

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3184

Appeal MA13-597

The Corporation of the Town of Cobourg

April 17, 2015

**Summary:** The appellant sought access to records relating to complaints made by members of the public about her garden. The town located a number of responsive records and denied access to those which would identify the individuals and a group who made the complaints. In this order, the adjudicator upholds the town's decision to deny access to the names of individuals who filed complaints with the town on the basis that the disclosure of this personal information would result in an unjustified invasion of their personal privacy under section 38(b). The town's search was also upheld as reasonable and the "public interest override" provision in section 16 was found to have no application. Information about a complainant who was an organization was ordered disclosed to the appellant as it did not qualify as "personal information".

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, definition of 'personal information' in section 2(1), sections 14(1), 14(2)(d), 14(3)(b) and 38(b).

**Cases Considered:** *Counter v. City of Toronto*, 2002 CanLII 26796 (ONSC), 2003 CanLII 48374 (ONCA).

### OVERVIEW:

[1] The Corporation of the Town of Cobourg (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

From the date of previous FOI request [August 19, 2013]

1. Copy of all complaints, attachments, reports, and staff notes pertaining to complaints about boulevard garden at [named address] and related actions.
2. Disclosure of identifying information of all complainants – request for information necessary due to resulting harassment of applicant above facilitated by named institution (process).

[2] After identifying the records considered responsive to the request, the town issued a decision granting partial access to them, while denying access to the withheld portions pursuant to the mandatory personal privacy exemption in section 14(1) of the *Act*.<sup>1</sup>

[3] The appellant appealed the town's decision to deny access to the withheld portions of the records to this office, which opened Appeal MA13-597 and appointed a mediator to explore the possibility of resolution. During mediation, the mediator raised the possible application of section 38(b) (discretion to refuse requester's personal information) to the records, rather than section 14(1), since the information in the records appears to relate to the appellant, as well as other identifiable individuals.

[4] The appellant explained that she had received several notices of violation from the town in relation to the boulevard garden at her home. She takes the position that she should be provided with access to the withheld information relating to those individuals who submitted complaints to the town about her garden because she believes that the complaints may be malicious or political in nature. The appellant suggests that knowing the identities of the complainants would assist her in making this determination.

[5] The town did not notify the complainants of the request under section 21(1)(b) of the *Act*.<sup>2</sup> However, the mediator attempted to seek their consent to disclosure of their names and contact information. Both complainants declined to provide consent for disclosure of their information. The town advised that without the complainants' consent, it would not disclose the withheld names and contact information. The town also advised the appellant that public complaints regarding possible violations of its by-laws are received and kept in confidence. Therefore, the town argues that disclosure of

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<sup>1</sup> The town initially and mistakenly identified the relevant exemption as section 21(2), which is part of the personal privacy exemption in the provincial *Act*.

<sup>2</sup> Section 21(1)(b) states: "A head shall give written notice in accordance with subsection (2) to the person to whom the information relates before granting a request for access to a record, ... (b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 14(1)(f).

the complainants' information would constitute an unjustified invasion of their personal privacy.

[6] The appellant advised the mediator that she wished to continue pursuing access to the complainants' names and contact information. The appellant also argues that there is a compelling public interest in disclosure of their names and contact information and provided the following rationale for her position:

In summary, a requirement to disclose of the names of the complainants would prompt the Town of Cobourg to reassess Town policies and procedures with regard to dispute resolution, to identify gaps and implement improvements, in the interest of transparency and openness of process; and/or, to include a right to appeal to an 'at arms-length' body in the matter of complaint driven municipal by-laws would advance good governance practices and better protect the public interest and rights of a citizen. ... officially knowing the names of the complainants would also provide me the option to seek remedy in protecting my rights as a citizen via legitimate channels.

[7] Since the appellant's position raises the possible application of section 16 of the *Act* to the records, it has been added as an issue for this appeal.

[8] The appellant also suggests that the town did not conduct a reasonable search for records because one form (page 41 of the records) indicates that there were 15-20 complaints about her garden, but there were only two written complaints in the records she received. The appellant points out that she did not receive copies of letters and presentations which the town has received that speak in support of her garden. She also thinks more records related to a conversation she had with the mayor should exist because he allegedly indicated during this conversation that he had spoken and corresponded with others about the appellant's garden. The appellant believes that the mayor relied on that information to make relevant decisions regarding her garden.

[9] When the mediator discussed the appellant's concerns about search with the town, staff clarified that it had received two written complaints, one of which (page 41) indicated that it was written on behalf of 15-20 people. The town states that it has never received a list of the people associated with that complaint. The appellant does not accept this explanation and remains convinced that the town has not conducted a thorough search for records.

[10] The town also advised the mediator that many of the records it provided to the appellant were not responsive to her request, but related to other properties where by-law infractions were issued regarding the gardens at those properties. The town claims that it provided more records than were requested to ensure that it had interpreted the appellant's request as broadly as possible. The appellant confirmed that she is not

interested in pursuing access to withheld information that relates to by-law infractions at properties other than her own. Accordingly, this information is not at issue. The appellant only wishes to pursue access to the names and contact information of the individuals that complained about her property and any other records with information withheld that related to her or her property. This narrowed the records at issue down to pages 7, 41, 45, 69 and 74.

[11] A mediated resolution of this appeal was not possible and it was transferred to the adjudication stage of the appeals process for an inquiry. The adjudicator assigned to the appeal sent a Notice of Inquiry to the town and to the two complainants, seeking their representations. In the Notice of Inquiry, the adjudicator asked the town to respond to all of the issues identified while the two complainants were asked only to address the possible application of the personal privacy exemption.

[12] The two complainants did not respond in writing, but when staff from this office contacted them by telephone, both expressed a strong opposition to disclosure of their names and contact information. The town provided a letter in response to the Notice which did not address any of the issues outlined for the town in the Notice of Inquiry. Instead, it raised for the first time explicitly the possible application of a new discretionary exemption, section 8(1)(d). Accordingly, the adjudicator provided the town with a Supplementary Notice of Inquiry to the town stating, in part:

The town's letter does not address the search issue described as Issue B. As outlined in the initial Notice of Inquiry, the appellant apparently believes that a list of individuals associated with one of the complaints ought to exist. It would be useful for the town to provide evidence of the searches conducted so as to establish what steps were taken to identify records that would be considered responsive to this request.

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The town cites, for the first time, the exemption in section 8(1)(d) of the *Act*. No decision letter has been issued to the appellant that cites this exemption. Accordingly, this adds the issue of the late raising of a discretionary exemption claim to this inquiry. I may or may not permit the town to claim a new exemption claim at this late stage of the appeal process. Whether or not I decide to do so will depend on the town's submissions supporting the new exemption claim. Institutions are required to claim discretionary exemptions not later than 35 days after the Notice of Mediation is sent by this office. Section 11.01 of the *IPC Code of Procedure* states:

In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a

new discretionary exemption claim only 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.

In this appeal, the Notice of Mediation was sent December 24, 2013 and the deadline for claiming additional discretionary exemptions was January 31, 2014. ...

[13] The town did not submit representations in response to the Supplementary Notice of Inquiry. Since the town did not provide any submissions to support the "late raising" of section 8(1)(d), or the discretionary exemption claim itself, the adjudicator determined that the town was not entitled to rely on section 8(1)(d). Accordingly, only section 38(b) is at issue in terms of the denial of access to the records.

[14] The adjudicator then provided a copy of the Notice of Inquiry to the appellant, who also submitted representations in response. The appeal file was then transferred to me to complete the adjudication.

[15] In this decision, I uphold the town's decision to deny access to portions of record 41 and all of the undisclosed information in records 45 and 69. I do not uphold the town's decision to deny access to the undisclosed portion of record 7 (which is identical to that in record 74) and to a portion of record 41 and I order it to disclose this information to the appellant. I also find that there is no compelling public interest in the disclosure of the records and section 16 has no application to them. Finally, I find that the town's search for responsive records was reasonable and I dismiss that aspect of the appeal.

## **RECORDS:**

[16] The information remaining at issue in this appeal is found in the withheld portions of pages 7, 41, 45 and 69. Although page 74 was also identified as being at issue, my review of this page reveals that it is identical to page 7.

## **ISSUES:**

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the personal information at issue?

- C. Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?
- D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 38(b) exemption?
- E. Did the town conduct a reasonable search for records?

## **DISCUSSION:**

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

[17] 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;

[18] 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.<sup>3</sup>

[19] 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.

[20] 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.<sup>4</sup> 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.<sup>5</sup>

[21] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>6</sup>

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<sup>3</sup> Order 11.

<sup>4</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>5</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>6</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

## **Analysis and findings**

[22] The undisclosed information in record 7 and the first severance in page 41 refer to an entity which is not a natural person. This information cannot, accordingly, qualify as "personal information" within the meaning of the definition of that term in section 2(1). As the information is not personal information, it cannot qualify for exemption under the personal privacy exemptions claimed by the town. As no other exemptions have been claimed for this information and no mandatory exemptions apply to it, I will order that the severance on page 7 and the first severance in page 41 be disclosed to the appellant.

[23] The remaining undisclosed information in record 41 consists of the name, address, telephone number of another identifiable individual. I find that this information qualifies as this person's "personal information" within the meaning of paragraphs (d) and (h) of the definition of that term in section 2(1).

[24] In addition, I find that the undisclosed information in records 45 and 69, consists of the telephone and fax number, as well as the email address of another identifiable individual. The telephone and fax numbers, as well as the email address given, appear to relate to a business entity. However, I find that examining the context in which the information appears and the subject matter of the email messages themselves, this information relates to this individual in his or her personal, rather than their professional, capacity. I find that the information is about this individual in their personal capacity as it describes their personal views (paragraph (e)), their email address, telephone and fax numbers (paragraph (d)) and their name, along with other personal information about them, as contemplated by paragraph (h).

[25] In addition, because the information in each of the records relates to complaints made about the appellant's property, I find that they qualify as her "personal information" under paragraph (g) of the definition, despite the fact that they do not refer to her by name. This information represents the views of the other two individuals about the appellant and her property and were disclosed to her by the town.

[26] To summarize, I find that the undisclosed portions at the bottom of page 41 and all of the undisclosed information on pages 45 and 69, qualify as the personal information of the individuals identified therein. Because all of the records contain the personal information of the appellant, the correct personal privacy exemption to be applied is the discretionary exemption in section 38(b) of the *Act*.



**Issue B: Does the discretionary exemption at section 38(b) apply to the personal information at issue?**

[27] Section 36(1) of the *Act* 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.

[28] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.<sup>7</sup>

[29] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy. I find that none of the circumstances outlined in section 14(4) apply to the personal information at issue in this appeal. In addition, I find that the only exception in section 14(1) which may apply in the circumstances of this appeal is section 14(1)(f), which reads:

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

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

[30] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.<sup>8</sup> 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 38(b). In the circumstances, it appears that the presumption at paragraph (b) could apply.

[31] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.<sup>9</sup> The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.<sup>10</sup>

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<sup>7</sup> See below under “Exercise of Discretion” for a detailed discussion of the institution’s discretion under section 38(b).

<sup>8</sup> Order MO-2954.

<sup>9</sup> Orders P-242 and MO-2235.

<sup>10</sup> Orders MO-2213, PO-1849 and PO-2608.

[32] The presumption can also apply to a variety of investigations, including those relating to by-law enforcement<sup>11</sup> and violations of environmental laws or occupational health and safety laws.<sup>12</sup>

[33] The town takes the position that the disclosure of the remaining portions of records 41, 45 and 69 would result in an unjustified invasion of the personal privacy of the individuals who are identified in them.

[34] Clearly, the personal information in the undisclosed portions relates to an investigation into a possible violation of law, the town's by-law 029-2013, which governs, in part, boulevard maintenance. I find that the presumption in section 14(3)(b) applies to the personal information relating to the other two individuals that is contained in records 41, 45 and 69 and that its disclosure is presumed to constitute an unjustified invasion of the personal privacy of the other two individuals.

[35] The appellant takes the position that the consideration in section 14(2)(d) applies to the personal information remaining at issue. This section states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information is relevant to a fair determination of rights affecting the person who made the request;

[36] For section 14(2)(d) to apply, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

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<sup>11</sup> Order MO-2147.

<sup>12</sup> Orders PO-1706 and PO-2716.

- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.<sup>13</sup>

[37] In support of her arguments in favour of a finding that section 14(2)(d) applies, the appellant submits that:

- The town's by-law which limits the height of vegetation on boulevards is a violation of "a legal right protected by the freedom of expression we enjoy in Canada under the *Charter of Rights and Freedoms*." She is of the view that this legal right to grow a natural boulevard garden has been recognized by the Ontario Superior Court in *Counter v. City of Toronto*,<sup>14</sup> which she argues recognized "gardening as a form of expression in and of itself". On this basis, she submits that the records relate to a legal right which she enjoys to maintain a natural boulevard garden. I note that in that case, both courts upheld the by-law's application to limit the right of individuals to grow and maintain boulevard gardens. I find, however, that this represents a legal right being exercised by the appellant as contemplated by the first part of the test under section 14(2)(d).
- The appellant argues that she has a right to know who has complained about her garden to the town. She also suggests that revised versions of the boulevard bylaw are unlikely to include provisions for an "identified process of investigation or appeal mechanism on which I, or other members of the public, can rely." The appellant has failed to identify a proceeding, either existing or contemplated, to which the right in question is related, as is required to satisfy part two of the test under section 14(2)(d). The complaints reflected in the records at issue in this appeal were addressed some time ago in prior proceedings under the application town by-law. These proceedings were resolved at that time.
- The appellant also submits that the personal information she is seeking "has bearing on related matters that have subjected me to having to repeatedly defend my rights as a citizen and as a councillor." Again, the appellant has failed to establish that the disclosure of the personal information in the records has some bearing on or is significant to the determination of some infringement on her rights. As a result, I conclude that the third part of the test under section 14(2)(d) has also not been met.
- The appellant's submissions with respect to the fourth part of the test do not address it and instead discuss the town's position respecting natural gardens and the need for fairness. Again, these submissions fail to address this aspect of the consideration under section 14(2)(d).

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<sup>13</sup> Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

<sup>14</sup> 2002 CanLII 26796 (ONSC), 2003 CanLII 48374 (ONCA).

[38] I conclude that the appellant has failed to establish the relevance or applicability of the factor listed in section 14(2)(d) to the personal information contained in the remaining records. Therefore, I will not consider its application when balancing the relevant considerations and presumptions.

[39] I have found that the presumption in section 14(3)(b) applies to the personal information at issue in records 41, 45 and 69 and that the consideration listed in section 14(2)(d) favouring disclosure does not apply. Balancing the appellant's right of access against the privacy interests of the individuals whose personal information is at issue, I find that its disclosure would give rise to an unjustified invasion of the personal privacy of these individuals and that it is, therefore, exempt from disclosure under section 38(b).

**Issue C: Did the institution exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?**

[40] The section 38(b) 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.

[41] 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.

[42] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>15</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>16</sup>

**Relevant considerations**

[43] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>17</sup>

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<sup>15</sup> Order MO-1573.

<sup>16</sup> Section 43(2).

<sup>17</sup> Orders P-344 and MO-1573.

- 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
- 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.

[44] The town submits that it considered whether the disclosure to the appellant of the personal information relating to other identifiable individuals would constitute an unjustified invasion of their personal privacy and determined that any such disclosure would do so.

[45] Based on the representations of the town and my review of the records themselves, as well as the information recorded by the mediator that was not a privileged communication, I am satisfied that the town properly exercised its discretion not to disclose the complainants' names and contact information sought by the appellant. I find that it did not rely on irrelevant or improper considerations in making its decision not to disclose the personal information to the appellant.

**Issue D: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 38(b) exemption?**

[46] Section 16 states:

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

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

[48] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.<sup>18</sup>

[49] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.<sup>19</sup> Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.<sup>20</sup>

[50] A public interest does not exist where the interests being advanced are essentially private in nature.<sup>21</sup> Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.<sup>22</sup> The word "compelling" has been defined in previous orders as "rousing strong interest or attention".<sup>23</sup>

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<sup>18</sup> Order P-244.

<sup>19</sup> Orders P-984 and PO-2607.

<sup>20</sup> Orders P-984 and PO-2556.

<sup>21</sup> Orders P-12, P-347 and P-1439.

<sup>22</sup> Order MO-1564.

<sup>23</sup> Order P-984.

[51] I note that in her representations, the appellant acknowledges that “[I]dentifying a complainant or two may be deemed not to be of compelling public interest.” I concur, and find that the appellant’s interest in pursuing the identities of two complainants who raised concerns with the town about her garden is strictly a private one. I find that there does not exist any public interest, let alone a compelling one, in the disclosure of the personal information of the two complainants identified in the records. There is nothing in the personal information in the records which would shed light on the operations of government or which would serve the purpose of informing or enlightening the town’s residents about the activities of its municipal government. As a result, I find that section 16 has no application in the current appeal.

**Issue E: Did the town conduct a reasonable search for records?**

[52] 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.<sup>24</sup> 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.

[53] 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.<sup>25</sup> To be responsive, a record must be "reasonably related" to the request.<sup>26</sup>

[54] 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.<sup>27</sup>

[55] 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.<sup>28</sup> The institution is required to provide a written summary of all steps taken in response to the request. In this case, the town has provided nothing in its representations regarding the nature and extent of the efforts it expended to identify and locate responsive records.

[56] 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.<sup>29</sup> The appellant’s representations focus on

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<sup>24</sup> Orders P-85, P-221 and PO-1954-I.

<sup>25</sup> Orders P-624 and PO-2559.

<sup>26</sup> Order PO-2554.

<sup>27</sup> Orders M-909, PO-2469 and PO-2592.

<sup>28</sup> Order MO-2185.

<sup>29</sup> Order MO-2246.

her belief that additional records pertaining to complaints made by a group of individuals ought to exist. Specifically, the appellant believes that a petition or a clear statement showing the names and addresses of any individuals who joined with the complainants identified in the records ought to exist. The town responded to this position during mediation, stating that no such petition or other information identifying other individuals who support the complainants named in the records exists.

[57] In the material provided during the intake and mediation stages of the processing of this appeal, the town demonstrated that, in response to the request, the Municipal Clerk contacted the Mayor and the Chief Administrative Officer requesting that they conduct searches of their record-holdings for responsive records. Clearly, the clerk also conducted searches of the town's record-holdings and located a large number of documents, most of which were disclosed to the appellant.

[58] During mediation, the clerk advised the mediator and the appellant that the only records that exist relating to complaints made about her garden were identified as records 7 and 41, which relate to the first complaint, and 45 and 69, which relate to the second complaint.

[59] Despite the lack of representations on this issue from the town during the inquiry, it is clear from the Mediator's Report and the non-privileged communications which the mediator documented in the file, that a great deal of energy and effort was expended by the town in responding to the appellant's request. I am satisfied, based on my review of all of the information available in the file that the town made a reasonable effort to identify and locate records responsive to the request. I further find that the town conducted reasonable searches for records relating to the complaints which it received about the appellant's garden. On that basis, I dismiss this aspect of the appeal.

## **ORDER:**

1. I order the town to disclose the severed information in record 7 and the reference in the middle of record 41 to the appellant by providing her with copies of this information by **May 25, 2015** but not before **May 19, 2015**.
2. I uphold the town's decision to deny access to the remaining information in record 41 and the undisclosed portions of records 45 and 69.



3. I find that the town conducted a reasonable search for responsive records and I dismiss this aspect of the appeal.

Original Signed By: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_ April 17, 2015