

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3978

Appeal MA18-395

Tay Valley Township

December 2, 2020

**Summary:** The appellant made an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the township for access to correspondence mentioning herself or a centre that she operates and township representatives or officials. The township issued a fee estimate and requested a deposit. After paying the deposit, the appellant made a second access request for records relating to the fee estimate and the first access request.

The township issued an access decision to the appellant, granting her partial access to the records. The township advised that it withheld some information from disclosure under various discretionary exemptions, including sections 7(1) (advice or recommendations), 8(1) (law enforcement), and 12 (solicitor-client privilege) of the *Act*. The township assessed a final fee of \$1,114.20.

During mediation, the township stated that some of the records were not responsive to the request and the mediator raised the possible application of section 38(a) (discretion to refuse requester's own information).

In this order, the adjudicator partially upholds the township's decision to withhold information on the basis that: it is non-responsive; section 38(a), in conjunction with sections 7(1) or 12, applies; or, sections 7(1) or 12 apply alone. The adjudicator orders that part of the fee paid be reimbursed to the appellant.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O., Ch. M.56, sections 48(a), 7(1), 8(1), 8(2), 12, 45(1) and sections 6 and 6.1 of Regulation 823 under the *Act*.

**Cases Considered:** *John Doe v. Ontario (Finance)*, 2014 SCC 36.

## **OVERVIEW:**

[1] The appellant made an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Tay Valley Township (the township) for access to:

All correspondence mentioning myself [appellant's name] or [a particular school or centre] and: Tay Valley Township staff, contractors, councillors and planners, including but not limited to: [twelve named individuals].

[2] The request is best understood with some context, provided for in the parties' representations in this matter. The appellant owns a property in the township (the property) on which she intends to operate a centre or a school (the centre). She sought and obtained a building permit from the township.

[3] After construction began, staff from the township and the Rideau Valley Conservation Authority (RVCA) attended the property. The township determined that construction was not proceeding in accordance with the permit and it issued a Stop Work Order under the *Building Code Act*.

[4] In addition, the RVCA determined that a permit was required under its permitting authority in the *Conservation Authorities Act*. The RVCA is also an institution under the *Act*. The appellant's spouse made an access request to the RVCA about the same circumstances (Appeal MA19-00062).

[5] There is a dispute about the property, its use and these events involving the appellant, the RVCA and the township.

[6] The appellant made the above-described access request after the Stop Work Order was issued.

[7] The township issued a fee estimate of \$2,339.00, for which it provided a cost breakdown, and requested a deposit of \$1,000.

[8] After paying the deposit, the appellant submitted a second access request for records relating to the appellant's first access request and the township's fee estimate.

[9] After locating responsive records to both requests, the township issued an access decision to the appellant, granting her partial access to them. The township advised that it withheld some information from disclosure under the discretionary exemptions in sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 8(1) (law enforcement), 8(2)(a) (law enforcement report) and 12 (solicitor-client privilege) of the *Act*.

[10] The township also issued its final fee in the amount of \$1,114.20 and requested payment of \$109.20, which reflected the final fee less the \$1,000 deposit and a refund

of the \$5 fee for the second request.

[11] The appellant appealed the township's decision.

[12] During mediation, the appellant confirmed that she appeals both the township's fee and its access decision. The township issued a revised access decision to the appellant, granting her access to additional records.

[13] The mediator raised the possible application of section 38(a) of the *Act* (discretion to refuse a requester's own personal information) because the records appeared to contain the appellant's personal information.

[14] The appellant reviewed the revised access decision and disclosure. She confirmed her interest in pursuing access to the information withheld from disclosure, with the exception of the information of other individuals subject to the township's personal privacy claim.<sup>1</sup> The information withheld on the basis of the personal privacy exemption is therefore not at issue in this appeal.

[15] The township issued a second revised decision and updated its Index of Records to identify records that it claims consist of information that is not responsive to the appellant's request. As a result, one of the issues in the appeal for some of the records is whether the record is responsive to the request.

[16] Mediation did not resolve the issues under appeal, the file was transferred to the adjudication stage of the appeal process and a written inquiry was conducted. The parties submitted representations in the inquiry, which were shared in accordance with the IPC's *Code of Procedure and Practice Direction 7*.

[17] In its representations, the township withdrew its reliance on sections 6(1)(b) and 8(2) and accordingly these exemptions are no longer at issue in this appeal.

[18] In this order, I uphold the township's decision to withhold some of the withheld information because: it is non-responsive to the request; section 38(a), in conjunction with sections 12 and 7(1) applies; section 12 alone applies; or, section 7(1) alone applies. I therefore order the township to disclose the information for which I have not upheld its exemption claims. I also order the township to refund part of the fee paid by the appellant.

## **RECORDS:**

[19] There are 96 records at issue in this appeal consisting of letters, emails, notes

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<sup>1</sup> The township applied section 14(1) to withhold portions of records 83, 99, 100 and 138.

and memoranda.

## **ISSUES:**

- A. What records are responsive to the request?
- B. Do the records contain "personal information," as defined in section 2(1), of the appellant?
- C. Does the exemption for solicitor-client privilege at section 12 alone, or in conjunction with section 38(a), apply to the information at issue?
- D. Does the exemption for advice and recommendations at section 7(1) alone, or in conjunction with section 38(a), apply to the information at issue?
- E. Does the exemption for law enforcement at section 8(1) alone, or in conjunction with section 38(a), apply to the information at issue?
- F. Did the institution exercise its discretion properly in the circumstances? If so, should this office uphold the exercise of discretion?
- G. Should the fee be upheld?

## **DISCUSSION:**

### **Issue A: What records are responsive to the request?**

[20] The township submits that some of the information in the following records is not responsive to the request: 21, 83, 84, 88, 99, 100, 128, 132 and 138.

[21] The township also asserts that some information in records 88, 99 and 132 contain personal information other than the appellant's. The appellant has not appealed the township's withholding of other individuals' personal information and so this information will not be considered further or ordered disclosed in this order.

[22] Institutions should adopt a liberal interpretation of requests made, 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.<sup>2</sup> To be considered responsive to the request, records must "reasonably relate" to the request.<sup>3</sup>

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<sup>2</sup> Orders P-134 and P-880.

<sup>3</sup> Orders P-880 and PO-2661.

[23] The township's claim that some of the records are not responsive relates only to the first part of the appellant's request, which is for, "correspondence *mentioning* [the appellant] or [a particular centre or school] and: Tay Valley Township staff, contractors, councillors and planners, including but not limited to: [named individuals]" [emphasis added]. The township says that some records and portions of them are not responsive because they do not respond to the clear and unambiguous wording of the request.

[24] The appellant, without being able to see the content of the records, makes no specific representations in response to this claim other than to concede on the basis of the Index that Record 21 is not responsive as claimed by the township.

[25] After review, I agree that Record 21 is not responsive. It pertains to a matter unrelated to the access request before me.

[26] I find, however, that most of the remaining records are responsive to the request. I have reviewed the records in the context of the access request, and in my view, the township is taking an overly narrow view of the request made, which was for records that *mention* the centre.

[27] Record 83 is an email chain. The township asserts that the last email in the chain is not responsive to the request. I disagree and based on my review find that its content reasonably relates to the appellant's request.

[28] Record 84 is an email chain. The township asserts that the entire chain is not responsive to the request. I disagree and based on my review find that its content reasonably relates to the appellant's request.

[29] Based on my review, I find that records 88 and 132 are reasonably related to the appellant's request and are therefore responsive.

[30] Record 99 consists of two emails in an email chain. I find that the most recent email in the chain is responsive. However, I agree with the township that the remaining email in Record 99 is not responsive and I will uphold its decision regarding that portion of the record.

[31] Record 100 is an email chain consisting of two emails. The township claims that one complete email (i.e. the oldest, chronologically, in the chain) and part of the other are not responsive. I agree that the oldest email in the chain is not responsive and I uphold the township's decision not to disclose this part of Record 100. On the other hand, I find that the other email within Record 100 is responsive when one considers that the request was for correspondence that *mentions* the particular centre.

[32] Record 128 is an email. The township claims that one phrase of the email is not responsive. In consideration of the language of the request, I disagree and find that the email is responsive as it is an email that mentions the particular centre.

[33] Record 138 is an email. The township claims that only two sentences of the entire email are responsive. In consideration of the language of the request, I disagree and find that the email is responsive.

[34] In summary, I uphold the township's decision to withhold the following information on the basis that it is not responsive: Record 21 and parts of records 99 and 100. I find that the following information is responsive, and I will consider the township's alternative claims regarding this information below: records 83, 84, 88, 128, 132 and parts of records 99 and 100.

**Issue B: Do the records contain the "personal information," as defined in section 2(1), of the appellant?**

[35] I must consider whether the appellant's personal information is contained in the records to determine whether the exemption claims made by the township ought to be considered under section 38(a), which is the section of the *Act* that sets out the exemptions from the right of access to one's own personal information.

[36] The township concedes that the records at issue "for the most part" contain the appellant's personal information. The township states in its representations that it, "understood [the first request] to be at heart a request for personal information and took this into consideration while exercising its discretion...." However, the township also submits<sup>4</sup> that although the request was for the appellant's personal information, the request was also for records referencing the centre. The township submits that had the request been limited to her personal information only, there would have been "significantly fewer records." The township submits that information about the centre and the property are not the personal information of the appellant.

[37] In section 2(1) of the *Act*, "personal information" is defined as "recorded information about an identifiable individual," including information such as: an individual's age or marital status (paragraph (a)), information relating to financial transactions in which the individual has been involved (paragraph (b)), any identifying number, symbol or other particular assigned to the individual (paragraph (c)), or the address or telephone number of the individual (paragraph d)), correspondence sent to the institution of a private and confidential nature (paragraph (f)) or the views or opinions of another individual about the individual (paragraph (g)). The list of examples of personal information under section 2(1) is not exhaustive, meaning that other types of information may qualify.

[38] Sections 2(2.1) and (2.2) also relate to the definition of personal information. These sections state:

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<sup>4</sup> This argument was raised regarding the appropriateness of the fee.

(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.

[39] As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual.<sup>5</sup> However, if information associated with an individual in a professional capacity reveals something of a personal nature of about the individual, it may qualify as personal information.<sup>6</sup>

[40] Based on my review, some of the records contain the appellant’s personal information because there are brief references to information that may reveal something personal about the appellant, although also related to her role as the operator of the centre.

[41] The remainder of the records relate to the approvals sought by the appellant for the property and the centre. Information in those records about the appellant as the operator of the centre without revealing anything of a personal nature about her is not her personal information.

[42] As a result of this finding, some of the township’s exemption claims will be examined under section 38(a) of the *Act* in conjunction with sections 7(1), 8(1)(a) and (b), and 12, as applicable. The others will be examined under each of sections 7(1), 8(1) and 12, alone, as applicable.<sup>7</sup>

**Issue C: Does the exemption for solicitor-client privilege at section 12 alone, or in conjunction with section 38(a), apply to the information at issue?**

***Application of Section 38(a)***

[43] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from

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<sup>5</sup> Orders P-257, P-427, P-1414, P-1612, R-980015, MO-1550-F and PO-2225.

<sup>6</sup> Orders P-1409, R-980015, PO-2224 and MO-2344.

<sup>7</sup> Sections 36(1) and 38(a) are found in Part II of the *Act*, which addresses a requester’s right of access to their own personal information. For records that do not contain the requester’s own personal information, the right of access is determined under Part I of the *Act* and the exemptions set out in that Part.

this right. Section 38(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section ...7, 8, ... 12, ... would apply to the disclosure of that personal information.

[44] 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.<sup>8</sup>

[45] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

### ***Section 12***

[46] The township claims that section 12 applies to several of the records at issue in this appeal. I will first review the general principles of the section 12 exemption, with which the parties generally agree, consider the parties' representations, and then decide whether section 12 applies to the records.

[47] Section 12 states:

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

[48] 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. To claim this exemption, the township must establish that one or the other (or both) branches apply.

#### *Branch 1: common law privilege*

[49] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. The township relies on solicitor-client communication privilege.

[50] Solicitor-client communication privilege protects direct communications of a

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<sup>8</sup> Order M-352.



confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.<sup>9</sup> The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.<sup>10</sup> 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.<sup>11</sup>

[51] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.<sup>12</sup>

[52] 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.<sup>13</sup> The privilege does not cover communications between a solicitor and a party on the other side of a transaction.<sup>14</sup>

### *Branch 2: statutory privilege*

[53] Branch 2 is a statutory privilege that applies where the records were "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." The statutory and common law privileges, although not identical, exist for similar reasons. Like the common law solicitor-client communication privilege, this privilege covers records prepared for use in giving legal advice.

### ***Representations***

[54] The township claimed the application of section 12 to the following records: 44-50, 53-62, 67-69, 72, 73, 78, 79, 84-88, 89, 90, 91, 93, 94, 96, 97, 98, 99, 102, 104, 105, 106, 109, 114-116, 118-127, 129, 130, 132, 136 and 140.

[55] I will also consider whether section 12 applies to records 52, 99 and 108.<sup>15</sup>

[56] Records 52 and 108 are duplicates of records 45 and 59. Although the township claims that section 7(1) applies to Record 52, and section 8(1) applies to Record 108, it also relies on the fact that they are duplicates of record 45 for which it claims section 12. In my view, the fairest interpretation of the township's representations is that it

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<sup>9</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.) ("*Descôteaux*").

<sup>10</sup> Orders PO-2441, MO-2166 and MO-1925.

<sup>11</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.) ("*Balabel*").

<sup>12</sup> *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

<sup>13</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936 ("*Chrusz*").

<sup>14</sup> *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

<sup>15</sup> The following records contain the appellant's personal information: 45, 52, 59, 89, 91, 94, 105, 108, 114, 115, 116.

claims the application of sections 7(1), 8(1) and 12 in relation to Records 45, 52, 59 and 108.

[57] I found the township's representations about Record 99 to be ambiguous regarding its alternative exemption claims for that record. In part, it refers to its claims for Record 88, which includes the totality of Record 99. I therefore understand the township to be asserting that the following exemptions apply to Record 99: sections 14(1) (not at issue in this appeal), 7(1) and 12.

[58] The appellant states that she takes no issue with the section 12 claim in relation to the many of the records, subject to this office's review. However, she takes issue with its application to records 105, 109, 115 and 116.

[59] The township stresses the importance of solicitor-client privilege and points to several Court of Appeal or Supreme Court of Canada authorities to underline its position both in the context of the *Act* and in other contexts, such as *Big Canoe and Descôteaux*<sup>16</sup>, *Lavallée v. Canada (Attorney General)*<sup>17</sup> and *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*.<sup>18</sup> The township states that the IPC must approach claims of privilege in a manner that gives due regard to the importance of the protection provided by solicitor-client privilege.

[60] The township refers to Order MO-2945-I, in which the adjudicator referred and relied on *Balabel*,<sup>19</sup> which states that solicitor-client privilege protects any and all communications forming part of the "continuum of communications" between client and lawyer for the purpose of seeking and providing legal advice.

[61] Further, the township states that the IPC has previously accepted that section 12 permits an institution to withhold documents relating to investigations conducted by or on behalf of legal counsel to assist in providing legal advice.<sup>20</sup> The township asserts that this office must only be satisfied that the records at issue contain statements of legal advice, a blend of fact and legal advice or form part of the continuing conversation between the township and its solicitor for the exemption to apply.

[62] As noted, the appellant has only taken issue regarding the township's section 12 claims in relation to four records. She does not dispute the principles underpinning solicitor-client privilege but asks this office to pay careful attention to whether the records for which the township claims privilege are for the purpose of seeking or obtaining legal advice. The appellant points to the township's representations about

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<sup>16</sup> Cited above.

<sup>17</sup> 2002 SCC 61.

<sup>18</sup> 2010 SCC 23.

<sup>19</sup> Cited above.

<sup>20</sup> Orders MO-2781 and MO-2195.

protecting communications within the “continuum of communications” and asserts that only those communications within that continuum are for the purpose of seeking or receiving legal advice, not those that are mere “commentary.”

[63] Regarding records 105, 109, 115 and 116, the appellant points to the index and notes that they appear to contain either her own or her spouse’s communications with the township and asserts that she is entitled to know which of these emails the township sought legal advice about.

[64] In reply, the township disputes the appellant’s claim that she is entitled to know which emails that it sought legal advice about. The township states that it is entitled to the protection of solicitor-client privilege over the fact that it sought legal advice.

[65] The appellant also notes that some of the records already disclosed refer to the township’s “solicitors,” in plural, and she asserts that there is a duty pursuant to the Law Society of Ontario’s “Rules of Practice and Procedure” for the township to disclose the lawyers that it has retained for issues involving the appellant. Compliance with the Law Society of Ontario’s rules is not within the jurisdiction of the IPC. In any case, the access request before me did not seek the identity of the township’s lawyer or lawyers and I will not address the issue further in this order. Nevertheless, in case it assists the parties, I note that the township has clarified in its reply that reference to “solicitors” was a typographical error that should have said “solicitor.”

### ***Analysis and Findings***

[66] I will first deal with the records for which the appellant has made specific representations: 105, 109, 115 and 116. Based on my review, these records are subject to solicitor-client communication privilege as they are direct communications of township staff with the township solicitor for the purpose of seeking or receiving legal advice. They are exempt under section 12 (in the case of records 109 and 115) and section 38(a) in conjunction with section 12 (records 105 and 116) as they are subject to Branch 1 solicitor-client communication privilege.

[67] I considered but disagree with the appellant’s argument that she is entitled to know which emails the township sought legal advice about. Disclosing this type of information would reveal the legal advice sought by the town, which is protected under section 12.

[68] I will now deal with the balance of the township’s section 12 claim. To do so, I have reviewed all of the other records for which the township claims that privilege applies. While I appreciate the approach taken by the appellant to concede some of the township’s claims, I have given little weight to these concessions because the onus to establish the application of the exemption rests with the township.

[69] I have taken into account the appellant’s general argument that it is only those communications that pertain to seeking or receiving legal advice that ought to be

captured by the solicitor-client privilege exemption. I have also taken into account the township's argument that solicitor-client privilege is an important protection and that it can include communications that form part of the continuum of communications to enable legal advice to be provided or sought.

[70] In my view, records 79, 84-91, 93, 94, 96, 98, 99, 104, 106, 118-127, 132 and 140 in their entirety fall squarely within Branch 1 solicitor-client communication privilege of section 12 exemption. Some of these records are direct communications between township employees and the township solicitor for the purpose of seeking or receiving legal advice about a variety of matters, some unrelated to the appellant, the centre or the property. The remainder are communications between township employees and although the town solicitor was not a party to these communications, I find that the communications form part of the "continuum of communications" between the township and its solicitor regarding a particular matter.

[71] Taking into account whether they contain the appellant's personal information, I find that records 89, 91 and 94 are eligible for exemption under section 38(a) in conjunction with section 12 and that the remaining records are eligible for exemption under section 12 alone. I will review the township's exercise of discretion under Issue F.

[72] This leaves the remaining records: 44-50, 53-62, 67, 68, 69, 72, 73, 78, 97, 102, 114, 129, 130 and 136, which can be grouped in five ways.

[73] First, records 44, 50, 53, 54, 55, 56, 60, 69, 72, 73, 102, and 136 are different versions of or portions of an email chain of communications among members of council and township staff. All of these records include the withheld portions of Record 136. Based on my review, the withheld information in Record 136 is eligible for the section 12 exemption under Branch 1 solicitor-client communication privilege. Although the solicitor was not party to these communications, disclosure of the information would reveal solicitor-client communication privileged information. Confidentiality concerns prevent me from describing the records further.

[74] The portion of Record 136 that the township disclosed is a discrete exchange that was capable of being severed without disclosing solicitor-client communication privileged information. I cannot say the same about the severability of the information in records 53, 54, 55, 56, 60, 73, 102, which contains duplicates of the solicitor-client communication privileged information in Record 136 and other exchanges that are related to the privileged information. In my view, there is no non-exempt information in these exchanges that is reasonably capable of being severed. They are therefore eligible in their entirety to be withheld on the basis of section 12, alone.

[75] However, it is my view that portions of records 44, 50, 69 and 72 may be severed without disclosing the solicitor-client communication privileged information in Record 136. These records also duplicate the disclosed portion of Record 136. I will therefore consider the township's alternative claims regarding these portions under Issue D.

[76] In summary, I find that records 53, 54, 55, 56, 60, 73, 102 in their entirety, the withheld information in Record 136 and duplicates of it in records 44, 50, 69 and 72 are eligible for exemption under section 12. Therefore, I need not consider the township's alternative claims that section 7(1) also applies to that information. I will accordingly consider whether the town properly exercised its discretion to withhold this information under Issue F.

[77] Second, records 45, 46, 52, 59, 67, and 108 are either different versions of or portions of an email chain between members of council and township staff. Record 67 has been partially disclosed.

[78] In my view, two lines of the first email in this email chain (and contained in all of records 45, 46, 59, 108 and the withheld portions of 67) qualify as solicitor-client communication privileged (Branch 1) information, because although the town solicitor was not a party to this communication, I find that it forms part of the "continuum of communications" between the township and its solicitor regarding a particular matter.

[79] I considered whether the two lines may reasonably be severed from the balance of the email (which is the first email in the email chain) in which they appear and in my view, they may not as it would reveal privileged information. I therefore find that section 12 alone<sup>21</sup> or section 38(a) in conjunction with section 12<sup>22</sup> applies only to the first email in the chain wherever it appears in records 45, 52, 59, 108 and to the entirety of the withheld information in records 46 and 67. I will review the town's exercise of discretion regarding this information under Issue F.

[80] Records 45, 52, 59 and 108 contain duplicate copies of an email that, in my view, may be severed from the solicitor-client communication privileged information in the first email within in this email chain. I therefore find that section 12 does not apply to part of the information in records 45, 52, 59 and 108 and I will consider the township's alternative claim that section 38(a), in conjunction with sections 7(1) or 8(1), applies to that information.

[81] Third, records 47, 48, 49, 57 (original), 58, 61, 62, 68, 78 and 97 (duplicate of 57) are either different versions, or portions, of a chain of emails between members of council and township staff. In my view, the original email in the chain contains solicitor-client communication privileged information including advice from the solicitor, although the solicitor himself was not included in these communications. While there are other topics discussed in the emails, it is my view that these emails are best understood as a single discussion that cannot be reasonably or logically severed without disclosing the information that is eligible for exemption under section 12. In light of this finding, it is

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<sup>21</sup> Records 46 and 67.

<sup>22</sup> Records 45, 52, 59 and 108.

not necessary for me to consider the township's alternative claim that section 7(1) applies to these records.<sup>23</sup> I will review the township's exercise of discretion under Issue F.

[82] Fourth, records 129 and 130 are related. In my view, the withheld portions of records 129 and 130 do not reveal any solicitor-client communication privileged information. These records contain a copy of a communication from the solicitor to a third party adverse in interest to the township. There is no information in the record that could be said to be confidential between solicitor and client. I therefore find that the township may not rely on section 12 to withhold records 129 and 130. The township also relies on section 7(1) to withhold these records, which will be considered below.

[83] Fifth and lastly, there is the withheld portion of Record 114, which is an email. Based on my review of all of the records, and the context of this record, I find that the withheld portions reveal Branch 1 solicitor-client communication privileged information and that therefore section 38(a), in conjunction with section 12, applies. I form this view in consideration of other records in this appeal that include the information contained in record 114. I will consider the township's exercise of discretion at Issue F.

[84] In conclusion on this issue, I find that some or all of the information on the following pages is eligible for the section 38(a) exemption, in conjunction with section 12: 45 (part), 52 (part), 59 (part), 89, 91, 94, 105, 108 (part), 114, and 116. I will review the township's exercise of discretion in relation to these records at Issue F, below.

[85] I find some or all of the information on the following pages is eligible for the section 12 exemption alone: 44 (part), 46, 47, 48, 49, 50 (part), 53, 54, 55, 56, 57, 58, 60, 61, 62, 67, 68, 69 (part), 72 (part), 73, 78, 79, 84-88, 90, 93, 96, 97, 98, 99, 102, 104, 106, 109, 115, 118-127, 132, 136 and 140.

[86] I find that some of the information on the following pages is not eligible for the exemptions in section 12 alone or in conjunction with section 38(a): 44 (part), 45 (part), 50 (part), 52 (part), 59 (part), 69 (part), 72 (part), 108 (part) 129 and 130 and I will therefore review the township's alternative claims that the sections 7(1) and 8(1), alone or in conjunction with section 38(a), apply below.

**Issue D: Does the exemption for advice and recommendations at section 7(1) alone, or in conjunction with section 38(a), apply to the information at issue?**

[87] The township relies on the advice and recommendations exemption at section 7(1) of the *Act* to withhold some of the information. As discussed in detail under Issue

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<sup>23</sup> It is noted that the township did not make the alternative section 7(1) claim in relation to Record 49.

B, because of my finding that some of the records contain the appellant's personal information, I must analyze this claim under section 38(a) in conjunction with section 7(1) for those records and under section 7(1) alone for the remainder.

[88] The following records that remain at issue will be discussed below:<sup>24</sup> 1, 2, 5, 6, 7, 14, 15, 16, 17, 19, 22, 27, 28, 32, 37, 38, 43, part of 44, part of 45, part of 50, part of 52, part of 59, 63, part of 69, part of 72, 75, 80, 81, 83, 92, 95, the responsive part of 100, 103, part of 108, 110, 117, 128, 129, 130, 137, 138.<sup>25</sup>

[89] Of these records, the appellant takes no issue with the section 7(1) claim for the following records, subject to this office's review: 1, 2, 14, 15, 16, 17, 19, 27, 32, 38, 80, 81, 92, 95, 103, and 110.

[90] There was some ambiguity about the township's claims regarding records 5 and 37 and whether the township intended to claim that section 7(1) applies to them. This ambiguity arises, in part, because Record 37 is an exact duplicate of Record 27, for which the township claims section 7(1) applies. Record 5 is also duplicated in both Records 27 and 37. In my view, the fairest interpretation of the township's representations is that it claims the application of both sections 7(1) and 8(1) in relation to Records 5, 27 and 37.

[91] 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.

[92] In *John Doe v. Ontario (Finance)*,<sup>26</sup> the Supreme Court of Canada held that the purpose of the equivalent section in the *Freedom of Information and Protection of Privacy Act*, 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.

[93] There is no dispute between the parties about the meaning and purpose of section 7(1); the focus of the appeal is whether the township has properly applied the exemption. I will first review the relevant considerations that come to bear when applying section 7(1) and then I will turn to the parties' representations.

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<sup>24</sup> The township claimed that section 7(1) applied to several additional records but these are no longer at issue due to my findings under Issue C.

<sup>25</sup> Of these, records 45, 52, 59 and 108 contain the appellant's personal information.

<sup>26</sup> 2014 SCC 36 (*John Doe*), at para. 43.

[94] "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.

[95] "Advice" has a broader meaning than "recommendations." "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.<sup>27</sup> "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.<sup>28</sup>

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

- the information itself consists of advice or recommendations, or,
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.<sup>29</sup>

[97] 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 a public servant or consultant.<sup>30</sup>

[98] Section 7(1) exemption 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 section 7(1).<sup>31</sup>

[99] Sections 7(2) and (3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7(1). Only paragraph (a) of section 7(2) may be relevant to this appeal which states that a head shall not refuse to disclose a record on the basis of section 7(1) that contains "factual material."

[100] Factual material refers to a coherent body of facts separate and distinct from the

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<sup>27</sup> *John Doe*, above, at paras. 26 and 47.

<sup>28</sup> Order PO-3315.

<sup>29</sup> Order P-1054

<sup>30</sup> *John Doe*, cited above, at para. 51.

<sup>31</sup> *John Doe*, cited above, at paras. 50-51.



advice and recommendations contained in the record.<sup>32</sup> Where the factual information is inextricably intertwined with the advice or recommendations, section 7(2)(a) may not apply.<sup>33</sup>

### ***Representations***

[101] First, the township claims that the several records refer to advice and recommendations received from consultants and the RVCA. The township explains other underlying circumstances that I am not able to disclose in this order because of confidentiality concerns that, it says, explain why these records were created. The township asserts that disclosure of these records would either reveal the advice or recommendations or allow for accurate inferences to be drawn about the nature of the advice or recommendations.

[102] Second, the township claims that disclosure of several of the records, although not involving communications with consultants or the RVCA, would allow for accurate inferences to be drawn about the nature of advice received. The township provided additional information about the parties to the communications that may not be disclosed due to confidentiality concerns. The township states that even where the record does not contain advice and recommendations received, disclosure of these records would reveal the advice sought and allow for inferences to be drawn.

[103] The township argues that it is entitled to withhold draft documents under section 7(1) because disclosure of drafts would permit comparisons to final versions that would reveal advice received.

[104] The township states that none of the exceptions in sections 7(2) or 7(3) apply to the records and that it has severed all parts of them that may be severed without revealing the nature of advice and recommendations.

[105] As noted, the appellant concedes that the township may be able to claim the section 7(1) exemption for some of the records, subject to this office's review.<sup>34</sup> The appellant specifically disputes the township's section 7(1) claim for records 6, 7, 22 and 28.

[106] Regarding records 6, 7 and 28, the appellant submits that section 7(1) should not apply because these records relate to a meeting that occurred with the appellant and, drawing on information contained in the index, that "a handout [that] is intended for distribution at a meeting that [the appellant] was privy to" cannot also be advice or

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<sup>32</sup> Order 24.

<sup>33</sup> Order PO-2097.

<sup>34</sup> I note that the appellant states that she takes no issue with record 139, which is not a record in dispute in this appeal.

recommendations. Rather, the appellant states that these documents are "more properly categorized as internal memoranda relating to the factual background of this matter" and not subject to the exemption.

[107] On this point, in reply, the township states that the withheld portions of records 6, 7 and 29 were not disclosed to the appellant and that this information was intended for internal use only. The township submits that the appellant's attendance at the meeting in question does not impact whether the withheld information contains advice or recommendations.

[108] Regarding Record 22, the appellant states that the date of the record is a week before staff attended at the property to observe that the construction did not accord with the permit. The appellant says that prior to this visit, to her knowledge, there were no known issues relating to the permit and that accordingly disclosure of Record 22 cannot said to contain "advice or recommendations" that would be harmful if released to the appellant.

[109] In further support of her position, the appellant refers to and quotes from an entry in a timeline already disclosed to her in a record not at issue in this appeal. Based on part of the timeline describing events that occurred on the date of Record 22, the appellant asserts that the RVCA (in this case) was providing "conjecture" to the township and not advice or recommendations.

[110] In reply regarding Record 22, the township states that section 7(1) does not limit its ability to exercise its discretion only when the advice or recommendations relate to an issue known to the appellant and that it is entitled to seek advice and recommendations at all stages. Further, the township states that the timeline quoted by the appellant "summarizes the factual piece of the exchange between the RVCA and the township, but that disclosure of the actual record would reveal the advice and recommendations sought by the township and the RVCA," and disagrees with the appellant's view that it is "conjecture."

### ***Analysis and Findings***

[111] The appellant states in her representations that Record 14 was already disclosed to her without redactions. As a result, I will not consider this record further as it has been disclosed.

[112] I have reviewed the records at issue and taken into account the arguments made by the township and the appellant. Although the appellant has only made specific representations in relation to four of the records at issue, I have considered these arguments more broadly against the background circumstances and the principles set out in *John Doe*. While I appreciate the approach taken by the appellant to concede some of the township's claims, I have given little weight to these concessions because the onus to establish the application of the exemption rests with the township.

[113] Based on my review of the records and the township's representations, which included confidential representations that I am unable to describe in this order to protect confidentiality, I find that disclosure of the following records would reveal the advice or recommendations of consultants or employees of the township or the employees of the RVCA, another institution under the *Act*:<sup>35</sup> 1, 2, 5, 6, 7, 15-17, 19, 22 (part), 27, 28, 32, 37, 38, 80, 81, 92, 95, 103, 110 and 138.

[114] I also observe that the information contained in these records consists mainly of advice, as opposed to recommendations from the RVCA's employees, the township's employees or one of the township's consultants. These records also include draft versions of communications or documents that in some cases became public. However, I am satisfied that disclosure of these drafts would reveal staff or consultant advice.

[115] I considered the specific arguments made by the appellant regarding records 6, 7, and 28, which are emails responding to already-disclosed emails. The appellant argued that the exemption does not apply because she and her spouse attended the meeting for which the records were prepared. Although I considered these arguments, I agree with the township's position that the fact that the records were prepared for a meeting with the appellant does not impact the application of section 7(1). In my view, the withheld emails contain advice.

[116] The appellant made specific arguments about Record 22. As noted above, I only uphold section 7(1) in relation to parts of Record 22. Record 22 is an email chain. Some of the discrete emails within the chain contain no advice or recommendations and are capable of being severed from the rest. I therefore do not uphold the township's claim of section 7(1) to some portions of Record 22.

[117] The appellant's first argument regarding Record 22 is that because it was prepared in advance of any known concerns about the permit, disclosure would not cause any harm. Institutions claiming section 7(1) need not establish harm, although the section is protective of the free flow of advice. I must only determine based on the content of the records whether section 7(1) applies. I find based on my review that regardless of when the emails were sent and received, some of the information at issue contains advice.

[118] The appellant's second argument regarding Record 22 is that the withheld information is factual and not eligible for the section 7(1) exemption. It is accurate that some of the information in Record 22 is factual. However, I am satisfied that any such information is inextricably intertwined with advice and I therefore conclude that these records contain advice within the meaning of section 7(1) and I uphold the township's

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<sup>35</sup> The RVCA is the institution in appeal MA19-00062 and objects to the disclosure of the advice of its employees.

claim that it applies to some portions of Record 22.

[119] Records 43, 63, 75 and 137 are different versions and duplicates of an email chain. Based on my review, I am unable to conclude that that disclosure of these records would reveal any advice or recommendations provided by township employees or consultants and I will not uphold the township's section 7(1) claim. Because there are no other exemption claims made, I will order this information to be disclosed.

[120] Records 44, 50, 69 and 72, only part of which remain at issue, contain different versions and duplicates of an email chain. The township's main confidential arguments about these records focus on the information that I have found to be eligible for exemption as solicitor-client privileged communication information. After review, I find that the portions that remain at issue do not qualify for the section 7(1) exemption. They neither disclose advice from employees or consultants nor does their disclosure allow for any inferences to be made about advice given by its employees or consultants. I do not uphold the township's section 7(1) claim in relation to these records and because there are no other exemption claims made, I will order this information to be disclosed.

[121] Records 45, 52, 59, and 108, only part of which remain at issue, contain duplicate copies of the same email. I have considered the township's confidential representations regarding these records, most of which pertain to its solicitor-client privilege claim. Based on my review, the information at issue is not advice or recommendations from township staff or consultants, nor would its disclosure reveal such advice or recommendations. Accordingly, I do not uphold the township's claim. I will consider the township's alternative claim, the exemption in section 38(a) in conjunction with section 8(1), below.

[122] I have reviewed the township's confidential representations regarding records 129 and 130, which are emails discussed at greater length under Issue C. Based on my review, I am unable to conclude that their disclosure would reveal any advice or recommendations provided by township employees or consultants. The information is factual and not eligible for exemption under section 7(1) because of the exception in section 7(2)(a) and I do not uphold the township's claim.

[123] Similarly, based on my review of Record 128, a single email, I am unable to conclude that disclosure of this record would reveal any advice or recommendations provided by township employees or consultants; the information is factual and not eligible for exemption (under the exception in section 7(2)(a)). However, there is some personal information in Record 128 that is unrelated to the appellant or the issues in dispute between them. Although I order Record 128 to be disclosed, the personal information must be withheld because information withheld on the basis that the appellant is not seeking access to personal information in the records at issue.

[124] Record 83 is an email chain. Although I have reviewed the township's confidential representations, I am unable to conclude that disclosure would reveal the

content of any advice or recommendations provided by township staff or a consultant. This record also contains personal information, as claimed by the township. I will therefore order Record 83 to be disclosed, but the personal information of another individual withheld.

[125] Only part of Record 100, an email chain, is at issue because I have already determined that part of this record is not responsive. In my view, the responsive portion of Record 100 is factual and therefore not eligible for the section 7(1) exemption because of section 7(2)(a). This record contains personal information of another individual, as claimed by the township. I will therefore order the responsive part of Record 100 to be disclosed, except for the personal information contained within it.

[126] Based on my review of Record 117, which is an email exchange that includes draft minutes of a meeting, I find that it qualifies for the section 7(1) exemption because it contains advice and because the draft, if compared to the final minutes, could reveal that advice and accordingly, I will uphold the township's claim.

[127] To summarize, I find that section 7(1) alone applies to the following records: 1, 2, 6, 5, 7, 15-17, 19, part of 22, 27, 28, 32, 37, 38, 80, 81, 92, 95, the responsive part of 100, 103, 110, 117, 128, 129, 130, 137, and 138. I will review the township's exercise of discretion under Issue F.

[128] I find that section 7(1) does not apply to the information remaining at issue in records 22, 45, 52, 59, and 108. I will consider the township's alternative exemption claims under Issue E.

[129] I also find that section 7(1) does not apply to the following records: 43, part of 44, part of 50, 63, part of 69, part of 72, 75, 137, 129, 130, 128, 83, and 100. Because the township has not made any alternative claims that are under appeal, I will order this information to be disclosed except for information covered by the township's section 14(1) claims.<sup>36</sup>

**Issue E: Does the exemption for law enforcement at section 8(1), alone or in conjunction with section 38(a), apply to the information at issue?**

[130] The township relies on sections 8(1)(a) and (b) in relation to several records, many of which the township made alternative claims. After considering the township's alternative claims, only parts of records 22, 45, 52, 59 and 108 remain at issue. The

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<sup>36</sup> In the case of Record 128, although the township did not specifically assert a section 14(1) claim, it does contain personal information of an identifiable individual other than the appellant and because the appellant does not seek access to other individuals' personal information, it should not be disclosed.

parts remaining at issue in records 45, 52, 59 and 108 are duplicates of each other.<sup>37</sup>

[131] Sections 8(1) states:

(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(a) interfere with a law enforcement matter;

(b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

[132] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b)

[133] Previous orders of this office have determined that the term "law enforcement" includes a municipality's investigation into a possible violation of a municipal by-law.<sup>38</sup>

[134] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.<sup>39</sup>

[135] It is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.<sup>40</sup> The institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is

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<sup>37</sup> These records contain the appellant's personal information.

<sup>38</sup> Orders M-16 and MO-1245.

<sup>39</sup> *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

<sup>40</sup> Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

needed will depend on the type of issue and seriousness of the consequences.<sup>41</sup>

[136] For section 8(1)(a) to apply, the matter in question must be ongoing or in existence.<sup>42</sup> The exemption does not apply where the matter is completed, or where the alleged interference is with “potential” law enforcement matters.<sup>43</sup> “Matter” may extend beyond a specific investigation or proceeding.<sup>44</sup>

[137] For section 8(1)(b) to apply, the law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with “potential” law enforcement investigations.<sup>45</sup> The investigation in question must be ongoing or in existence.<sup>46</sup>

### ***Representations***

[138] The township submits that “law enforcement” includes a municipality’s investigation into possible violation of a municipal by-law, relying on Orders M-16 and MO-1245 of this Office. It says that the township is involved in an ongoing investigation into the appellant’s breach of the township zoning by-law. It says that disclosure of the records would cause harm but that it need not produce evidence of actual harm, intent to harm or actual intent to harm, relying on Order MO-2074.

[139] The township says that disclosure of the records “may compromise the investigation” into the zoning by-law contravention. As an example, it says that disclosure would reveal the township’s conclusion in the current investigation to the public, allowing other parties to utilize the results and conclusions of the township to avoid detection of similar violations of the zoning by-law, which would reduce the efficacy of the township’s future investigations.

[140] The appellant accepts that a prosecution under the *Provincial Offences Act* for a zoning bylaw infraction is a “law enforcement” matter within the meaning of section 8(1). However, the appellant denies knowledge of any active investigation.

[141] Regarding Record 22, the appellant submits that because the email in question relates to whether the property is located on a flood plain, it is not related to any investigation into any zoning bylaw infraction. The appellant says that a permit to build

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<sup>41</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

<sup>42</sup> Order PO-2657.

<sup>43</sup> Orders PO-2085 and MO-1578.

<sup>44</sup> *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).

<sup>45</sup> Order PO-2085.

<sup>46</sup> Order PO-2657.

within a flood plain is within the jurisdiction of the RVCA and is not a zoning bylaw matter. Further, the appellant says that whether the property is located on the flood plain was not an issue "represented in the" township's zoning bylaw at the time the building permit was issued.

[142] In response to the township's claim that disclosure could cause harm because "other parties" could utilize the results and conclusions to avoid detection, the appellant says that this is not a reasonable or realistic conclusion to draw when viewed against the appellant's right to access information. The appellant submits that it is unlikely that another property owner would benefit from release of records because she is using the property for a novel use.

[143] In reply, the township disputes that the appellant is not aware of an active investigation and points to the fact that it issued a Stop Work Order. It elaborates that Stop Work Orders are remedies available to the township pursuant to its law enforcement authority.

[144] Regarding Record 22 and the appellant's submission that section 8(1) cannot apply because the flood plain issue is not related to a zoning bylaw infraction, the township submits that construction without an RVCA permit is a "potential law enforcement matter" that is related to the flood plain issue. In addition, the township says that appellant's intended use of the property was "in breach of" the township's zoning bylaw and therefore "potentially a law enforcement matter." The township says that the RVCA and the township were "jointly undertaking investigations that constitute the law enforcement matter for which the exemption was identified."

### ***Findings and Analysis***

[145] For the following reasons, I find that the township has not established that sections 8(1)(a) or (b) apply to the remaining withheld portions of records 22, 45, 52, 59 and 108.

[146] Without making a finding about whether there is an ongoing investigation into a law enforcement matter, I am not persuaded that the information remaining at issue could reasonably be expected to cause the harm that is necessary to establish the exemption. In my view, the evidence of harm provided by the township is speculative and too general to demonstrate any particular harms that could reasonably be expected to arise if the information remaining at issue was disclosed.

[147] In sum, I find that neither section 38(a), in conjunction with section 8(1), nor section 8(1) alone, applies to the parts of records 22, 45, 52, 59 and 108 remaining at issue. Because there are no other exemptions claimed, I will order that the township disclose those parts.



**Issue F: Did the institution exercise its discretion properly in the circumstances? If so, should this office uphold the exercise of discretion?**

[148] The sections 38(a), 7(1) and 12 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so.

[149] In addition, this office 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.

[150] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>47</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>48</sup>

[151] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>49</sup>

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

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<sup>47</sup> Order MO-1573.

<sup>48</sup> Section 43(2).

<sup>49</sup> 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.

### ***Representations***

[152] The township says that it exercised its discretion properly, considering only relevant factors, acting in good faith and in furtherance of its duties under the *Act*. The township says that it considered the appellant's interest in receiving the records and the public interest in transparency and access to information, as well as the township's "need for confidentiality" in reliance on the exemptions claimed. The township says that it did not apply a "blanket approach" and that when possible, it severed and disclosed portions of records to the appellant.

[153] The township says that it weighed the potential harm from disclosure against any public interest in favour of disclosure and that it concluded that the township's interest in being able to receive advice, including legal advice, supported withholding portions of the records.

[154] In response, the appellant states that the township has not exercised its discretion thoughtfully or liberally and points to the number of withheld records is evidence of in support of her point.

[155] The appellant says, further, that the township has improperly placed its own public perception before the right of the appellant's and urges this office to take account of the background circumstances, the public nature of the dispute between the parties and that the office should guard against upholding any claims that are made for the purpose of making the township or its author "look bad."

[156] The appellant says that the township relied on section 7(1) improperly and that disclosing the records withheld on this basis would not result in any harm.

[157] In reply, the township states that the volume of withheld records is not relevant evidence regarding the township's exercise of discretion. It also states that background circumstances between the appellant and the township are not relevant considerations, but that in any case it had no bearing on the township's exercise of discretion.

### ***Analysis and Finding***

[158] I uphold the township's exercise of discretion to withhold records eligible for exemption under section 38(a), in conjunction with sections 12 and 7(1), or sections 12

or 7(1) alone, as the case may be. The focus of the review of discretion is whether the institution has engaged in its “residual discretion” to consider all relevant matters and possibly disclose information that it may otherwise be entitled to withhold.

[159] In reaching this conclusion I have considered the totality of the records before me, the approach taken by the township and the parties’ representations. There is no evidence before me that the township acted in bad faith or for an improper purpose or that it took into account irrelevant considerations. I am also unable to conclude that it engaged in a “blanket approach” that fettered its own discretion.

[160] The township appears to suggest that when an institution exercises its discretion it is not proper to consider the underlying circumstances. To the contrary, institutions are required to assess each request on its own merits. In an appeal like this one – where the appellant’s personal information is at issue – the institution is required to take that into consideration. Depending on the information at issue and its magnitude and demonstrated public interest in a matter, the institution may be required to take underlying considerations into account.<sup>50</sup>

[161] The appellant’s main argument is that the township should not use the exemptions in the *Act* to shield itself from information that would be harmful to its reputation or make it “look bad.” Certainly, the township claimed exemptions which it was entitled to do, but I am not persuaded that the township acted for any improper motive as suggested by the appellant.

[162] Considering that there is a legal dispute between the parties, it is my view that the township’s reliance on section 12 in particular – a section of the *Act* that is intended to protect the interests of the party claiming that protection – was proper and can only be understood against the underlying circumstances. I accept the township’s representations that in applying this exemption, it considered the interests of the appellant in receiving the information and weighed the interests protected by the exemption against the purposes of the *Act*. I uphold the township’s exercise of discretion in relation to its section 12 based claims.

[163] Regarding the section 7(1) claims, the township states that it considered the interests protected by section 7(1) – to protect the ability of public servants to provide frank advice. The main thrust of the appellant’s representations on this issue relate to whether the records at issue were eligible for exemption under section 7(1), which was canvassed under Issue D, above.

[164] In my view, the section 7(1) claims in this appeal required the township to

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<sup>50</sup> See Order MO-3924-I and *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23.

concerned itself with the fact that the records contained the appellant's personal information. The township states, in general, that it exercised its discretion as well as competing public interest considerations. It describes the balancing in which it engaged. Based on my review of the records, I find the township's representations to be reflected in its approach and I am therefore satisfied with the township's exercise of discretion and I uphold it.

**Issue G: Should the fee be upheld?**

[165] The appellant appeals the fee of \$1,114.20 assessed by the township, which has already been paid.

[166] There appears to be a dispute between the parties that was not raised until the adjudication stage about whether the appellant received copies of the records for which the township made no exemption claim. I have advised the parties that they should resolve this issue among themselves and I will not address it further in this order, other than to state, because it will become relevant later, that the township states that it prepared records for the appellant to pick up.

[167] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823 (the Regulation), as set out below.

[168] Section 45(1) requires an institution to charge fees for requests under the *Act*. That section reads:

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

- (a) the costs of every hour of manual search required to locate a record;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
- (d) shipping costs; and
- (e) any other costs incurred in responding to a request for access to a record.

[169] More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of the Regulation. Relevant sections read:

6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:

1. For photocopies and computer printouts, 20 cents per page.
2. For records provided on CD-ROMs, \$10 for each CD- ROM.
3. For manually searching a record, \$7.50 for each 15 minutes spent by any person.
4. For preparing a record for disclosure, including severing a part of the record, \$7.50 for each 15 minutes spent by any person.
5. ...

6.1 The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act for access to personal information about the individual making the request for access:

1. For photocopies and computer printouts, 20 cents per page.
2. ...

[170] Section 45(1)(a) (manual search) does not include the search time for manually searching for the requester's personal information.<sup>51</sup>

[171] Section 45(1)(b) (preparation time) includes time for:

- severing a record; or,<sup>52</sup>
- a person running reports from a computer system.<sup>53</sup>

[172] Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.<sup>54</sup>

[173] Section 45(1)(b) does not include time for

- deciding whether or not to claim an exemption<sup>55</sup>
- identifying records requiring severing<sup>56</sup>
- identifying and preparing records requiring third party notice<sup>57</sup>

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<sup>51</sup> Section 6.1 of the Regulation.

<sup>52</sup> Order P-4.

<sup>53</sup> Order M-1083.

<sup>54</sup> Orders MO-1169, PO-1721, PO-1834 and PO-1990.

<sup>55</sup> Orders P-4, M-376 and P-1536.

<sup>56</sup> Order MO-1380.

- removing paper clips, tape and staples and packaging records for shipment<sup>58</sup>
- transporting records to the mailroom or arranging for courier service<sup>59</sup>
- assembling information and proofing data<sup>60</sup>
- photocopying<sup>61</sup>
- preparing an index of records or a decision letter<sup>62</sup>
- re-filing and re-storing records to their original state after they have been reviewed and copied<sup>63</sup>
- preparing a record for disclosure that contains the requester's personal information.<sup>64</sup>

[174] Section 45(1)(c) includes the cost of photocopies at the rates specified in Regulation 823. Section 45(1)(d) includes shipping costs but it does not include the cost of correspondence to notify affected parties or discharge other general responsibilities under the *Act*<sup>65</sup>

[175] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.<sup>66</sup>

### ***Representations***

[176] The township says that it calculated the fee in accordance with the *Act* and Regulation and that it was based on the work actually performed. It says that it assessed fees on the basis of the permitted activities set out in the *Act*: manual search time, preparation time, photocopying charges and shipping costs.

[177] Regarding the preparation time, the township says that the records were prepared by staff to review their responsiveness, apply exemptions and redacting information. Regarding the search, the township says that several staff were involved in searching both email and hard copy files. It describes the keyword searching that it

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<sup>57</sup> Order MO-1380.

<sup>58</sup> Order PO-2574.

<sup>59</sup> Order P-4.

<sup>60</sup> Order M-1083.

<sup>61</sup> Orders P-184 and P-890.

<sup>62</sup> Orders P-741 and P-1536.

<sup>63</sup> Order PO-2574.

<sup>64</sup> Section 6.1 of the Regulation.

<sup>65</sup> Order MO-2274.

<sup>66</sup> Orders P-81 and MO-1614.

conducted to identify electronic records.

[178] The township says that the searches identified 306 responsive records yielding approximately 915 *pages*. Further, it says that only 140 of the responsive records were subject to an exemption.

[179] In its representations, the township calculated the fee as follows:

|                 |  |
|-----------------|--|
| 124.20          | photocopying at a rate of 0.20/page                        |
| 465             | manual search time at a rate of \$7.50/15 min (15.5 hours) |
| 510             | preparing records at a rate of \$7.50/15 min (17 hours)    |
| 15              | Shipping   |
| <b>1,114.20</b> | <b>Total</b>   |

[180] Although not specified in the township's representations, a charge of \$124.20 for photocopying at a rate of \$0.20/page means that it has charged for 621 *pages*. As noted, the township submits that the request yielded 915 *pages* of records. However, as set out in the overview, the township provided a different rationale for the photocopying charge at earlier stages of this appeal, where it indicated that it used a different rate for black and white copies and colour copies.

[181] In response, the appellant notes the discrepancy between the township's original calculation for photocopying and the one included in its representations.

[182] Regarding search and preparation time, the appellant says that section 6.1 of the Regulation ought to apply to all of the records in this appeal, meaning that because the request was for personal information, the township is unable to assess a fee for searching or preparing records.

[183] In reply, the township acknowledges that part of the request was for the appellant's personal information, but it submits that part of it was for correspondence mentioning a particular centre. The township states that if the appellant had only sought access to her own personal information, there would be "significantly fewer" responsive records. In summary, the township argues that section 6.1 does not apply to "the vast majority of the records."

### ***Analysis and Finding***

[184] I uphold part of the fee assessed by the township and will order that it reimburse the appellant for some portions of the fee already paid.

[185] The appellant's main argument is that a fee ought not to be charged for preparation and search time – which amounts to \$975 – because the request was for her personal information. In its representations about fee, the township concedes this to be the case but only for a small portion of the records.

[186] As it relates to the records before me in this appeal – and there were others previously disclosed that I have not reviewed – there were only a handful of records that contained the appellant's personal information as suggested by the township.

[187] I agree with the township that it was entitled to charge fees for search and preparation time as provided for in section 6 of the Regulation. However, I am also satisfied that some component of the work related to the appellant's personal information, meaning that the township was not entitled to charge fees for search and preparation time for these records. Although the township has conceded this point, it has not quantified how much of the search and preparation time are attributable to these types of records.

[188] Based on my review of the records before me and considering the wording of the request that sought records referencing the appellant's personal name, I find that the township's fees for search and preparation ought to be reduced by 20 per cent from a total of \$975 to \$780. I have selected a reduction at 20 per cent because this takes into account the proportion of records at issue in this appeal that contain the appellant's personal information (11 per cent) and adjusts for the likelihood that a greater proportion of those already disclosed contained the appellant's personal information.

[189] This leaves the photocopying (\$124.20) and shipping costs (\$15).

[190] Regarding photocopies, the township has modified its calculation of how it calculated the photocopying costs and whether the costs included colour copies or not. At the adjudication stage, the township appears to have abandoned any claim for colour copies. It also asserts that it under-charged for eligible photocopying costs, stating that the request yielded 915 pages, which would amount to a fee of \$182.40 at a rate of \$0.20/page as set by the Regulation.

[191] Based on my review of the representations, I am satisfied that the appellant received some copies of records and a charge for photocopying is appropriate. Unfortunately, the parties are not in agreement about the number of pages disclosed. When the township assessed the final fee, it stated that there were 491 black and white copies. I find this page count to be the most reliable indicator of the number of pages and accordingly uphold the township's photocopying fee to a total amount of \$98.20 (491 × \$0.20/page).

[192] I also find that the township has provided insufficient support for its assessment of \$15 for the shipping costs and I do not uphold this aspect of the fee. The township is required to provide a detailed statement of how a fee is calculated, yet it has provided no information to support this aspect of the fee. Further, it has stated in its



representations that the appellant was required to attend in person to retrieve the records disclosed to her, so it is not clear why shipping costs were incurred at all.

[193] In summary, I partially uphold the fee assessed by the township in the amount of \$878.20, consisting of \$98.20 for photocopying costs and \$780 of preparation and search time. I will order the township to reimburse the appellant for the difference between what was already paid and \$878.20.

## **ORDER:**

1. I uphold the township's decision to deny access to the information in record 21, part of record 99 and part of record 100 on the basis that it is not responsive to the request.
2. I uphold the township's decision to deny access to the information in records 44 (part), 45 (part), 46, 47, 48, 49, 50 (part), 52 (part), 53, 54, 55, 56, 57, 58, 59 (part), 60, 61, 62, 67, 68, 69 (part), 72 (part), 73, 78, 79, 84-91, 93, 94, 96, 97, 98, 99, 102, 104, 105, 106, 109, 114, 115, 116, 118- 127, 132, 136 and 140 on the basis of section 12 alone or section 38(a) in conjunction with section 12, as the case may be.
3. I uphold the township's decision to deny access to the information in records 1, 2, 5, 6, 7, 15-17, 19, 22 (part), 27, 28, 32, 37, 38, 80, 81, 92, 95, 103, 110 and 13f8 on the basis of section 7(1) alone or section 38(a) in conjunction with section 7(1), as the case may be.
4. I order the township to disclose records: 22 (part), 43, 44 (part), 45 (part), 50 (part), 59 (part), 63, 69 (part), 72 (part), 75, 83 (part), 100 (part), 108 (part), 128 (part), 129, 130, and 137 except for information covered by the mandatory personal privacy exemption claimed by the township or as described in this order in relation to record 128 by providing the appellant with a copy of these records by **January 11, 2021** but not before **January 5, 2021**. For certainty regarding records that I am ordering partially disclosed, only the information highlighted in the copy of the records provided to the township should be disclosed.
5. I partially uphold the township's fee and order it to reimburse the appellant for any amounts paid in excess of \$878.20.
6. In order to verify compliance with order provision 4, I reserve the right to require the township to provide me with a copy of the access decision and the records sent to the appellant.
7. The timelines in this order may be extended if the township is unable to comply in light of the current COVID-19 situation. I remain seized of the appeal to address any such requests.

Original signed by \_\_\_\_\_  
Valerie Jepson  
Adjudicator

December 2, 2020 \_\_\_\_\_