Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3085

Appeal MA12-368-2

Town of South Bruce Peninsula

August 22, 2014

Summary: The town received a request for access to any records which refer to the requester, who is involved in a number of legal proceedings against the town, its staff and its elected officials. The town denied access to a number of records, claiming the application of sections 6(1)(b), 12, 11(d) and 8(1)(f). The town also claimed the application of the frivolous and vexatious provision in section 4(1) of the *Act*. In this order, the adjudicator upheld the town's decision respecting the application of sections 6(1)(b) and 12 to the majority of the records for which they were claimed. He did not uphold the town's claim regarding the application of sections 8(1)(f) and 11(d); nor did he affirm its reliance on the frivolous and vexatious provision in section 4(1). The town's exercise of discretion not to disclose the exempt records was also upheld.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 2(1) [definition of 'personal information'], 6(1)(b), 8(1)(f), 11(d), 12, 38(a).

Orders and Investigation Reports Considered: MO-2937.

Cases Considered: *Privacy Commissioner of Canada v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574.

OVERVIEW:

[1] The Town of South Bruce Peninsula (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to the following:

> All records regarding [the requester] or mentioning [the requester] or alluding to [the requester] in any way, from or to anyone or from or to any organization, and including internal correspondence and records. Including a letter from someone, possibly a lawyer, possibly the Town lawyer, possibly outlining proceedings that involve [the requester], and possibly advising against contact with [the requester], (with confidential information about others blocked out).
>
> Requesting records up to and including date of mailing of records.

[2] The town issued an interim decision to the requester with a fee estimate of $4,320.00. The town indicated that approximately 144 hours of staff time would be necessary to respond to the request and to prepare the records for disclosure. The town also provided its preliminary decision on access stating that the solicitor-client privilege exemption at section 12 of the *Act* would apply to records responsive to the second part of the request. The town requested a deposit of $2,160.00 pursuant to section 7 of Regulation 823 of the *Act*, prior to further work being undertaken to complete the request.

[3] The requester appealed the interim fee decision and appeal file MA12-368 was opened. During the mediation of that appeal, the requester decided to narrow his request to include only any records about him which appear in the files of six named individuals. Appeal MA12-368 was closed with the appellant's acceptance of a revised fee estimate of $20.00 and an extension of time to enable the town to locate the responsive records.

[4] Subsequently, the town issued a decision to the appellant granting partial access to the 157 responsive records which it located. Access was denied to the withheld portions of the records pursuant to the exemptions in sections 6(1)(b) (closed meeting), 8(1)(a) and (b) (law enforcement), 8(1)(f) (right to a fair trial), 11(d) (economic and other interests), 12 (solicitor-client privilege), 14(1) (invasion of privacy) and 15 (information published or available). In addition, the town claimed that portions of the request were frivolous and vexatious within the meaning of sections 4(1) of the *Act*.

[5] The town also charged a photocopying fee of $76.20 for the records.

[6] The appellant appealed the Town's decision to deny access to the withheld records.

[7] Shortly after receiving a request from this office for copies of the records, the town advised that it would not be providing copies of the records it believes are subject to solicitor-client or litigation privilege, based on the principles enunciated by the Supreme Court of Canada in *Privacy Commissioner of Canada v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574. In lieu of sending the records, on June 12, 2013 the town provided an affidavit to this office which described the records in some detail and set out the town's position on the application of the section 12 exemption to each of them, individually.

[8] However, the town provided this office with copies of records 26, 28, 32, 38, 71, 72, 73, 74, 99, and 156 that were withheld pursuant to the other exemptions which it has claimed, as well as an index of all of the records. The town also submitted that the appellant's request for records was prepared to assist him in his litigation against the town and that it was, accordingly, frivolous and vexatious within the meaning of section 4(1). It is the position of the town that the appellant is aware that these records are privileged legal documents and protected from disclosure pursuant to section 12 of the *Act*. In addition, the town informed the mediator that, in its view, the appellant's request for these records was frivolous and vexatious because he has requested this information before through different avenues and this request was part of a pattern of conduct that amounted to an abuse of the right of access.

[9] I note that the town has agreed to the disclosure of some 363 pages of records, upon payment of a fee of $72.60 for photocopying. The appellant has not made the required payment, nor has he attended at the town's offices or made some other arrangement for the delivery of these records. The appellant's bona fides in making this request has been questioned by the town in light of his demonstrated lack of interest in actually obtaining the records to which he is entitled under the *Act*.

[10] The mediator raised the possible application of sections 38(a) and 38(b) of the *Act* to the records, as they appear to contain the personal information of the appellant. The town agreed that the exemptions in sections 38(a) and (b) apply to the records and relies upon them, in conjunction with the other discretionary exemptions outlined above.

[11] The appellant advised the mediator that he was not interested in pursuing access to Records 32 and 156, which were withheld pursuant to section 15 of the *Act*. Accordingly these records, and the section 15 exemption, are no longer at issue in this appeal.

[12] As further mediation was not possible, the appeal was moved to the adjudication stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the town, a complete copy of which were shared with the appellant. In its representations, the town indicated that it is withdrawing its reliance on the exemptions in sections 8(1)(a) and (b) and 14(1), but that it continues

to claim the application of sections 38(a), in conjunction with sections 6(1)(b), 8(1)(f), 11(d) and 12 and section 38(b). The appellant also provided me with representations in response to the Notice.

[13] During the adjudication of the appeal, I wrote to the town requesting that it provide me with copies of records 6, 46, 50, 81, 100, 122 and 152-155 because the affidavit evidence submitted as to the contents of these records was inadequate for me to determine whether the exemptions claimed actually applied to them. The town provided copies to me, along with some further explanation of the circumstances surrounding their creation.

[14] In this order, I find that the majority of the records qualify for exemption under section 6(1)(b) or 12 while some of the remaining records are not exempt under any of the exemptions claimed and ought to be disclosed to the appellant. I also find that the request is not "frivolous or vexatious" within the meaning of section 4(1).

RECORDS:

[15] The 157 responsive records are described in an Index of Records that was provided to the appellant by the town on April 8, 2013. All but Records 32 and 156 remain at issue.

ISSUES:

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

B. Are the records exempt from disclosure under the discretionary exemption in section 38(a), taken in conjunction with sections 6(1)(b), 8(1)(f), 11(d) and 12 of the *Act*?

C. Are the records exempt from disclosure under the discretionary exemption in section 12 of the *Act*?

D. Are the records exempt from disclosure under the discretionary exemption in section 6(1)(b) of the *Act*?

E. Are the records exempt from disclosure under the discretionary exemption in section 11(d) of the *Act*?

F. Are the records exempt from disclosure under the discretionary exemption in section 8(1)(f) of the *Act*?

G. Did the town properly exercise its discretion to deny access to the records found to be exempt under section 38(a)?

H. Is the request "frivolous and vexatious" within the meaning of section 4(1) of the *Act* and the regulations?

DISCUSSION:

Issue A: Do the records contain "personal information" as defined in section 2(1) of the *Act*, and if so, to whom does it relate?

[16] 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,
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> (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,
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> (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;

[17] 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.[1]

[18] Sections 2(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.

[19] 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.[2] 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.[3] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[4]

[20] In this appeal, all of the records relate generally to the appellant's litigation with the town and the involvement in that litigation of various other individuals. The appellant is referred to in the records, in many cases through references to the various styles of cause of the legal proceedings initiated by the appellant. I find that the fact that the records refer to the appellant by name, along with reference to the fact that he has initiated the proceedings described therein, represents his personal information

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

within the meaning of paragraph (h) of the definition of that term, set out in section 2(1).

[21] While the records also identify a number of other individuals by name, I find that any references to these people arise in their official capacity as either the Mayor of the town, a town Councillor, a member of a committee or local board or as a staff person employed by the town. As a result, I find that the records are not about these individuals in a personal capacity and the disclosure of the information which refers to them would not reveal anything of a personal nature about these individuals. Accordingly, I find that the records do not contain "personal information" about any of these town officials or staff as contemplated by the definition of that term in section 2(1).

[22] I have found that the records only contain the personal information of the appellant, and not that relating to other identifiable individuals. As a result, the disclosure of the records would not result in an unjustified invasion of another person's personal privacy under section 38(b). Accordingly, I conclude that because the records do not contain personal information relating to anyone other than the appellant, they are not subject to the discretionary exemption in section 38(b). I will not, therefore, address this exemption further in this order.

Issue B: Are the records exempt from disclosure under the discretionary exemption in section 38(a), taken in conjunction with sections 6(1)(b), 8(1)(f), 11(d) and 12 of the *Act*?

[23] 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.

[24] 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.

[25] 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.[5]

[5] Order M-352.

[26] 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. In this case, the town relies on section 38(a) in conjunction with sections 6(1)(b), 8(1)(f), 11(d) and 12.

[27] Having found that the records contain the personal information of the appellant, I will now determine whether they are exempt under sections 6(1)(b), 8(1)(f), 11(d) and 12 and if so, whether they are then exempt under section 38(a). I will first determine whether the records qualify for exemption under the solicitor-client privilege exemption in section 12.

Issue C: Are the records exempt from disclosure under the discretionary exemption in section 12 of the *Act*?

[28] The records to which the town applied the solicitor-client privilege exemption in section 12 were compiled by the town as part of its defence of 8 legal proceedings begun by the appellant which involve the town, its staff or elected officials. The town retained outside counsel to represent it in some of these matters, while the town's insurers also provided it with legal representation with respect to others. Seven of these proceedings were commenced in the Superior Court of Justice and one was brought in the Small Claims Court.

[29] Section 12 states:

> 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.

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

Branch 1: common law privilege

[31] Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the town must establish that one or the other, or both, of these heads of privilege apply to the records at issue.[6]

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[6] Order PO-2538-R and *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

Solicitor-client communication privilege

[32] 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.[7] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[8]

[33] 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.[9]

[34] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[10] 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.[11]

Litigation privilege

[35] Litigation privilege protects records created for the dominant purpose of litigation, actual or contemplated.[12] In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, at pages 93-94,[13] the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
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> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to

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[7] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[8] Orders PO-2441, MO-2166 and MO-1925.
[9] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[10] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[11] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[12] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above see also *Blank v. Canada (Minister of Justice)*, cited above.
[13] Butterworth's: Toronto, 1993.

> conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.

. . . . . .

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

Branch 2: statutory privileges

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

Statutory solicitor-client communication privilege

[37] Branch 2 applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice."

Statutory litigation privilege

[38] Branch 2 applies to a record that was prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation." Termination of litigation does not affect the application of statutory litigation privilege under branch 2.[14] Branch 2 includes records prepared for use in the mediation or settlement of actual or contemplated litigation.[15]

Is the town a client for the purposes of section 12?

[39] As a preliminary question, I must first determine whether the town is a client with respect to the legal proceedings which form the basis for the solicitor-client privilege claim under section 12 with respect to the records identified as responsive. The town relies on my decision in Order MO-2937 involving these same parties and a decision respecting access to a single record which addressed litigation between the town and the appellant. In that decision, I found the record to be exempt under

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[14] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.
[15] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

section 38(a), in conjunction with section 12, on the basis that it represented a confidential communication between a solicitor and his client, in that case the town, in relation to various legal proceedings brought against the town, its staff and its elected officials by the appellant.

[40] In that order, I determined that the town was "involved in each of these proceedings, either as a named party or in a representative capacity on behalf of its staff and elected officials in the conduct of their official duties on behalf of the town." I then went on to conclude that "the town's involvement in any communications with counsel retained in each of these matters is that of a client of the law firm providing the advice. I concluded that, at the time the communication was made to the town staff and elected officials, there existed a solicitor-client relationship between them."

[41] I then went on to find that the record at issue in that appeal was directly related to the giving of legal advice by a solicitor to his clients, the town's staff and elected officials, about a legal matter "pertaining directly to the conduct of the litigation." As a result, I upheld the town's decision to deny access to the record under section 38(a), in conjunction with section 12.

[42] In the present appeal, the town argues that all of the records to which it has applied section 12 represent confidential communications passing between it, its employees and its elected officials and the solicitors who represent it in the legal proceedings begun by the appellant.

In his representations, the appellant provides extensive arguments disputing my findings in Order MO-2937. He argues that my conclusion that a solicitor-client relationship existed between the town, through its staff or elected officials, and the lawyer providing advice to it was "factually incorrect".

[43] To support this contention, the appellant has provided extensive representations outlining the reasons why he believes that the town was not involved in this litigation, either as a client or as the representative of one of its staff or elected officials who are named as a party to the litigation. The appellant contends that the payment of legal fees by the town on behalf of its elected officials or board members is authorized by the *Municipal Act*, but only fees incurred "as a result of proceedings arising out of facts or omissions done or made by them in their capacity as . . . or members". The appellant argues that a distinction must be made between the payment of legal fees incurred for acts made by them "in their capacity" as members and the payment of legal fees for acts done "while acting in their capacity as members". He argues that the legal proceedings he commenced involve, in part, defamation against him by members of various town boards or council. He suggests that defaming another individual is not part of a councillor or board member's duties, nor is it done "in their capacity" as members. Accordingly, he argues that the town is not permitted to pay legal fees

incurred in defending these actions until such time as a finding has been made that the "member did not defame or did not breach the *Municipal Conflict of Interest Act*."

[44] The appellant's arguments misconstrue the purpose behind the provisions in the *Municipal Act* which enable municipalities to cover the costs of legal proceedings brought against their elected and appointed council and board members. These provisions protect individual members of council and boards from personal liability for legal expenses incurred when defending legal proceedings against them for the actions and decisions they make while serving as councillors or board members.

[45] The appellant's legal proceedings are, in part, against individuals who were acting as councillors or board members at the time they took the action that the appellant complains of. The appellant's contention that he was defamed will ultimately be determined by the courts in which these actions were brought. In the meantime, the *Municipal Act* provides that the town may choose to cover the legal costs of these individuals in defending the actions. If the appellant's allegations are borne out, there may be some costs consequences against the defendants in these actions. The determination of fault lies with the court hearing the case and until that outcome is determined, the town has the right to cover the legal costs incurred by its staff and elected officials, contrary to what is argued by the appellant.

[46] Accordingly, I do not accept the arguments put forward by the appellant and will proceed to evaluate the propriety of the section 12 claims put forward by the town for the responsive records.

Are the records subject to solicitor-client privilege and, therefore, exempt under section 38(a), taken in conjunction with section 12?

[47] As noted above, in the present appeal the town argues that all of the records to which it has applied section 12 represent confidential communications passing between it, through its employees and its elected officials, and the solicitors who represent it in the legal proceedings begun by the appellant. It has provided me with a breakdown of each of the legal proceedings begun by the appellant, including a description of the individuals who are involved in each matter and the nature of the proceeding.

[48] Rather than providing me with copies of all of the records which are subject to the section 12 exemption, the town has instead, on the advice of its counsel, provided me only with a general description of some of the records, relying on the decision of the Supreme Court of Canada in *Privacy Commissioner of Canada v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574 as the basis for refusing to do so. However, as noted above, at my request the town provided me with copies of records 6, 46, 50, 81, 100, 122 and 152-155 in order to assist me in determining whether these records qualified for exemption under sections 6(1)(b) or 12. I will examine each of these records individually as follows:

- Record 6 is a letter from the town's legal counsel to the Commissioner's office respecting a request for the production of the records at issue in the appeal. Clearly, there can be no solicitor-client communication privilege in a document passing between a party and a tribunal. As no other exemptions have been claimed to apply to record 6, I will order that it be disclosed to the appellant.

- Record 46 is an exchange of emails passing between town staff and the former Chair of its Economic Development Committee which discuss the conduct of certain litigation initiated by the appellant against the former Chair. I find that the disclosure of this communication would reveal the specifics of legal advice given by legal counsel for the town's insurers about the litigation. Record 46 is, accordingly, exempt from disclosure under section 12.

- Record 50 is similar in content to Record 46 and involves communications passing between the town's insurer, its legal counsel, the former Chair and the town's Manager of Financial Services about the litigation initiated by the appellant. The town argues, and I agree, that these emails form part of the continuum of communications passing between a solicitor and his clients relating to a legal issue. Record 50 is, accordingly, also exempt under section 12.

- The town indicates that it is withdrawing its reliance on section 12 with respect to record 81. Because no other exemptions have been claimed for this document, I will order that it be disclosed to the appellant.

- Record 100, an email exchange passing between the town's Manager of Financial Services and a member of the Wiarton Business Improvement Association (the BIA), a committee of town council. The emails include specific information from legal counsel addressing the conduct of the litigation involving the BIA and the appellant. Again, I find that this email exchange represents part of the continuum of communications passing between the town's solicitor and his clients, including the BIA member. Record 100 is, accordingly, exempt under section 12.

- Record 122 is communication between the town's insurers and its Manager of Financial Services dated May 28, 2012. The emails directly address the town's legal rights and requests advice as to how to proceed to respond to certain actions undertaken by the appellant. In the circumstances and given the on-going nature of the various proceedings initiated by the appellant, I find that this communication also represents part of the seeking of legal advice by the town from its legal counsel, through its insurers. As a result, I find that this document also qualifies for exemption under section 12.

[49] With respect to records 152-155, which are the minutes of certain closed meetings of the town council, I will address the application of section 6(1)(b) to these records below. Given my finding in the discussion of the application of section 6(1)(b) to these records, it is not necessary for me to determine whether they also qualify for exemption under section 12.

[50] I find, however, that all of the remaining records to which the town has applied section 12 are exempt on the basis that they represent or contain confidential communications between a solicitor, either for the town or its insurers, and a client, in this case the town's staff or the parties to the litigation being represented by these counsel. On this basis, I conclude that records 2, 3, 4, 7, 29, 31, 33, 34, 35, 37, 39, 40, 41, 42, 43, 44, 45, 63, 64, 65, 67, 68, 69, 70, 75, 76, 77, 79, 80, 82, 83, 97, 101, 102, 103, 104, 109, 110, 111, 113, 115, 116, 118, 121, 124, 125, 126, 127, 128, 133, 137, 139, 140, 141, 143, 144, 146, 148, 149 and 157 qualify for exemption under section 12 and are, accordingly, exempt under section 38(a).

Issue D: Are records 26, 78 and 152-155 exempt from disclosure under the discretionary exemption in section 6(1)(b) of the *Act*?

[51] 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.

[52] For this exemption to apply, the town must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting

2. a statute authorizes the holding of the meeting in the absence of the public, and

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting

[Orders M-64, M-102, MO-1248]

Previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision [Order M-184]; and

- "substance" generally means more than just the subject of the meeting [Orders M-703, MO-1344].

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

[54] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera* (Order M-102).

[55] 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? [*St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.)]

[56] With respect to the third requirement set out above, the wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution's *in camera* meeting, not merely the subject of the deliberations (Orders MO-1344, MO-2389 and MO-2499-I).

[57] As part of its representations on this exemption, the town was specifically asked 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? [*St. Catharines (City) v. IPCO*]

The parties' representations

[58] The town argues that records 26, 78 and 152-155 qualify for exemption under section 6(1)(b). Record 26 is a motion from a town councillor with respect to an item for discussion at the council's January 17, 2012 closed session meeting respecting certain litigation then underway involving the town. Records 78 and 152-155 157 are minutes of closed meetings which took place on May 1, 2012, March 6, 2012, May 7, 2012, June 5, 2012 and November 20, 2012, respectively. The minutes provided to me by the town indicate that the meetings took place and that they were authorized by section 239 of the *Municipal Act* as they pertain directly to litigation in which the town was involved. The town also submits that the disclosure of the minutes would reveal the substance of the *in camera* discussion about the town's strategic position in the litigation under consideration at the meetings.

[59] The town notes that its November 20, 2012 meeting was the subject of an investigation undertaken by the office of the Ombudsman, who upheld the validity of the meeting and found that it had been properly constituted.

[60] The appellant takes the position that the town's decision to go *in camera* to discuss litigation matters was improper because, he argues, that the town was not a party to some of the litigation under consideration. He argues that because the litigation did not involve the town directly, it was not authorized by section 239 of the *Municipal Act* to go into closed session and the decision to do so was improper. As a result, he suggests that section 6(1)(b) has no application because the *Municipal Act*

does not authorize a municipality to go into a closed meeting for that reason, unless the litigation under discussion involves the municipality itself.

Findings

[61] Based on my review of the records and the representations of the town, I am satisfied that the meetings which are reflected in the minutes were held on the dates indicated. In addition, I find that section 239 of the *Municipal Act* authorizes the holding of a council meeting in the absence of the public in order to discuss litigation in which the town is involved. Despite the arguments of the appellant to the contrary, I find that the town, its staff and elected officials were involved as parties to the litigation under consideration at the closed meetings listed above and that the requirements for the holding of a closed meeting in the *Municipal Act* were complied with, a fact confirmed by the office of the Ombudsman with respect to the November 20, 2012 closed meeting. As a result, I am satisfied that the first two parts of the test under section 6(1)(b) have been satisfied.

[62] Record 26 is a brief report setting out an item for discussion by the town Council on January 17, 2012. The issue under discussion involves the town's participation in certain litigation and some concerns raised by a councillor about it. I find that the disclosure of record 26 would reveal the deliberations of council with respect to this item and that it satisfies the requirements of part three of the test under section 6(1)(b). As a result, I find that record 26 is exempt under section 38(a).

[63] Record 78 consists of page one of the minutes of a closed meeting of council which took place on May 1, 2012. I find that the disclosure of record 78 would reveal the actual substance of the deliberations of council that took place on that date. As a result, the third part of the test under section 6(1)(b) has been met and this record is exempt from disclosure under section 38(a), taken in conjunction with section 6(1)(b).

[64] Records 152-155 are excerpts from the minutes of closed meetings of council that took place on March 6, 2012, May 7, 2012, June 5, 2012 and November 20, 2012. Again, I find that the disclosure of these minutes would reveal the actual substance of the deliberations of council that took place on those dates. As a result, I conclude that these records are exempt from disclosure under section 38(a), taken in conjunction with section 6(1)(b) as all three parts of the test for that exemption have been met.

Issue E: Are records 6, 28, 38, 70, 71, 72, 73, 74, 81 and 99 exempt from disclosure under the discretionary exemption in section 11(d) of the *Act*?

[65] Section 11(d) states:

> A head may refuse to disclose a record that contains,

> information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

[66] The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report)[16] explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[67] For sections 11(b), (c), (d) or (g) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[17]

[68] 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 11.[18]

[69] The town only provided this office with copies of records 6, 28, 38, 71, 72, 73, 74 and 99. Because it claimed the application of section 12 to records 46, 50, 70, 81, 100 and 122, the town did not provide copies of these records to assist in my determination of whether they are exempt from disclosure under section 11(d). Had the records been made available to me, I may have better been able to understand the reasons behind the section 11(d) exemption claim, particularly in light of the paucity of evidence tendered to describe their contents.

[70] The town's representations on the application of section 11(d) to the records for which it is claimed do not address in any substantive way the contents of these records or how the exemption in section 11(d) might apply to them. I have reviewed each of the records which were provided to this office, as well as the brief descriptions of them in the Clerk's affidavit and the Index of Records and find that the exemption in section

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[16] Toronto: Queen's Printer, 1980.
[17] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[18] Orders MO-1947 and MO-2363.

11(d) does not apply to any of them. As a result, I find that records 6, 28, 38, 70, 71, 72, 73, 74, 81 and 99 are not exempt under section 11(d).

Issue F: Are records 6, 28, 38, 70, 71, 72, 73, 74, 81 and 99 exempt from disclosure under the discretionary exemption in section 8(1)(f) of the *Act*?

[71] Section 8(1)(f) states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > deprive a person of the right to a fair trial or impartial adjudication;

[72] 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.[19] The town must show that there is a "real and substantial risk" of interference with the right to a fair trial or impartial adjudication. The exemption is not available as a protection against remote and speculative dangers.[20]

[73] The only representations made by the town in support of the application of section 8(1)(f) to the records is the following:

> Section 8(1)(f) of the Act applies as the appellant has Litigation against the Town. Obtaining the deliberations between the Town and its solicitors would affect the legal position of the Town and wold give the appellant an unfair advantage at trial. The Town is not privy to the appellant's defence strategy and nor should the appellant be privy to the Town's.

[74] The town's representations indicate its concern about the disclosure of information that describes communications with its solicitors. I have found above, however, that the records which contain this information qualify for exemption under section 38(a), taken in conjunction with section 12. The town has not, however, provided me with sufficiently detailed and convincing evidence to establish a reasonable expectation of harm to a person's right to a fair trial or impartial adjudication. For this

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

[20] Order P-948; *Dagenais v. Canadian Broadcasting Corp.* (1994), 120 D.L.R. (4th) (S.C.C.); and Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, cited above.

reason, I find that section 8(1)(f) has no application to the records and they are not exempt on that basis.

Issue G: Did the town properly exercise its discretion to deny access to the records found to be exempt under section 38(a)?

General principles

[75] The section 38(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[76] 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.

[77] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[21] This office may not, however, substitute its own discretion for that of the institution.[22]

Relevant considerations

[78] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[23]

- 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

[21] Order MO-1573.
[22] Section 43(2).
[23] Orders P-344 and MO-1573.

    - 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
- 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.

[79] The town indicates that it considered whether to grant access to all of the requested information and determined that it would not do so. I note that many of the responsive records have been made available to the appellant as a result of this request, though he has declined to make arrangements for their delivery to him. The town suggests that the request was made with a view to obtaining information to assist the appellant in his legal actions against the town, its staff and elected officials. It argues that its decision to not grant access to the records was not made in bad faith and that there are no valid policy reasons to "override the protection afforded to solicitor-client privilege and litigation privilege in these circumstances."

[80] Further, the town relies upon my findings in Order MO-2937 in which I upheld the manner in which it exercised its discretion not to disclose a similar record to this same appellant. The town argues that it has taken a consistent approach to the information that is responsive to this request.

[81] The appellant submits that the records do not qualify for exemption under section 38(a) but suggests that if they do, the town ought to exercise its discretion to disclose them to him. He argues that he lives in the community and that the town tendered "no credible evidence that the release will cause harm to the public." I note that "harm to the public" is not the test required of section 38(a), in conjunction with

sections 12 and 6(1)(b). The town is only required to demonstrate that these exemptions apply and that it exercised its discretion in a proper manner, taking into account relevant factors and in good faith.

[82] Based on the representations of the town, the Clerk's affidavit and my own review of the records that were made available to this office, I am satisfied that the town exercised its discretion not to disclose information that is subject to the discretionary exemption in section 38(a), taken in conjunction with sections 12 and 6(1)(b) in a proper manner. In particular, I find that the town relied upon relevant, and did not rely on irrelevant, considerations in deciding not to disclose the exempt records. The appellant has been involved in a number of proceedings against the town, its staff and its elected officials and the communications and discussions reflected in these records relates directly to its conduct of those many proceedings. On that basis, I find that the town properly exercised its discretion and I uphold this aspect of its decision.

Issue H: Is the request "frivolous and vexatious" within the meaning of section 4(1) of the *Act* and the regulations?

[83] Section 4(1)(b) reads:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> > the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[84] Section 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the terms "frivolous" and "vexatious":

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
>
> (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
>
> (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

[85] Section 4(1) provides institutions with a summary mechanism to deal with frivolous or vexatious requests. This discretionary power can have serious implications on the ability of a requester to obtain information under the *Act*, and therefore it should not be exercised lightly.[24] An institution has the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious.[25]

[86] In support of its claim that the request qualifies as "frivolous and vexatious" for the purposes of section 4(1) of the *Act*, the town submits the following:

> . . . the Town denied access to some of the responsive records as it is felt to be frivolous and vexatious of the appellant to request the documents. As an example, Document 155 is the subject of Order MO-2937 for which the Town was not made to provide the documents. The appellant in 2012 has lodged 5 FOI requests and made two separate complaints for invasion of his personal privacy in 2012 and 2013. The requests have all been for all documentation containing his name and when the solicitor-client privilege documents are denied, he has appealed all decisions, with the exception of one. As in Order MO-1782, the 'requests encompass a very large number of records . . . He seeks every kind of record for multiple years from various sources or individuals and their assistants.'

[87] The town goes on to submit that the appellant posts information obtained through his requests under the *Act* on his internet blog as a means to embarrass and attack the town's staff and members of council.

[88] The appellant has not made any specific representations respecting the application of section 4(1) to the request beyond pointing out that the town's initial reliance on section 17(1.1) was incorrect.

[89] I find that the town has failed to meet its evidentiary burden in demonstrating the application of the frivolous and vexatious provisions to the request which gave rise to this appeal. I find that the town has not adequately substantiated that the request is part of a pattern of conduct that amounts to an abuse of the right of access or that the request would interfere with the operations of the institution, as is required under section 4(1)(a). The fact that the appellant made five requests and two privacy complaints under the *Act*, without some additional evidence as to the breadth of the requests or the responsive records, is insufficient to enable me to make a finding that the request is frivolous and vexatious under section 4(1)(a).

[90] Similarly, I find that the town has not provided me with sufficiently detailed evidence to support a finding that the request meets the requirements of section 4(1)(b). I find that the town has not provided a reasonable basis for concluding that

[24] Order M-850.
[25] Order M-850.

the request was made in bad faith or for a purpose other than to obtain access. As a result, I find that the request cannot be characterized as "frivolous and vexatious" for the purposes of section 4(1) and I decline to dismiss the appeal on that basis.

ORDER:

1. I uphold the town's decision to deny access to records 2, 3, 4, 7, 26, 29, 31, 33, 34, 35, 37, 39, 40, 41, 42, 43, 44, 45, 46, 50, 63, 64, 65, 67, 68, 69, 70, 75, 76, 77, 78, 79, 80, 82, 83, 97, 100, 101, 102, 103, 104, 109, 110, 111, 113, 115, 116, 118, 121, 122, 124, 125, 126, 127, 128, 133, 137, 139, 140, 141, 143, 144, 146, 148, 149, 152-155 and 157.

2. I order the town to disclose records 6, 28, 38, 70, 71, 72, 73, 74, 81 and 99 to the appellant by providing him with copies by **September 29, 2014,** but not before **September 23, 2014.**

3. I uphold the town's exercise of discretion and find that the request was not frivolous or vexatious under section 4(1) of the *Act*.

Original Signed By: August 22, 2014
Donald Hale
Adjudicator