once the personal information of individuals listed therein in their personal capacity is removed. I will order these records disclosed in a severed form:

- Records 39 to 41, 77 to 79, 80, 82, 83 to 93, 95, 104, 105, 107 to 109, and 111 to 113.

[89] I have also found that Record 94 and a portion of Record 99 are not responsive to the appellant's request and I will order this information withheld.

D. Does the discretionary closed meeting exemption at section 6(1)(b) apply to the information at issue?

[90] Section 6(1)(b) reads:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

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

1. a council, board, commission or other body, or a committee of one of them, held a meeting
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting¹⁹

[92] Previous orders have found that:

- “deliberations” refer to discussions conducted with a view towards making a decision;²⁰ and
- “substance” generally means more than just the subject of the meeting.²¹

[93] Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings.²²

[94] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera*.²³

[95] In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, was the purpose of the meeting to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting?²⁴

¹⁹ Orders M-64, M-102 and MO-1248.

²⁰ Order M-184.

²¹ Orders M-703 and MO-1344.

²² Order MO-1344.

²³ Order M-102.

²⁴ *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).

[96] With respect to the third requirement set out above, the wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution's *in camera* meeting, not merely the subject of the deliberations.²⁵

[97] The municipality has applied section 38(a) in conjunction with section 6(1)(b), to Records 5, 14, 15, 20, 23, 49, 72, 73, and 96 to 101.

[98] The municipality has applied section 6(1)(b) on its own to Records 44, 48, 50, 57, 64, 66, 67, and 69.

[99] The municipality's representations on each record are set out in the following chart:

Record #	Representations of Municipality
5	correspondence from a law firm that is a result of a direction from council to the solicitor following deliberations in a closed meeting of council
14	report provided to the Committee of the Whole during a meeting that was closed to the public
15	agreement made as a result of deliberations held in a closed meeting of council
20	draft agreement that was part of deliberations held in a closed meeting of council
23	letters written as a result of direction from council to the solicitor following deliberations held in a closed meeting of council
44	minutes of a Committee of the Whole meeting that was closed to the public
48	the municipality did not provide representations on the application of section 6(1)(b) to this record
49	court application record and this document is a draft only of an affidavit that includes the substance of deliberations by the Property Standards Committee
50	minutes of a Committee of the Whole meeting that was closed to the public
57	Property Standards Meeting Closed Session Minutes that include information regarding litigation or potential litigation in regards to a property standards matter
64	report to Council prepared for and received by council in a meeting closed

²⁵ Orders MO-1344, MO-2389 and MO-2499-I.

	to the public containing information regarding litigation or possible litigation.
Record #	Representations of Municipality
66	agenda for a closed meeting of council that includes information regarding litigation and to receive legal advice, as well as information pertaining to the possible acquisition of property
67	minutes for a closed meeting of council that include information regarding litigation and to receive legal advice, as well as information pertaining to the possible acquisition of property
69	closed meeting minutes of council that includes information regarding litigation and to receive legal advice, as well as employment salary and contract negotiations
72	email containing personal information of individuals other than the requester; permission has not been granted to release this information.
73	minutes for a closed meeting of council that includes information regarding litigation and to receive legal advice, as well as employee salary negotiations
96	closed session report prepared for and received by council at a closed meeting of council that includes information regarding possible litigation
97 to 101	closed session meeting of council minutes that includes information regarding litigation or potential litigation. In addition, Record 97 has a report included in the minutes [Record 98]

[100] The municipality states that section 239 of the *Municipal Act, 2001* authorized the holding of the meetings in the absence of the public for all the records at issue, except Record 72.

[101] The appellant provided detailed representations on each record, essentially stating that the municipality has not provided sufficient information for a determination that the section 6(1)(b) exemption applies.

[102] In reply, the municipality provided a copy of section 239 of the *Municipal Act, 2001*, as amended, which sets out the legislation regulating municipal council meetings and the exceptions to the provision that all meetings shall be open to the public. The FOIC states that:

I can assure the adjudicator and appellant that all by-laws, resolutions and minutes of meetings are approved at properly held Council meetings and have enclosed a copy of the Municipality of South Huron's procedural by-law, By-Law #71-2008, which is a bylaw adopting a procedure for governing the calling, place and proceedings of meetings of council, council committees and boards of council of the Corporation of the Municipality of South Huron...

I can assure you that the Municipality of South Huron is in compliance with the *Municipal Act's* meeting requirements. I trust this clarification addresses the appellant's concerns regarding meeting procedures for the Municipality of South Huron, although, these documents were also not requested at any time by the appellant, or raised as an issue in the inquiry.

Analysis/Findings

[103] The institution was asked in the Notice of Inquiry to provide answers to the following questions:

1. Did a council, board, commission or other body, or a committee of one of them, hold a meeting? If so, was the meeting held in the absence of the public? Please explain.
2. What is the statute and specific section that authorizes the holding of the meeting in the absence of the public? Was there a resolution closing the meeting to the public? Please explain, and provide a copy of the section and/or resolution.
3. Has a procedural by-law been passed under section 238(b) of the *Municipal Act* or any applicable analogous provision? Does the by-law include requirements for closed meetings? Please describe any such requirements and provide a copy of the by-law. Do these requirements pertain to the type of closed meeting that occurred in this case?
4. Were all required conditions for holding a closed meeting met? Were all required notices for holding a closed meeting provided to those entitled to notice? Please explain, and provide any relevant documentation.
5. Was a vote taken at the closed meeting? Was the vote authorized to be held at a closed meeting? If so, on what authority was the vote taken?
6. How would disclosure of the record reveal the actual substance of the deliberations at the meeting, and not merely the subject of the deliberations? Please explain, and provide evidence in support of your position.

7. Would the disclosure of any part of the record reveal the actual substance of the deliberations that took place at the closed meeting? If so, could any part of the record be disclosed?²⁶

[104] As well, the municipality was asked to provide representations on the application of the exception in section 6(2)(b), which reads:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,

- (b) in the case of a record under clause (1)(b), the subject matter of the deliberations has been considered in a meeting open to the public;

[105] In particular, it was asked:

Has the subject matter of the deliberations in question been considered in a meeting that was open to the public? Please explain.

Was a vote taken in a public meeting concerning the subject matter of the deliberations?

[106] As can be seen from the municipality's representations, set out above, the municipality did not address most of the questions set out in the Notice of Inquiry.

[107] I will now consider each type of record separately, considering both the contents of the record and the parties' representations.

Letters, agreements, and emails

[108] Records 5 and 23 are letters from a law firm to an affected party that did not provide representations in this appeal.

[109] Record 15 is an agreement between the municipality and this affected party. Record 20 is described as a draft agreement by the municipality; however, it is actually a copy of an agreement that was sent to this same affected party by the municipality. Record 15 is attached as an appendix to Record 20.

[110] The municipality did not provide representations on the application of section 6(1)(b) to Record 48. Record 48 is a letter from a law firm to the municipality enclosing Record 49 and advising of a scheduled court date. Although the municipality describes

²⁶ *St. Catharines (City) v. IPCO*, cited above.

Record 49 as a draft affidavit, the cover letter, Record 48, describes it as an issued affidavit filed in a court application.

[111] Record 72 is an email chain and makes no reference to a meeting of council or a committee of council or any meeting at all. The municipality only stated that this record contains personal information. I found above that this record does not contain personal information.

[112] These records make no mention of a meeting of a council, board, commission or other body or a committee of one of them. They refer to public orders made pursuant to the Building Code and the requirements of various municipal by-laws. As stated above, section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting.

[113] Accordingly, I find that I do not have sufficient information to determine that section 6(1)(b) applies to Records 5, 15, 20, 23, 48, 49, and 72. As no other exemptions apply, I will order these records disclosed.

Staff reports

[114] Record 14 is a staff report to the Committee of the Whole dated January 28, 2013. This record does not state that it is a report made to a closed meeting of council.

[115] Records 64, 96, 98 and 101 are staff reports to council. Only Record 64 states that it is for a closed session of council.

[116] The municipality did not provide representations about the actual closed meetings where these reports were received. However, I am able to ascertain from a review of the records that Record 98 is the report considered at the closed meeting as set out in the minutes at Record 97. Record 96 is a follow-up report to Record 98. In addition, Record 101 is the report considered at the closed meeting as described in the minutes of Record 100. I will consider the application of section 6(1)(b) to the reports at Records 96, 98 and 101 below when I consider the application of the exemption to the applicable minutes in Records 97 and 100.

[117] Concerning Records 14 and 64, I have not been provided with the minutes of the closed meeting demonstrating that disclosure of these records would reveal the actual substance of the deliberations of the meeting, required by part 3 of the test in section 6(1)(b).

[118] As I have not been provided with sufficient evidence to satisfy part 3 of the test in section 6(1)(b), I do not uphold the application of this exemption to Records 14 and 64. As no other exemptions apply, I will order the municipality to disclose Records 14 and 64 to the appellant.

Agendas

[119] Record 44 and 50 are each entitled "Committee of the Whole Closed Session Agenda". Record 66 is entitled "Council Meeting Closed Session Agenda". These records do not contain the actual substance of the deliberations of the meeting.

[120] In Order MO-2221, Adjudicator Catherine Corban found that part 3 of the test under section 6(1)(b) had not been met with respect to closed meeting agendas and supporting documentation, as disclosure would not reveal the actual substance of the deliberations as opposed to the subject of the deliberations. She stated that:

Based on my review of the records at issue in this appeal, they represent a collection of agendas describing items to be discussed at council meetings, along with any corresponding documentation that were put before council during those meetings to facilitate discussion about the agendas items. As noted above, the Township submitted no representations on this issue to explain how disclosure of the records for which section 6(1)(b) were claimed might reveal the substance of the deliberations of Township Council. I have reviewed the records closely and in my view their disclosure would not reveal the actual substance of the deliberations or discussions that took place leading up to any decisions that were taken on any of the issues to be addressed in any of the meetings.

Specifically, following the reasoning outlined by former Assistant Commissioner Mitchinson, I find that none of the severed information listed on all of the agendas (the information under the heading "items of discussion") would reveal the substance of the deliberations on those issues. The agendas simply list the subject matter of the issues that are intended to be addressed at the meetings.

[121] Accordingly, I find that Records 44, 50 and 66 do not meet part 3 of the test as disclosure would not reveal the actual substance of the deliberations as opposed to the subject of the deliberations and, therefore, do not qualify for exemption under section 6(1)(b). I will order these records disclosed less the portions that are not responsive to the appellant's request. I will order these non-responsive portions withheld.

Closed Session Minutes

[122] Record 57 is entitled "Property Standards Committee Meeting Closed Session Minutes". Records 67, 97 and 99 are entitled "Council Meeting Closed Session Minutes". Record 69 is entitled "Closed Session Minutes". Record 73 is entitled "Council Meeting in

camera minutes". Record 100 is entitled "Committee of the Whole Closed Session Minutes".

[123] Unlike the other records at issue, Records 69 and 73 do not contain a resolution closing the meeting as is required by section 239(4) of the *Municipal Act, 2001*. Therefore, part 2 of the test under section 6(1)(b) has not been met for Records 69 and 73 and I will order these records disclosed, less the portions of these records that are not responsive to the appellant's request.

[124] Record 98 is the report considered at the closed meeting minutes at Record 97 and Record 96 is a follow-up report to Record 98 and has a copy of Record 98 attached to it. In addition, Record 101 is the report considered in the minutes of Record 100.

[125] I find that Records 57, 67, 97, 99, and 100, as well as the reports at Records 96, 98 and 101 meet the requirements of section 6(1)(b). In particular, council, or in the case of Record 57, a committee of council, held a meeting. The *Municipal Act, 2001*, authorizes the holding of the meeting in the absence of the public and disclosure of these records would reveal the actual substance of the deliberations of the closed meetings. In addition, based on my review of the records, I find that the exception in section 6(2)(b) does not apply.

[126] Accordingly, subject to my review of the municipality's exercise of discretion, Records 57, 67, and 96 to 101 are exempt by reason of section 6(1)(b).

Conclusion

[127] I have found that the section 6(1)(b) exemption did not apply to Records 5, 14, 15, 20, 21, 23, 44, 48, 49, 50, 60, 64, 66, 69, 72, and 73. As no other exemptions apply, I will order these records disclosed, less the non-responsive portions of Records 44, 50, 66, 69, and 73.

[128] I have found that Records 57, 67, and 96 to 101 are subject to the exemption in section 6(1)(b).

E. Does the discretionary solicitor-client privilege exemption at section 12 apply to the information at issue?

[129] Section 12 states as follows:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

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

[131] Records 6, 25 to 30, and 32 contain information about legal fees. Records 51, 58 and 59 are email chains. Record 75 is also described in the municipality's index as an email. The remaining records at issue are letters from law firms to the municipality. The municipality provided the following representations:

Record Number	Representations
1	Subject to solicitor client privilege in order to protect direct communications of a confidential nature between solicitor and client, made for the purpose of giving professional legal advice.
6	document prepared for the Council by the solicitor for legal services
25 to 32	Subject to solicitor client privilege in order to protect direct communications of a confidential nature between solicitor and client. This document was prepared for the Council by the solicitor for legal services.
24	Subject to solicitor client privilege in order to protect direct communications of a confidential nature between solicitor and client. This document contains information that is protected by solicitor-client privilege and contains advice from the solicitor to the municipality.
45 to 47	This letter contains information that is subject to solicitor-client privilege, including advice from the solicitor to the municipality regarding on-going litigation.
51	This email contains information regarding direction to the municipal solicitor and is protected by solicitor-client privilege.
58 to 60	This email contains information that is protected by solicitor-client privilege including retaining advice for use in contemplation of litigation.
65	This letter contains information that is protected by solicitor-client privilege, including direction and legal advice from the solicitor to the municipality for use in litigation.
68	This letter contains information that is protected by solicitor-client privilege including legal advice or use in the contemplation of litigation.
70	This letter contains information that is protected by solicitor-client privilege, including legal advice from the solicitor for use in the contemplation of litigation.
74	This letter contains information that is protected by solicitor-client privilege including legal advice regarding an on-going property standards matter or use in the contemplation of litigation.
75	This email contains information that is protected by solicitor-client privilege, including legal advice from the solicitor to the municipality regarding the conditions of a plea of guilty by the defendant.

76	This letter contains information that is protected by solicitor-client privilege including legal advice regarding an on-going property standards matter or use in the contemplation of litigation, and includes a draft disclosure brief.
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[132] The appellant disputes the municipality's section 12 claim and also submits that any privilege has been lost or waived.

Analysis/Findings

[133] I will determine whether each type of record is subject to section 12.

Legal fees

[134] The question of whether legal billing information, including legal fees, is subject to solicitor-client privilege at common law has been the subject of many recent judicial decisions. The Supreme Court of Canada dealt with the issue in *Maranda v. Richer*,²⁷ which found this information to be presumptively privileged, unless the information is "neutral".

[135] In determining whether or not the presumption has been rebutted, the following questions will be of assistance: (1) is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege? (2) Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications? If the information is neutral, then the presumption is rebutted. If the information reveals or permits solicitor-client communications to be deduced, then the privilege remains.²⁸

[136] Record 6, 25 to 30, and 32 all contain legal fee information. Record 6 is a printout of total legal fees charged to the municipality and indicates that a copy of a law firm invoice is attached. Record 28 is dated the same date as Record 6 and appears to be an invoice from the municipality to an affected party that did not provide representations in this appeal, billing this affected party for the legal fees set out in Record 6. Record 28 also states that a copy of the law firm invoice is attached. Record 29 are pages 1 and 2 and Record 30 is page 3 of a three-page law firm invoice for the legal fees in Records 6 and 28. Record 28 indicates that Record 29 was provided to the affected party.

²⁷ [2003] 3 S.C.R. 193.

²⁸ Order PO-2484, upheld on judicial review in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769 (Div. Ct.); see also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).

[137] Record 25 appears to be another invoice from the municipality for legal fees to the same affected party. Records 26 and 27 are invoice summaries for these legal fees from a law firm to the municipality containing only the total amount of legal fees, disbursements and GST.

[138] Record 32 is a three-page invoice for legal fees on the same matter as in Records 6, and 25 to 30.

[139] Although the municipality claims that each record is privileged, its representations only indicate that Records 6, 25 to 30, and 32 were "prepared for the Council by the solicitor for legal services". There is no information in the municipality's representations on the particular information in each record or whether Council considered this information at an open or closed session. The appellant indicated in his representations that:

Invoices such as these are regularly presented to councillors in open meetings, they regularly are a part of the councillor's agenda package which is posted on the municipal website. To my knowledge this information has regularly been posted on the municipal website attached to the meeting agenda.

[140] The municipality did not reply to this assertion by the appellant that the invoices were presented in open meetings and posted on its website. Nor did the municipality provide representations on whether privilege has been waived, despite being requested to do so in the Notice of Inquiry.

[141] It appears from my review of the records that all of the information in Records 6, and 25 to 30 has been provided by the municipality to an outside party. I find that the presumption of solicitor-client privilege has not only been rebutted but that this privilege has been waived through the disclosure of the records to an outside party.

[142] Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

[143] Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege²⁹

²⁹ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

[144] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.³⁰

[145] Waiver has been found to apply where the record is disclosed to another outside party.³¹

[146] Waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.

[147] The common interest exception has been found to apply where, for example

- the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties³²
- a law firm gives legal opinions to a group of companies in connection with shared tax advice³³
- multiple parties share legal opinions in an effort to put them on an equal footing during negotiations, but maintain an expectation of confidentiality vis-à-vis others³⁴

[148] In this appeal, the affected party that was provided the information in Records 6 and 25 to 30 does not have a common interest with the municipality. Therefore, the common interest exception does not apply. I find that the municipality has waived privilege in these records. Section 12 does not apply to them and I will order Records 6, and 25 to 30 disclosed.

[149] The other law firm invoices for the same matter were provided to an affected party and the municipality did not rebut the appellant's claim that these invoices were considered in open council meetings and posted online. Accordingly, I also find that any privilege in Record 32 has been waived and I will also order it disclosed.

Letters and emails

[150] The remaining records are all letters or emails. Based on my review of these records and taking into consideration the parties' representations, I find that disclosure

³⁰ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669 see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.) and *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S.C.).

³¹ Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

³² *General Accident Assurance Co. v. Chrusz*, cited above and Order MO-1678.

³³ *Archean Energy Ltd. v. Canada (Minister of National Revenue)* (1997), 202 A.R. 198 (Q.B.).

³⁴ *Pitney Bowes of Canada Ltd. v. Canada* (2003), 225 D.L.R. (4th) 747 (Fed. T.D.).

of the remaining records for which section 12 has been claimed would reveal or permit solicitor-client communications to be deduced.

[151] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.³⁵

[152] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.³⁶

[153] The privilege applies to "a continuum of communications" between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.³⁷

[154] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.³⁸

[155] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.³⁹

[156] The remaining records all contain solicitor-client communications or are part of the continuum of communications of privileged information between a client, the municipality, and its counsel. Although some of the records may concern the appellant or his company as the appellant submits, all of the remaining records are subject to section 12 branch 1 communication privilege. I do not have evidence, as was the case with the invoices, that the privilege in these records has been waived.

[157] Although some records refer to litigation involving the appellant that the appellant claims is no longer ongoing, branch 1 communication privilege still applies to these records.

[158] Accordingly, I find that, subject to my review of the municipality's exercise of discretion, that Records 1, 24, 45 to 47, 51, 58 to 60, 65, 68, 70 and 74 to 76 are exempt under section 12.

³⁵ *Descôteaux v. Mierzewski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

³⁶ Orders PO-2441, MO-2166 and MO-1925.

³⁷ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

³⁸ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

³⁹ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

F. Did the institution exercise its discretion under sections 6(1)(b) and 12? If so, should this office uphold the exercise of discretion?

[159] The sections 6(1)(b) and 12 exemptions are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[160] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[161] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁴⁰ This office may not, however, substitute its own discretion for that of the institution.⁴¹

[162] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁴²

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information

⁴⁰ Order MO-1573.

⁴¹ Section 43(2).

⁴² Orders P-344 and MO-1573.

- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[163] I have found above that the discretionary exemption in section 6(1)(b) applies to Records 57, 67, and 96 to 101, which are minutes of closed meetings of council and its property standards committee, as well as the staff reports considered in these meetings.

[164] I also found above that the discretionary exemption in section 12 applies to the emails and letters in Records 1, 24, 45 to 47, 51, 58 to 60, 65, 68, 70 and 74 to 76, which contain legal advice or are part of the continuum of communications between a solicitor and the municipality.

[165] The appellant is concerned that the municipality in exercising its discretion improperly withheld the names of employees and contractors, as well as the appellant's own personal information.

[166] Based on my review of the records that I have found subject to sections 6(1)(b), and considering the municipality's entire representations, I find that the municipality exercised its discretion in a proper manner with respect to Records 1, 24, 45 to 47, 51, 57 to 60, 65, 67, 68, 70, 74 to 76, and 96 to 101. Therefore, I will uphold the municipality's exercise of discretion with respect to these records and find them exempt.

G. Does the mandatory personal privacy exemption at section 14(1) apply to the personal information at issue?

[167] I found above that Records 7, and 96 to 103, contain the personal information of other individuals. I also found that Records 96 to 101 were subject to section 6(1)(b).

Therefore, I need only consider whether Records 7, and 102 to 103 are exempt by reason of section 14(1).

[168] The municipality states that each record contains the personal information of individuals other than the appellant who have not consented to disclosure.

[169] The appellant states that he has no interest in actual personal information about private individuals. i.e. names, phone numbers, addresses etc., except where the forms filled out by these individuals specifically state that this information is being collected and will be public, for example on a building permit application, or when the information was given in an open meeting to the public.

Analysis/Findings

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

[171] In the circumstances, it appears that the only exception that could apply is section 14(1)(f), which allows disclosure if it would not be an unjustified invasion of personal privacy. Section 14(1)(f) states that:

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

the disclosure does not constitute an unjustified invasion of personal privacy.

[172] The factors and presumptions in sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f). Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy. Section 14(4) does not apply in this appeal.

[173] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies.⁴³

[174] In this appeal, the presumptions in section 14(3) do not apply.

⁴³ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

[175] If no section 14(3) presumption applies and the exception in section 14(4) does not apply, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.⁴⁴ In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.⁴⁵

[176] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).⁴⁶

[177] Based on my review of the records at issue, I find that none of the factors favouring disclosure in section 14(2) apply. Therefore, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies to Records 7, and 102 to 103.⁴⁷

H. Did the institution conduct a reasonable search for records?

[178] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.⁴⁸ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[179] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.⁴⁹ To be responsive, a record must be "reasonably related" to the request.⁵⁰

[180] The municipality states that experienced staff members, including staff members from its Corporate Services Department, Building Department and Finance Department, have collaborated to complete an extensive and thorough search of records. It states that the record search has exceeded a reasonable search, with considerable time and effort put into the initial response to the request, as well as the mediation and inquiry stages.

⁴⁴ Order P-239.

⁴⁵ Orders PO-2267 and PO-2733.

⁴⁶ Order P-99.

⁴⁷ Orders PO-2267 and PO-2733.

⁴⁸ Orders P-85, P-221 and PO-1954-I.

⁴⁹ Orders P-624 and PO-2559.

⁵⁰ Order PO-2554.

[181] The appellant disputes that a reasonable search has been carried out by the municipality and provided a list of records that he believes should have been located by the municipality.

[182] In reply, the municipality states that its staff completed an extensive search for records involving a number of staff members and hours of search time and that it does not know of any files or locations to search that have not already been searched exhaustively. It states that:

Many of the appellant's representations refer to documents that he has received. His representation states that he has received them but should have received them in 2013...

Throughout the representations of the appellant he states that he "assumes" or "expects" that documents exist and where they would be filed, as well as how various administrative procedures were carried out. Assumptions or expectations on the appellant's part are just that...

Analysis/Findings

[183] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.⁵¹

[184] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁵²

[185] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.⁵³

[186] I will now consider the particular records the appellant claims should have been located by the municipality.

⁵¹ Orders M-909, PO-2469 and PO-2592.

⁵² Order MO-2185.

⁵³ Order MO-2246.

[187] The appellant already has a copy of or will receive a copy of the following records pursuant to this order:

- Report to council which would explain why the lowest bidder was not chosen for a specific contract regarding a particular property.⁵⁴
- Letter of interest sent to engineering consultants re a particular address.⁵⁵
- Records related to actions spelled out in a letter dated Dec 11, 2009.⁵⁶

[188] The following information is outside the scope of the appellant's request, which sought property files and any other correspondence. The appellant will have to make another request in order to obtain access to this particular information:

- Contract agreement with a named company about a particular address.
- Demolition permit and accounting records related to a particular property.
- Invoices, statements, and receipts to owner of a particular property as per specific report to council.
- Accounting department accounts due and paid by property owners.
- Notices to Tarion and the Municipal Property Assessment Corporation by the municipality.
- Professional qualifications and registration of the municipality's building officials.
- Invoices, meetings, letters, emails etc. regarding a specific Order to Remedy.

[189] The appellant has not provided a reasonable basis for me to conclude that the following records exist:

- Council decision and instruction to staff to ignore property standard issues, brought to their attention by appellant during a specific property standards meeting regarding a particular property.
- Copy of landfill receipts re a particular address.

⁵⁴ Attachment HC4.

⁵⁵ Record 56.

⁵⁶ Records to be disclosed as a result of this order contain this information.

- Invoice and a receipt for a specific sign permit.
- Property complaints related to a specific address, some of which was discussed in open court.

[190] The appellant has not provided sufficient details concerning the following records:

- Records related to an occupancy issue in relation to a particular address.⁵⁷

[191] The appellant has already received disclosure of a very large number of records by the municipality in response to his request, which was quite broad, seeking property files and any other correspondence regarding a number of addresses.

[192] I find that the municipality has conducted a reasonable search for responsive records. I find that the appellant has not provided a reasonable basis for concluding that additional responsive records exist.

[193] Accordingly, I will uphold the municipality's search for responsive records.

ORDER:

1. I uphold the municipality's decision not to disclose Records 1, 24, 45 to 47, 51, 57 to 60, 65, 67, 68, 70, 74 to 76, 94, and 96 to 101 and the non-responsive portions of Records 44, 50, 66, 69, and 73. For ease of reference, I will provide the municipality with a copy of Records 44, 50, 66, 69, and 73 highlighting the information that should not be disclosed.
2. I order the municipality to disclose Records 39 to 41, 77 to 79, 80, 82 to 93, 95, 104, 105, 107 to 109, and 111 to 113, less the personal information of the individuals referred to in these records in their personal capacities. For ease of reference, I will provide the municipality with a copy of these records highlighting the information that should not be disclosed.
3. I order the municipality to disclose the remaining records or portions of records to the appellant by **September 29, 2014** but not before **September 24, 2014**.

⁵⁷ Section 17(1)(b) of the *Act* requires a person seeking access to a record to provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.

4. I uphold the municipality's search for responsive records.

Original signed by: _____
Diane Smith
Adjudicator

_____ August 22, 2014