

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3672

Appeal MA17-130

Wollaston Township

October 12, 2018

Summary: The township received a request for all correspondence between councillors and staff during a specified period regarding the fire department operations or administration. The township granted access, in part, to some of the records and relied on the exemptions under sections 6(1)(b) (closed meeting), 14(1) (personal privacy), 38(b) (personal privacy) and the exclusion in section 52(3) to deny access to the remainder of the responsive records. During the inquiry stage, the appellant raised the issue that the Clerk was in a conflict of interest position in processing his request.

In this order, the adjudicator upholds the township's decision, in part, with respect to the exclusion in section 52(3), and orders the township to make an access decision for the record that is not excluded from the *Act* under section 52(3). She upholds the township's application of the section 14(1) and 38(b) exemptions, in part, and finds that the records at issue are not exempt under section 6(1)(b). Accordingly, she orders the non-exempt information to be disclosed. Finally, she finds that the Clerk was not in conflict of interest position in processing the appellant's request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 6(1)(b), 14(1), 38(b) and 52(3).

Orders Considered: Orders MO-1654-I, MO-1285, MO-2491, MO-3130, MO-3613, MO-3208, MO-3208, PO-3809, MO-1519, MO-2867, PO-3705, and PO-2915.

Cases Considered: *Imperial Oil Ltd. v. Quebec (Minister of the Environment)* (2003), 231 DLR (4th) 577 (SCC); *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, 2008 CanLII 2603 (Div. Ct.).

BACKGROUND:

[1] Wollaston Township (the township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

Please supply me with all correspondence between councillors and staff in the last year regarding fire department operations including fire dept. admin.

[2] The township issued a decision granting full access to 53 records, and denying access in part to another 60 records, pursuant to the exemptions at sections 6(1)(b) (closed meeting), 14(1) (personal privacy) and the exclusion at section 52(3) (employment or labour relations) of the *Act*. The township also stated in its decision that two of the records "previously included, have been reconsidered as unrelated to fire department operations."

[3] The requester, now the appellant, appealed the township's decision.

[4] During mediation, the township provided the appellant with a detailed index of records and explanation of the exclusion and exemptions claimed.

[5] Upon receipt, the appellant advised the mediator that he was not interested in any records considered to be non-responsive to his request for fire department operations correspondence, but wanted to proceed to adjudication with respect to the remaining records and issues on appeal.

[6] The mediator raised the discretionary exemptions at sections 38(a) (discretion to refuse a requester's own information) and section 38(b) (personal privacy), as the records at issue might contain both the appellant's personal information and that of other identifiable individuals. As a result, these sections were both added as issues on appeal.

[7] As no further mediation was possible, this appeal was moved to the adjudication stage, where an adjudicator conducts a written inquiry under the *Act*.

[8] During the inquiry stage, I sought and received representations from the township and the appellant. Pursuant to this office's *Code of Procedure and Practice Direction Number 7*, copies of the parties' representations were shared.

[9] In this order, I uphold the township's decision, in part, with respect to the exclusion in section 52(3), and I order the township to make an access decision for the

information that is not excluded from the *Act* under section 52(3). I partially uphold the township's application of the exemptions at sections 14(1) and 38(b) of the *Act* and I do not uphold the township's decision that the records at issue are exempt under section 6(1)(b). Accordingly, I order the non-exempt information to be disclosed to the appellant. Finally, I find that the Clerk was not in a conflict of interest position in processing the appellant's access request.

RECORDS:

[10] The records at issue are email chains (including duplicates), as set out in the index of records.

ISSUES:

- A. Was the Clerk in a conflict of interest position with respect to the processing of the request?
- B. Does section 52(3)3 exclude the majority of the records from the *Act*?
- C. Do the records at issue contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- D. Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information that has been withheld?
- E. Does the discretionary exemption at section 6(1)(b) or the discretionary exemption at section 38(a) in conjunction with the section 6(1)(b) apply to the withheld information at issue?
- F. Did the township exercise its discretion under sections 38(a) and (b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Was the Clerk in a conflict of interest position with respect to the processing of the request?

[11] The appellant alleges that the Clerk was in a position of conflict of interest with respect to the processing of his request.

[12] Previous orders have considered the issue of conflict of interest or bias.¹ In

¹ See for example Orders M-640, MO-1285, MO-2605, MO-3208, MO-2867, and PO-2381.

determining whether there is a conflict of interest, these orders posed the following questions:

- (a) Did the decision-maker have a personal or special interest in the records?
- (b) Could a well-informed person, considering all of the circumstances, reasonably perceive a conflict of interest on the part of the decision-maker?

[13] These questions are not intended to provide a precise standard for measuring whether or not a conflict of interest exists in a given situation. Rather, they reflect the kinds of issues which need to be considered in making such a determination.

Representations

[14] As noted above, the appellant alleges that the Clerk was in a position of conflict of interest in processing his request. He submits there are a number of factors that may have influenced the Clerk including the following:

- her ability to oblige individual councillor input;
- the fact that the access request was a taxpayer request; and
- being a member of the fire department herself²

[15] In its representations, the township submits that the Clerk was not in a position of conflict of interest. It points out that section 3 of the *Act* applies as the township has not designated the duties of the head of the institution. As such, this responsibility lies with Council. The township also submits that the Clerk identified all the records in an unbiased and professional manner and provided them to the "head" (Council) for consideration in a closed session. It further submits that the Clerk did not "screen or select" the records, but identified all records within the custody of the township that would be responsive to the request.

[16] In addition, the township relies on Orders MO-3208 and MO-1519. In particular, the township relies on Adjudicator Laurel Cropley, in Order MO-1519, quoting the following statements from *Administrative Law in Canada*:³

There is a presumption that a tribunal member will act fairly and impartially, in the absence of evidence to the contrary. The onus of demonstrating bias lies on the person who alleges it...mere suspicion is not enough.

² See letter dated March 5, 2017.

³ (3rd. ed.), (Butterworth's, 2001), at page 106.

[17] With respect to the above quote, the township acknowledges that the Clerk is not a tribunal member but submits that the same test should apply.

[18] The township points out that, in MO-3208, Adjudicator Catherine Corban recognized that in a small municipality the clerk will necessarily be required to process requests for records that relate to matters in which she might have been involved. As such, Adjudicator Corban found that such situations are not sufficient to establish a conflict of interest.

[19] Finally, the township submits that the Clerk attested that no document created by her was withheld to protect her personal, special or pecuniary interests.

[20] In response to the township's representations, the appellant points out that the Clerk and Council were involved in closed session meetings with some firefighters and others without informing the fire department administration.

Analysis and findings

[21] In Order MO-1285, Adjudicator Cropley discussed the factors to consider when addressing whether a conflict of interest exists. She states:

Previous orders of this office have considered when a conflict of interest may exist. In general, these orders have found that an individual with a personal or special interest in whether the records are disclosed should not be the person who decides the issue of disclosure. In determining whether there is a conflict of interest, these orders looked at (a) whether the decision-maker had a personal or special interest in the records, and (b) whether a well-informed person, considering all of the circumstances, could reasonably perceive a conflict of interest on the part of the decision-maker (see, for example: Order M-640).

[22] I agree with and adopt the reasoning stated above for this appeal.

[23] Having considered the representations of both parties and having reviewed the request, the decision letter, and the records, I find that the Clerk was not in a position of conflict of interest.

[24] The appellant's representations and sur-reply representations do not identify the Clerk's personal or special interest in the records. As noted above, he submits that there are three factors that may influence her duties. He also submits that the Clerk and Council were involved in closed session meetings with some firefighters and others without informing the fire department administration. I note that as section 3 of the *Act* applies to the township, it was appropriate for the Clerk to meet with Council in closed session meetings. I also note that the closed session meetings where some firefighters and others were included are not the same ones in which the Clerk and Council met to discuss the appellant's access request as the former meetings dealt with the

administrative matters relating to the fire department.

[25] I acknowledge that the Clerk is a member of the fire department, but individuals in a small municipality may be required to undertake a number of roles. As stated by Adjudicator Corban in MO-3208, such situations alone are not sufficient to establish a conflict of interest.

[26] In Order PO-2381, Adjudicator John Swaigen addressed whether the Ontario Realty Corporation's CEO, as the individual who made an access decision, was in a conflict of interest position in relation to the decision-making process. Adjudicator Swaigen cited *Imperial Oil*⁴ and found that the Ontario Realty Corporation's CEO was not in a conflict of interest despite the fact that he had been personally involved in the dealings with the requester that led to the requester's access request. Adjudicator Swaigen stated:

[I]n my view, the fact that the CEO has been personally involved in resolving the question of the disposition of these lands in his capacity as senior official of the ORC, including participating in exploring options other than sale to the appellant's company, combined with the fact that the ORC and the appellant are in litigation over the appropriate disposition of these lands, is not sufficient to disqualify the CEO from exercising the statutory function of deciding access requests under the *Act*. These facts do not establish a conflict of interest or a reasonable apprehension of bias.

In carrying out his functions under the *Act*, the CEO was not required to be impartial in the way that would be expected of an independent adjudicator. As set out in the *Imperial Oil* decision, the contextual nature may vary to reflect the content of a decision-maker's activities and the nature of his functions. The CEO was required to carry out certain functions and, in doing so, to comply with the procedural fairness obligations set out in the *Act* and to comply with the other legislation governing the ORC. He was also required to exercise his discretion in good faith, taking into account all relevant considerations and disregarding irrelevant ones. I cannot conclude from the evidence before me that he did otherwise.

[27] I agree with Adjudicator Swaigen's approach and will apply it to this appeal.

[28] Despite the Clerk's role in the fire department, I find that the Clerk was not in a position of conflict of interest with respect to her processing the request. I will now turn to discuss whether section 52(3) applies to exclude the majority of the records from the *Act*.

⁴ *Imperial Oil Ltd. v. Quebec (Minister of the Environment)* (2003), 231 DLR (4th) 577 (SCC).

B. Does section 52(3)3 exclude the majority of the records from the *Act*?

[29] The township takes the position that the *Act* does not apply to the majority of the records because they fall within the exclusion in section 52(3)3, and provides general representations in support of its position which read:

All the records listing the s. 52(3)3 [exclusion] were prepared by either members of Council or the Clerk.

...

All the records listing the s. 52(3)3 [exclusion] are communications about labour relations or employment related matters. The Township submits that no actions were taken as a result of these communications nor were these communications used in relation to meetings.

...

All of the records listing the s. 52(3)3 [exclusion] were communications in relation to employment related matters concerning working relationships between fire department employees and between Council and/or the Clerk and fire department employees.

[30] The township advises that the Fire Chief and Deputy Fire Chief are appointed by Council and receive an annual honorarium and benefits under the *Workplace Safety and Insurance Act*. I am satisfied that these positions are sufficiently akin to paid employment so as to be covered by the section 52(3)3 exclusion.⁵

[31] The appellant does not address the issue of the application of the exclusion.

[32] In this appeal, it appears that the township relies on section 52(3)3 which states:

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:

3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[33] 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*.

[34] The term "employment of a person" refers to the relationship between an

⁵ See Order PO-3705.

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.⁶

[35] 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.⁷

[36] 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.⁸

[37] The type of records excluded from the *Act* by section 52(3) are documents 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.⁹

[38] For section 52(3) to apply, the township 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.

[39] In *Ontario (Ministry of Correctional Services) v. Goodis* (2008),¹⁰ Justice Swinton for a unanimous Court wrote the following:

In *Reynolds v. Ontario (Information and Privacy Commissioner)*, [2006] O.J. No. 4356, this Court applied the equivalent to s. 65(6) [which is the provincial equivalent of 52(3)] found in municipal freedom of information legislation to documents compiled by the Honourable Coulter Osborne while inquiring into the conduct of the City of Toronto in selecting a proposal to develop Union Station. The records he compiled in

⁶ Order PO-2157.

⁷ *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.

⁸ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

⁹ *Ministry of Correctional Services*, cited above.

¹⁰ 2008 CanLII 2603 (Div. Ct).

interviewing Ms. Reynolds, a former employee, were excluded from the *Act*, as Mr. Osborne was carrying out a kind of performance review, which was an employment-related exercise that led to her dismissal (at para. 66). At para. 60, Lane J. stated,

It seems probable that the intention of the amendment was to protect the interests of institutions by removing public rights of access to certain records relating to their relations with their own workforce.

[40] Cautioning that there is no general proposition that all records pertaining to employee conduct are excluded from the *Act*, even if they are in files pertaining to civil litigation or complaints by a third party, Justice Swinton also pointed out that “(w)hether or not a particular record is ‘employment related’ will turn on an examination of the particular document.”

[41] I agree with and adopt the analysis set out above for the purpose of making my determinations in this appeal.

[42] This office takes the “whole record approach” to the exclusions at section 52(3) of the *Act* (and the equivalent section in the *Freedom of Information and Protection of Privacy Act*). This means that in order to qualify for an exclusion, the record is examined as a whole. The question of whether the exclusion applies to a whole record, based on the inclusion in the record of an excluded portion, has been addressed in previous orders.¹¹ In those orders, this office has applied the record-specific and fact-specific analysis to consider whether the record, as a whole, qualifies for the claimed exclusion. I agree with and adopt this approach for this appeal.

[43] In this appeal, the records at issue are email communications between councillors or between councillor(s) and the Clerk about specific fire department employees of the township and their work performance. The township has stated that it prepared and maintained these records in relation to communications about employment-related matters.

[44] On my review of the records for which the township claims the section 52(3) exclusion, I am satisfied that, with some exceptions, they were “collected, prepared, maintained, or used” by the township, in relation to “meetings, consultations, discussions or communications” about labour relations or employment-related matters in which the institution has an interest. Accordingly, these records (excluding the exceptions)¹² relate to the township’s relations with its own workforce, and the township has an interest in these records as an employer. More specifically, these records discuss the work performance of specific fire department employees. In these

¹¹ See for example Orders M-797, P-1575, PO-2531, PO-2632, MO-1218, and PO-3456-I.

¹² Records 1, 2, 9, 11, 17, 18, 27, 35, 36, 39, 40, 41, 43, 44, 45, 48 and 66.

circumstances, I am satisfied that the exclusion in section 52(3)3 applies to the records at issue, and they fall outside the scope of the *Act*. As such, those records will not be discussed further in this order.

[45] With respect to the non-excluded records, I find that these communications were not about "employment-related" matters as required under part 3 of the test. These records address various fire-related issues and are not employment matters. I find, therefore, that these records are not excluded from the *Act*, and I will order the township to issue an access decision for these records, with the exception of record 66, for which the township also relies on the personal privacy exemption at section 14(1) and the closed meeting exemption at section 6(1)(b). I will consider the applications of these exemptions below.

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

[46] The townships claims the application of personal privacy exemptions to records 60, 63, 65, 66, 67, 68, 69, 70 and 71. In order to determine whether the personal privacy exemption at section 14(1) or section 38(b) of the *Act* applies, it is necessary to decide whether these records contain "personal information" and, if so, to whom it relates.

[47] Relevant paragraphs of the definition of "personal information" are the following:

"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,

(e) the personal opinions or views of the individual except if they relate to another individual,

(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;

[48] 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.¹³

[49] 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.¹⁴

[50] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.¹⁵

[51] The township submits that records 60, 63 and 66 contain personal information about fire department employees by either listing them by name or by revealing information about them that would make it obvious as to whom they are referring. It also submits that although these records contain information about fire department employees in their professional capacity, they reveal something of a personal nature about these individuals.

[52] In addition, the township submits that records 65, 67, 68, 69, 70 and 71 contain personal information as they contain the names and e-mail addresses of members of the public.

[53] On my review of these records, I find that they contain "personal information" as defined by the *Act*. Records 60, 65, 67, 68 and 71 contains the personal opinions or views of identifiable individuals about other identifiable individuals. Record 63 contains the name of an identifiable individual and the value of their home fire loss. Record 66 contains information about an identifiable individual's marital status, their health, and finances. Records 69 and 70 contain the names of an identifiable individual along with other personal information about these individuals.

[54] None of the records contains the appellant's personal information except for record 60, which contains the appellant's personal information as it contains an email written by the appellant to the Clerk containing their personal opinion of issues involving the township.

[55] As record 60 contains the personal information of the appellant and another individual, Part II of the *Act* applies and I must consider whether this record is exempt pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*.

¹³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

¹⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

¹⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[56] As records 63, 65, 66, 67, 68, 69, 70 and 71 only contain the personal information of other individuals and not the appellant, Part I of the *Act* applies and I must consider whether the withheld portions are exempt pursuant to the mandatory personal privacy exemption at section 14(1) of the *Act*.

D. Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information that has been withheld?

[57] 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.

[58] 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.¹⁶

[59] In contrast, under section 14(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in sections 14(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy [section 14(1)(f)].

[60] In determining whether the disclosure of the personal information in the records *would not* be an unjustified invasion of personal privacy under section 14(1)(f) or *would* be an unjustified invasion of personal privacy under section 38(b), sections 14(1) to (4) provide guidance.

[61] The factors and presumptions at sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Additionally, if any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under either section 14(1) or 38(b). None of the circumstances listed in section 14(4) is present here.

Sections 14(2) and (3)

[62] 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.

¹⁶ See below in the “Exercise of Discretion” section for a more detailed discussion of the institution’s discretion under section 38(b).

[63] For records claimed to be exempt under section 14(1) (i.e., records that do not contain the requester's personal information), a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if a section 14(4) exception or the "public interest override" at section 16 of the *Act* applies.¹⁷ None of the section 14(4) exceptions is relevant here and the public interest has not been raised.

[64] If the records are not covered by a presumption in section 14(3), section 14(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy and the information will be exempt unless the circumstances favour disclosure.¹⁸

[65] For records claimed to be exempt under section 38(b) (i.e., records that contain the requester's own personal information), this office will consider, and weigh, the factors and presumptions in both sections 14(2) and (3) and balance the interest of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.¹⁹

Records 63, 65, 66, 67, 68, 69, 70 and 71

[66] I will first consider the application of the mandatory personal privacy exemption to the withheld information contained in these records as they contain personal information of other individuals and not the appellant. As stated earlier, the township is prohibited from disclosing the withheld information in these records unless one of the circumstances listed in sections 14(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy (section 14(1)(f)). In this case, sections 14(1)(a) to (e) do not apply to these records.

[67] To determine whether the withheld information in these records is an unjustified invasion of personal privacy, I need to consider whether any of the presumptions in section 14(3) applies. If so, the disclosure of the withheld information is presumed to be an unjustified invasion of personal privacy.

[68] With respect to records 63 and 66, I find that the presumption at section 14(3)(f) (financial information) applies to the withheld personal information in both these records. I also find that the presumption at 14(3)(a) applies to record 66 as it contains medical information about a named individual. As such, I find that disclosure of the withheld information in these records is presumed to be an unjustified invasion of the individual's privacy and is exempt from disclosure under the mandatory privacy exemption at section 14(1) of the *Act*.²⁰

¹⁷ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13. O.R. (3d) 767.

¹⁸ Order P-239.

¹⁹ Order MO-2954.

²⁰ *John Doe*, cited above.

[69] With respect to records 65, 67, 68, 69, 70 and 71, I find that none of the presumptions at section 14(3) applies to the withheld personal information. Consequently, I must consider the various factors listed in section 14(2). I note that the township relies on the factor in section 14(2)(h) (the personal information has been supplied by the individual to whom the information relates in confidence). In this case, I find that this factor is relevant as members of the public have communicated with Councillors in confidence. I also find that there are no factors favouring disclosure. Accordingly, I find that disclosure of this information would result in an unjustified invasion of personal privacy for the individuals in question. As such, I find that the withheld portions in these records are exempt under section 14(1) of the *Act*.

Record 60

[70] Record 60 is an email from the Clerk to a named individual forwarding an email from the appellant to the Clerk. As stated earlier, record 60 contains the personal information of the appellant and another individual. As such, I must weigh the presumptions and factors in sections 14(3) and 14(2) and balance the interests of the parties in determining whether the disclosure of the personal information in this record would be an unjustified invasion of personal privacy. In this case, I find that none of the presumptions in section 14(3) apply.

[71] With respect to the factors in section 14(2), the township relies on section 14(2)(g) – the personal information is unlikely to be accurate or reliable. It states:

The Township has no specific knowledge as to whether all the information in the documents is accurate and/or reliable, as some of it is based on the personal observations and/or experiences with various employees.

[72] I also note that the township lists a number of other factors in section 14(2), besides 14(2)(g), which it believes are relevant. However, it is unclear whether the township submits that these factors apply to this particular record. From my independent review of record 60, these other factors are irrelevant. As such, I will only consider the possible application of section 14(2)(g).

[73] As stated earlier, the township submits that record 60 is unlikely to be accurate or reliable. Besides stating that it has no specific knowledge as to whether the personal information contained in this record is accurate and/or reliable, the township has not indicated in what specific ways the personal information is inaccurate, nor has it submitted any evidence to show how this record is unlikely to be accurate, or reliable. Without more information, it is impossible for me to determine whether the personal information is unlikely to be accurate, or reliable. It is likewise impossible to assess what effect such inaccuracy, or unreliability may have if it exists.

[74] Although the appellant has not argued any specific factors favouring disclosure, I find that an unlisted factor exists, which strongly favours disclosure. This factor is that

the forwarded email is an email written by the appellant. As he is the author of this email, the appellant is well aware of its content. Consequently, I am satisfied that disclosure of record 60 would not constitute an unjustified invasion of the personal privacy of the individuals to whom that information relates.

[75] I also find that the portion of the email from the Clerk to a named individual do not contain any personal information. Therefore, section 38(b) does not apply to this portion of the record.

[76] Accordingly, I find that the personal information in record 60 is not exempt from disclosure under the discretionary privacy exemption at section 38(b) of the *Act*.

[77] The township also relies on the closed meeting exemption at section 6(1)(b) for this record. I will consider the application of section 6(1)(b) to record 60 below.

E. Does the discretionary exemption at section 6(1)(b) apply or the discretionary exemption at section 38(a) in conjunction with the section 6(1)(b) apply to the records at issue?

[78] The township claims the application of the exemption at section 6(1)(b) to records 55, 56, 57, 58, 59, 60, 61, and 64, and to a portion of record 66.

[79] As noted above, section 36(1) gives individuals a general right of access to their own personal information held by an institution, but section 38 provides a number of exemptions from this right.

[80] 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.

[81] 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.²¹

[82] In this case, the township relies on section 38(a) in conjunction with section 6(1)(b). That section states:

A head may refuse to disclose a record,

²¹ Order M-352.

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.

[83] For this exemption to apply, the township 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.²²

[84] All three parts of the three-part test set out above must be established in order for the records at issue to qualify for exemption under section 6(1)(b).

[85] 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.²³

[86] The township provided representations on all three parts of the test.

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

[87] In support of its position that this part of the test is met, the township states:

The Council of the Township of Wollaston did hold closed session meetings. Document #55 refers to a meeting held on May 24, 2016. Documents #56, 57, 58, 59, 64 and 66 refer to a meeting held on October 25, 2016.

[88] The township later clarified that record 66 actually refers to a closed meeting held on September 27, 2016. Record 60 also refers to this meeting.

[89] It appears that record 61 refers to a meeting held on November 8, 2016. However, it is unclear whether this meeting was a closed session. In any event, this fact is not relevant due to my findings under parts 2 and 3 of the test.

²² Orders M-64, M-102 and MO-1248.

²³ Order MO-1344.

[90] Based on the representation of the township, I find that Council held a meeting, and that Part 1 of the three-part test under section 6(1)(b) has been met.

Part 2 – a statute authorizes the holding of the meeting in the absence of the public

[91] In support of its position that this part of the three-part test is established, the township refer to section 239(2)(b) of the *Municipal Act*, which states:

(2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

(b) personal matters about an identifiable individual, including municipal or local board employees;

[92] The township then states that it passed a procedural by-law under section 238 of the *Municipal Act*, which allows for the holding of closed meetings. It refers to section 5.4(b)(ii) of By-law No. 23-17, which states:

Pursuant to Section 239(2), notwithstanding Paragraph 5.3(a) above, a meeting of Council or a Committee meeting may be closed in part or whole to the public if the subject matter being considered relate to:

(ii) personal matters about an identifiable individual, including municipal or local board employees.

[93] On my review of the records, I am not satisfied that section 239(2)(b) of the *Municipal Act* or section 5.4(b)(ii) of By-law No. 23-17 authorized the holding of the meetings at issue in the absence of the public, because the records at issue do not pertain to personal matters involving employees of the township.

[94] I find that record 55 is about the closed session procedure held for the May 24, 2016 closed meeting, and therefore does not fall within section 239(2) of the *Municipal Act*. In addition, I am not satisfied that the remaining records for which the township has claimed section 6(1)(b) pertain to personal matters involving employees of the township. However, I will continue my analysis for part 3 of the test as I find that the remaining records also fail under that part of the test.

Part 3 – disclosure of the record would reveal the actual substance of the deliberations of the meeting

[95] Under Part 3 of the test set out above, previous orders have found that:

- “deliberations” refer to discussions conducted with a view towards making a decision²⁴
- “substance” generally means more than just the subject of the meeting²⁵.

[96] In support of its position, the township states:

The Township submits that the subject of the deliberations is within the requestor’s knowledge, as it has been identified as subject to this appeal. The Township submits that it is appropriate to shield from disclosure the identity of complainants and details of their complaint.

[97] With respect to part three of the test, the wording of the provision and previous decisions of this office makes 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 deliberation which took place at the township’s *in camera* meeting, not merely the subject of the deliberation.²⁶

[98] I do not accept that records 56, 57, 58, 59, 60, 61, 64 or 66 reveal the substance of the deliberations at a closed meeting. Records 56, 57, 58, 59, 60, 61, and 64 merely reveal one of the subjects of discussion at a closed meeting. Record 66 reveals the reason for meeting in a closed session. I find that this does not reveal the substance of any of the deliberations that took place at the meeting.

[99] As parts 2 and 3 of the test under section 6(1)(b) have not been met, records 55, 56, 57, 58, 59, 60, 61, 64, and the withheld portion of record 66 are not exempt under section 6(1)(b). Further, as the withheld portion in record 66 is not exempt under section 6(1)(b), it is not necessary for me to consider it in conjunction with section 38(a) of the *Act*.

[100] As no other exemptions have been claimed for these records, I will order records 55, 56, 57, 58, 59, 60, 61, 64, and the withheld portion of record 66 disclosed.

F. Did the township exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

[101] Under “Issue D” above, I found that the section 38(b) exemption applies to some information. 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

²⁴ Order M-184.

²⁵ Orders M-703 and MO-1344.

²⁶ Orders MO-1344, MO-2389 and MO-2499-I.

exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[102] 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.

[103] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁷ This office may not, however, substitute its own discretion for that of the institution.²⁸

[104] In its representations, the township submits that it properly exercised its discretion under section 38(b). It also submits that it did not exercise its discretion in bad faith or for an improper purpose. The township further submits that it took into account all relevant factors, and did not take into account any irrelevant factors.

[105] Although the appellant provided representations, his representations did not directly address this issue.

[106] I have considered the circumstances of this appeal and the township's representations. I am satisfied that the township has not erred in its exercise of discretion with respect to its application of section 38(b) of the *Act*. I am also satisfied that it did not exercise its discretion in bad faith or for an improper purpose. Accordingly, I find that the township took relevant factors into account and I uphold its exercise of discretion on this appeal.

ORDER:

1. I uphold the township's decision that the following records are excluded from the *Act* under section 52(3)3:

Records 3, 4, 5, 6, 7, 8, 10, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 37, 38, 42, 46, 47, 49, 50, 51, 52, 53, 54, and 62.

2. I uphold the township's decision to deny access to the withheld portions of record 66, and records 63, 65, 67, 68, 69, 70, and 71.

²⁷ Order MO-1573.

²⁸ Section 43(2).

3. I order the township to disclose records 55, 56, 57, 58, 59, 60, 61, 64, and the non-exempt information in record 66 by **November 20, 2018** but not before **November 15, 2018** in accordance with the highlighted records I have enclosed with the township's copy of the order. To be clear, the highlighted information should **not** be disclosed to the appellant.
4. I order the township to issue an access decision with respect to records 1, 2, 9, 11, 17, 18, 27, 35, 36, 39, 40, 41, 43, 44, 45, and 48 which are not excluded from the *Act*.
5. I reserve the right to require the township to provide me with a copy of the records disclosed to the appellant.

Original Signed by: _____
Lan An
Adjudicator

_____ October 12, 2018