

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3543

Appeal MA15-95

Town of Oakville

December 19, 2017

Summary: This appeal arises from an access request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Town of Oakville (the town) for records relating to a job competition, an investigation, the commencement of a legal proceeding and this access request. The town denied access to the records. In this order, the adjudicator upholds the town's decision only in part. She finds that most of one record is not responsive to the request and that the majority of records are excluded from the scope of the *Act* by virtue of sections 52(3)1 and 52(3)3 (employment or labour relations). She upholds the personal privacy exemption in section 38(b) and the discretionary exemption in section 38(a) in conjunction with section 12 (solicitor-client privilege) for most of the records for which it was claimed. She does not uphold the exemption in section 38(a) in conjunction with section 7(1) (advice or recommendations). Lastly, she upholds the town's exercise of discretion and finds that the public interest override in section 16 does not apply.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2 (definition of personal information), 7(1), 12, 38(a), 38(b) and 52(3)1 and 52(3)3.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the Town of Oakville (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) in response to a request for records relating to the requester and to a named consulting firm for the period 2006 to date.

The request consists of 17 items, and is for continuing access for 2 years pursuant to section 17(3) of the *Act*.

[2] The town transferred one item to the Halton Regional Police Services Board for a response. The town also located responsive records with respect to the other parts of the request, and denied access to them, claiming the application of the exclusions in sections 52(2.1) (ongoing prosecution) and 52(3) (employment or labour relations) and the discretionary exemption in section 8 (law enforcement) of the *Act*.

[3] The requester, now the appellant, appealed the town's decision to this office.

[4] During the mediation of the appeal, the town advised the mediator that it would not change its decision with respect to access and that it was relying on additional exemptions to withhold some of the responsive records. The town then issued a revised decision letter to the appellant, advising that it was also relying on the discretionary exemptions in sections 12 (solicitor-client privilege), 13 (danger to safety or health) and 14 (personal privacy) of the *Act* to withhold some of the responsive records.

[5] The appellant advised the mediator that he would like to pursue the appeal at adjudication, and raised the possible application of the public interest override in section 16 of the *Act*. The town subsequently advised the mediator that it was no longer relying on section 52(2.1) of the *Act* to withhold the responsive records.

[6] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I sought representations from both the town and the appellant, but received representations only from the town.

[7] In its representations, the town advised that upon a closer examination of the records, it compiled a revised index of records, identifying the records that could now be disclosed either in whole or in part, to the appellant, as follows:

- Call File 1 – D2 in part, D5 in part, D6 in part, D10 in part, D18 and D20
- Call File 2 – D4 in part
- Call File 3 – D2 in part, D11 in part, D12 and D13
- Call File 4 – D24 in part, D25 in part and D26.
- Investigation 1 – D2, D9 in part, D13 in part, D17, D18 in part, D19, D22 and D27
- Investigation 2 – D4 in part, D8, D9, D10, D11 in part, D12, D20, D24 and D35 in part

- Medical Records – D1, D7, D8, D9, D10 in part, D12, D13, D20 in part, D30, D31, D32, D33, D34, D35, D40 in part, D42 in part, D47, D48 in part, D49 in part, D53 in part, D58 in part and D60 in part
- Retirement – D1, D2, D8 in part, D9 in part, D11, D12 in part, D14, D15, D16 in part and D17 in part.
- Consulting – D1-D26, D27 in part, D28-D31, D37-D39, D41-D42, D44-D61, D63-D69, D71-D72, D74, D88 in part, D100-D101 and D114 in part.

[8] Consequently, the records, or portions thereof, listed above are no longer at issue in the appeal. If the town has not already disclosed these records to the appellant, I will order it do so. In addition, in its index of records, the town added the exemption in section 7(1) (advice or recommendations) to some of the records, although it did not provide representations on this exemption.

[9] For the reasons that follow, I uphold the town's decision in part. I find that the majority of one record is not responsive to the request and that the majority of records are excluded from the scope of the *Act* by virtue of sections 52(3)1 and 52(3)3. I uphold the personal privacy exemption in section 38(b) to the record for which it was claimed, and the discretionary exemption in section 38(a) in conjunction with section 12 to most of the records for which it was claimed. I do not uphold the exemption in section 38(a) in conjunction with section 7(1). Lastly, I uphold the town's exercise of discretion and I find that the public interest override in section 16 does not apply. I order the town to disclose certain records to the appellant, as set out in the order provisions.

RECORDS:

[10] The records are categorized in the following batches:

1. Call File 1 – D1 to D20
2. Call File 2 – D1 to D12
3. Call File 3 – D1 to D28
4. Call File 4 – D1 to D26
5. Investigation 1 – D1 to D28
6. Investigation 2 – D1 to D38
7. Medical Records – D1 to D62
8. Personnel File – D1 to D4

- 9. Retirement – D1 to D17
- 10. Rosters and Lists – D1 to D4
- 11. Consulting – D1 to D114

ISSUES:

Preliminary Issue: Is record D109 (Consulting) responsive to the request?

- A. Does section 52(3) exclude the records from the *Act*?
- B. Do the records contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the discretionary exemption in section 38(b) apply to the information at issue?
- D. Does the discretionary exemption at section 38(a) in conjunction with section 7(1) apply to the records?
- E. Does the discretionary exemption at section 38(a) in conjunction with section 12 apply to the records?
- F. Did the institution exercise its discretion under sections 38(a) and 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Preliminary Issue: Is record D109 (Consulting) responsive to the request?

[11] In its index of records, the town indicates that most of record D109 in the batch of records entitled Consulting is not responsive to the request.

[12] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;

(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[13] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.¹

[14] To be considered responsive to the request, records must "reasonably relate" to the request.²

[15] Record D109 is a spreadsheet listing the names of individuals and businesses who made insurance claims in response to incidents involving them and the town. As previously stated, the request is for all records relating to the appellant and to a named consulting firm. On my review of Record D109, the only portion of it that is responsive to the request is the reference to the consulting firm located at page 49. The record does not contain any information about the appellant and the remaining portions of this voluminous record contain the personal information of other individuals and information about other businesses. I agree with the town that the information about other individuals and businesses is not responsive to the appellant's request and it will not be disclosed to him.

[16] The town has also claimed the application of section 14(1) to this record. I find that the responsive portion of this record, located at page 49, does not contain the personal information of an identifiable individual. Instead, it contains information about a consulting firm in a business capacity. Consequently, the personal privacy exemption in section 14(1) cannot apply. However, as explained below, I find that this information is excluded from the scope of the *Act*, as it meets the requirements of the three-part test in section 53(3)1.

Issue A: Does section 52(3) exclude the records from the *Act*?

[17] Section 52(3) states, in part:

¹ Orders P-134 and P-880.

² Orders P-880 and PO-2661.

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[18] If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

[19] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.³

[20] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.⁴

[21] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.⁵

[22] Section 52(3) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Act*.⁶

[23] The exclusion in section 52(3) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees.⁷

[24] The type of records excluded from the *Act* by section 52(3) are documents

³ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

⁴ Order PO-2157.

⁵ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

⁶ Orders P-1560 and PO-2106.

⁷ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.) (*Goodis*).

related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.⁸

Section 52(3)1: court or tribunal proceedings

[25] For section 52(3)1 to apply, the institution must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and
3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

[26] The word "proceedings" means a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue.⁹

[27] The word "court" means a judicial body presided over by a judge.¹⁰

[28] The proceedings to which the paragraph appears to refer are proceedings related to employment or labour relations per se – that is, to litigation relating to terms and conditions of employment, such as disciplinary action against an employee or grievance proceedings. In other words, it excludes records relating to matters in which the institution has an interest as an employer. It does not exclude records where the institution is sued by a third party in relation to actions taken by government employees.¹¹

[29] The town submits that all three parts of section 52(3)1 have been met in that the records were prepared and/or used on behalf of the town in relation to a human rights complaint and court matter involving the appellant, and that the proceedings were about the employment of persons by the town and labour relations matters.

[30] I am satisfied that some of the records at issue are excluded from the scope of the *Act* by virtue of the application in section 52(3)1. In particular, records D21 to D36 located in the batch of records entitled Investigation #2 meet the requirements of the three-part test in section 52(3)1. These records, I find, were prepared and/or used by the town in connection with an actual legal proceeding before a court. The proceeding

⁸ *Ministry of Correctional Services*, cited above.

⁹ Orders P-1223 and PO-2105-F.

¹⁰ Order M-815.

¹¹ *Ministry of Correctional Services*, cited above.

relates to the town's employment of two individuals, including the appellant. I distinguish the circumstances of this case with those in *Goodis*, as this is not the case where a third party is suing the town, based on the actions of its employees. In this case, the legal proceeding directly relates to the appellant's employment with the town. Consequently, I find that records D21 to D36 of Investigation #2 are excluded from the scope of the *Act*. Similarly, I find that records D40 and D43, and the remaining information in D109 of the Consulting records are also excluded from the scope of the *Act*. These two records were prepared by the town in relation to an actual court proceeding and relating to the appellant's employment with the town, meeting the requirements of the three-part test in section 52(3)1.

[31] Conversely, I find that other records for which the town has claimed the application of section 52(3)1 are not excluded from the scope of the *Act* because the requirements of three-part test have not been met. These records are D27, D31 through D36, D43, D62, D70, D73, D88, D91 through D99, D102 through D108 and D114 contained in the batch entitled Consulting. While the records were prepared and/or used by the town, I do not find that this preparation and use was in relation to a proceeding or anticipated proceeding. In my view, the town has adopted an overly broad approach to the exclusion, and has not established a substantial connection between these specific records and a proceeding or anticipated proceeding. The town is claiming the exclusion in section 52(3)3 to some of these records and exemptions to the rest, which I consider below.

Section 52(3)3: matters in which the institution has an interest

[32] The town has claimed the application of the exclusion in section 52(3)3 to the majority of the records at issue. For section 52(3)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[33] The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition¹²

¹² Orders M-830 and PO-2123.

- an employee's dismissal¹³
- a grievance under a collective agreement¹⁴

[34] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.¹⁵ The records collected, prepared maintained or used by the institution are excluded only if [the] meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions.¹⁶

[35] The town submits that the records consist of emails between staff members regarding various employment-related matters such as a job posting, interview schedules, vacancy management, job competitions, interview questions, application submissions, exams and tests, reference checks, and an offer of employment. The records, the town argues, were prepared and/or used by or on behalf of it in relation to discussions or communications, and that the discussions or communications were about employment related matters in which it has an interest.

[36] I find that the majority of the records at issue are excluded from the scope of the *Act*, as they meet the requirements of the three-part test in section 52(3)3.

Call Files #1, #2, #3 and #4

[37] I find that the records contained in Call Files #1 through #4 contain records relating to a job competition, including the following:

- interview schedules
- discussions regarding vacancy management
- interview questions and answers
- an assignment for interviewees
- resumes
- applications for the job
- reference checks

¹³ Order MO-1654-I.

¹⁴ Orders M-832 and PO-1769.

¹⁵ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

¹⁶ *Ministry of Correctional Services*, cited above.

- confirmation of interviews
- an offer of employment

[38] As has been found in previous orders of this office, job competition records are either collected, prepared, maintained or used by the town, and in many cases, all four. Therefore, the first requirement has been established. I also find that the collection, preparation, maintenance or usage of these records was in relation to meetings and communications, which meets the second part of the three-part test. Lastly, I find that the third part of the test has been met because the meetings and communications were about a job competition, which is an employment-related matter, and that the town had an interest in this employment-related matter because the town was conducting the job competition to select a future employee for a particular position. Accordingly, section 52(3)3 applies to the four Call Files, and these records are excluded from the scope of the *Act*.

Medical records, Personnel file and Retirement records

[39] At the outset, I note that portions of records D26 and D57 of the medical records and portions of record D4 of the retirement records are not responsive to the appellant's request, as they consist of information about individuals other than the appellant and do not contain any information about the consulting firm. I find that the remaining portions and records contained in these batches are excluded from the scope of the *Act*, as they meet the requirements of the three-part test. The town collected, prepared, maintained or used each of the records on its own behalf as the appellant's employer. These records form the appellant's personnel file and all of them relate to meetings, discussions or communications about the appellant's employment issues with the town, including an absence from work, the reasons for the absence, a proposed return to work and a retirement. I also find that the employment issues contained in the records are employment-related matters specific to the appellant and his work for the town, and that the town has an interest in these employment-related matters.

Rosters and lists

[40] The records consist of shift lists, training lists, roster lists and seniority lists. I find that these records are not excluded from the scope of the *Act* because they do not meet the second part of the three-part test in section 52(3)3. While the records were prepared and used by the town, I find that they are not in relation to meetings, consultations, discussions or communications. These records consist of lists of names of various employees, including their position, location, seniority and shifts, and do establish a substantial connection to meetings, consultations, discussions or communications. Consequently, I find that they are not excluded from the scope of the *Act*. The town has also claimed the application of the personal privacy exemption in section 38(b) to these records, which I consider below.

Investigations #1 and #2

[41] The records in these batches relate to an investigation the town conducted in response to a specific complaint made by an employee. I also note that the batch entitled Investigation #2 contains records relating to a grievance and duplicates of some of the records contained in the retirement batch of records.¹⁷ I find that all of these records are excluded from the scope of the *Act* as they meet the requirements of the three-part test in section 52(3)3. The town either prepared or used the records on its own behalf, and these records were prepared and used in relation to meetings, consultations, discussions or communications, thus meeting the first two parts of the test. I also find that these meetings, consultations, discussions or communications were in relation to employment-related matters in which the town has an interest, namely, investigating and responding to a complaint made by a town employee in which the subject of the complaint and resulting investigation was the employee's (and town's) work environment. As a result, I find that the third part of the test has been met and the records are excluded from the scope of the *Act*.

Consulting

[42] The town has claimed the application of section 52(3)3 to records D88, D91 through D99, D102 through D108, and D114. I find that records D88, D91 through D99 and D102 through D108 are not excluded from the scope of the *Act*. While the records were prepared and used by the town, and these records were used in relation to meetings, consultations, discussions or communications, I find that they are not in relation to employment-related matters. These records relate to a freedom of information request made to the town by the appellant, a former employee, which in my view, does not fall within the realm of an employment-related matter. Therefore, I find that the requirements of the three-part test have not been met and these records are not excluded from the scope of the *Act*. I note that the town has also claimed the application of other exemptions to these records, which I consider below.

[43] Conversely, I find that record D114 is excluded from the scope of the *Act*, as it was prepared and/or used by the town in communications, and these communications were in relation to employment-related matters in which the town has an interest. This record captures post job competition discussions relating directly to the job competition.

[44] I also find, based on my review of the records, that records D32 through D36 are excluded from the scope of the *Act*, as they meet the three-part test in section 52(3)3. These records form part of the investigation that was conducted in response to a complaint. The town either prepared or used the records on its own behalf, and these records were prepared and used in relation to meetings, consultations, discussions or communications, thus meeting the first two parts of the test. I also find that these

¹⁷ I further note that I have found records D21 through D36 in Investigation #2 to be excluded, as they met the requirements of the three-part test in section 52(3)1.

meetings, consultations, discussions or communications were in relation to employment-related matters in which the town has an interest, namely, investigating and responding to a complaint made by a town employee in which the subject of the complaint and resulting investigation was the employee's (and town's) work environment.

[45] I further find that none of the exceptions in section 52(4) apply to the records that I have found to be excluded from the scope of the *Act* under sections 52(3)1 and 52(3)3.

[46] Lastly, because of my findings regarding section 52(3), it is no longer necessary for me to consider the exemptions in sections 8 and 13 of the *Act*.

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

[47] As previously stated, I find that the majority of the records are excluded from the scope of the *Act* by virtue of the application of sections 52(3)1 and 52(3)3. However, I also find that other records are either not excluded from the scope of the *Act* or the town did not claim that any exclusions applied. For ease of reference, the following records remain at issue in this appeal:

- Rosters and lists – D1, D2, D3 and D4; and
- Consulting – D27, D40, D62, D70, D73, D75 through D99, D102 through D108 and D110 through D113.

[48] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the above-referenced records contain "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;

[49] 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.¹⁸

[50] 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.

[51] 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.¹⁹ 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.²⁰

[52] The town submits that the records contain the personal information of a number

¹⁸ Order 11.

¹⁹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

²⁰ Orders P-1409, R-980015, PO-2225 and MO-2344.

of individuals. I find that the Rosters and Lists records contain the personal information of both the appellant and several other identifiable individuals. In particular, although the individuals listed in these rosters are town employees, I find that the disclosure of these individuals' names, including the appellant, combined with the other information in the rosters would reveal something of a personal nature about them, such as their shift schedules and seniority. I find that this information falls within paragraph (h) of the definition of personal information in section 2(1) of the *Act*.

[53] I also find that all of the remaining Consulting records at issue contain the personal information of the appellant, because they contain his name and other personal information about him, also falling within paragraph (h) of the definition of personal information.

[54] Because all of the remaining records at issue contain the personal information of the appellant, any exemptions should be properly claimed under sections 38(a) and/or 38(b) of the *Act*.

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

[55] 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.

[56] 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.²¹

[57] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. Section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

[58] The section 14(1)(a) to (e) exceptions are relatively straightforward. The section 14(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex, and requires a consideration of additional parts of section 14.

[59] If the information fits within any of paragraphs (a) to (e) of section 14(1), it is

²¹ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

not exempt from disclosure. Under section 14(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure.

[60] Sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

[61] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies.²²

[62] The town is claiming the application of section 38(b) to records D1, D2, D3 and D4 of the Rosters and Lists records. The town submits that disclosure of the personal information would constitute an unjustified invasion of personal privacy and that the presumptions in sections 14(3)(a) (medical, psychiatric or psychological information), (b) (compiled as part of an investigation), (d) (employment or educational history) and (g) (personal recommendations) apply. The town further argues that the factors in sections 14(2)(f) (highly sensitive) and 14(2)(i) (unfairly damage reputation) apply.

[63] As previously stated, the personal information at issue is the names of town employees along with their shifts, and seniority. I find that the presumption in section 14(3)(d) applies to some of this information, namely the seniority of the individuals identified in the records. The other presumptions do not apply as the information at issue does not relate to medical, psychiatric or psychological history, it was not compiled as part of an investigation into a possible violation of law, and does not contain personal recommendations. With respect to the factors in section 14(2) either weighing for or against disclosure, I find that none of the factors applies. In particular, in my view, the information is neither highly sensitive nor likely to unfairly damage the reputation of the individuals. However, I also find that no factors favouring disclosure apply.

[64] Balancing the presumptions and the factors, I find that the personal information of other individuals in these records is exempt from disclosure under section 38(b), subject to my findings regarding the town's exercise of discretion. I further find that under section 4(2) of the *Act*, the personal information of individuals other than the appellant can be severed under records D1, D2, D3 and D4 (Rosters and Lists), and the appellant's own personal information ought to be disclosed to him.

²² *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

Issue D: Does the discretionary exemption at section 38(a) in conjunction with section 7(1) apply to the records?

[65] Section 7(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[66] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.²³

[67] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[68] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.²⁴

[69] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[70] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.²⁵

[71] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 7(1) to apply as that intention is inherent to the job of policy development, whether by

²³ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

²⁴ See above at paras. 26 and 47.

²⁵ Order P-1054

a public servant or consultant.²⁶

[72] Section 7(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by s. 7(1).²⁷

[73] Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information²⁸
- a supervisor's direction to staff on how to conduct an investigation²⁹
- information prepared for public dissemination³⁰

[74] The town indicates in its index of records that the exemption in section 7(1) applies to Consulting records D62, D70, D75 through D99, D102 through D108 and D110 through D113. However, the town did not provide any representations on the application of the exemption in section 7(1).

[75] In the absence of evidence before me from the town, and on my review of these records, I find that they do not contain advice or recommendations, but rather directions on how to proceed, and, therefore, I find that these records are not exempt under section 7(1).

[76] The town is claiming the application of section 12 to records D77 and D91 through D99, which I consider below. As no other exemptions have been claimed for records D62, D70, D75, D76, D78 through D90, D102 through D108 and D110 through D113, I will order the town to disclose these records, in full, to the appellant.

Issue E: Does the discretionary exemption at section 38(a) in conjunction with section 12 apply to the records?

[77] The town is claiming the application of section 12 to Consulting records D27, D73, D77, and D91 through D99.

[78] Section 12 states as follows:

²⁶ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

²⁷ *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

²⁸ Order PO-3315.

²⁹ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

³⁰ Order PO-2677

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.

[79] Section 12 contains two branches. Branch 1 (“subject to solicitor-client privilege”) is based on the common law. Branch 2 (“prepared by or for counsel employed or retained by an institution...”) is a statutory privilege. The institution must establish that one or the other (or both) branches apply. At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

[80] 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.³¹ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.³² The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.³³

[81] 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.³⁴ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.³⁵

[82] The town submits, via affidavit evidence, that the records at issue were prepared for or by legal counsel retained by the town for use in giving legal advice to it on a number of employment-related matters, investigations into complaints, possible criminal activity, a request under the *Act*, and litigation.

[83] On my review of the town’s representations and the records, and subject to my findings regarding the town’s exercise of discretion, I am satisfied that the above-listed records, with one exception, are exempt from disclosure under branch 1 of section 12, as they are subject to solicitor-client privilege. I find that these records consist of communications between the client (the town) and legal counsel, in which the town seeks legal advice and legal counsel, in turn, provides legal advice to the town on a number of specific issues. I also find that there is no waiver or loss of this solicitor-client privilege and these records are exempt from disclosure under section 38(a) in conjunction with section 12.

³¹ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

³² Orders PO-2441, MO-2166 and MO-1925.

³³ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

³⁴ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

³⁵ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

[84] Conversely, I find that Record D27, which is an email exchange between the appellant and an administrative staff member regarding an administrative matter, does not contain the seeking or giving of legal advice, and is not exempt from disclosure under section 12. As no other exemptions have been claimed with respect to this record, I will order the town to disclose it to the appellant in its entirety.

Issue F: Did the institution exercise its discretion under sections 38(a) and 38(b)? If so, should this office uphold the exercise of discretion?

[85] The sections 38(a) and 38(b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[86] 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.

[87] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.³⁶ This office may not, however, substitute its own discretion for that of the institution.³⁷

[88] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:³⁸

- 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; and 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

³⁶ Order MO-1573.

³⁷ Section 43(2).

³⁸ Orders P-344 and MO-1573.

- 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.

[89] The town submits that it exercised its discretion in good faith and for no improper purpose. It took into consideration the nature of the information contained in the records and the nature and purpose of the exemptions. The town further submits that it did consider whether the information in the records should be made public or not, and that individuals should have access to their own personal information, and that the application of exemptions should be limited and specific. It goes on to argue that records subject to solicitor-client privilege should be withheld in order to ensure that the client can communicate freely with their solicitor on a legal matter. Lastly, the town argues that it re-exercised its discretion during the inquiry of this appeal, resulting in the release of many records previously identified as not being subject to the *Act*.

[90] The town's exercise of discretion must be made in full appreciation of the facts of the case and upon proper application of the applicable principles of law.³⁹ It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion. In addition, in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*,⁴⁰ the Supreme Court of Canada stated that an institution must consider the public interest in the disclosure of the information when exercising its discretion under the provincial equivalent of section 12.

[91] Based on the town's representations, I am satisfied that it exercised its discretion under sections 38(a) and 38(b) in a proper manner. I am satisfied that it considered relevant factors, including the nature of the withheld information, the importance of solicitor-client privilege and the personal privacy of individuals, as well as the purposes of the *Act*, including the appellant's right of access in exercising its discretion. I am also satisfied that the town did not consider irrelevant factors. Lastly, I note that the town re-exercised its discretion during the inquiry of this appeal, making the decision to disclose further records to the appellant. In light of all of this, I uphold the town's

³⁹ Order MO-1287-I.

⁴⁰ [2010] 1 S.C.R. 815, 2010 SCC 23.

exercise of discretion under sections 38(a) and 38(b).

[92] I note that during the mediation of the appeal, the appellant raised the possible application of the public interest override in section 16. However, the appellant did not provide any representations in this appeal, including providing a rationale for why there is a compelling public interest in the information that is exempt under the personal privacy exemption and, on my review of the records, I conclude that there is not a compelling public interest in these records.⁴¹

[93] In sum, I uphold the town's decision in part. I find that the majority of one record is not responsive to the request and that the majority of records are excluded from the scope of the *Act* by virtue of sections 52(3)1 and 52(3)3. I uphold the personal privacy exemption in section 38(b) to the record for which it was claimed, and the discretionary exemption in section 38(a) in conjunction with section 12 to most of the records for which it was claimed. I do not uphold the exemption in section 38(a) in conjunction with section 7(1). Lastly, I uphold the town's exercise of discretion and I find that the public interest override in section 16 does not apply.

ORDER:

1. I order the town to disclose the following records in their entirety to the appellant by **January 30, 2018** but not before **January 24, 2018**
 - Call File 1 – D18 and D20
 - Call File 3 – D12 and D13
 - Call File 4 – D26
 - Investigation 1 – D2, D17, D19, D22 and D27
 - Investigation 2 – D8, D9, D10, D12, D20 and D24
 - Medical Records – D1, D7, D8, D9, D12, D13, D30, D31, D32, D33, D34, D35 and D47
 - Retirement – D1, D2, D11, D14 and D15
 - Consulting – D1-D31, D37-D39, D41, D42, D44-D69, D70, D71, D72, D74, D75, D76, D78-D90, D100-D108 and D110-D113

⁴¹ I also note that the public interest override in section 16 does not apply to records that are excluded from the scope of the *Act* or found to be exempt from disclosure on the basis of solicitor-client privilege.

2. I order the town to disclose the following records, in part, to the appellant by **January 30, 2018** but not before **January 24, 2018**, as set out in the index of records
- Call File 1 – D2, D5, D6 and D10
 - Call File 2 – D4
 - Call File 3 - D2 and D11
 - Call File 4 – D24 and D25
 - Investigation 1 – D9, D13 and D18
 - Investigation 2 - D4, D11 and D35
 - Medical Records – D10, D20, D40, D42, D48, D49, D53, D58 and D60
 - Retirement – D8, D9, D12, D16 and D17
 - Consulting – D88 and D114
 - Rosters and Lists – D1, D2, D3 and D4 disclosing only the appellant's personal information to him
3. I reserve the right to require the town to provide this office with copies of the records it discloses to the appellant.

Original Signed by: _____
Cathy Hamilton
Adjudicator

December 19, 2017 _____