

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4121

Appeal MA20-00081

Kettle Creek Conservation Authority

October 29, 2021

Summary: This appeal deals with an access request received by the Kettle Creek Conservation Authority (the conservation authority) for all emails dated November 12, 2014 between two named employees. The conservation authority granted access to the emails, in part, withholding a portion of an email under section 7(1) of the *Act* (advice or recommendations). At mediation, the discretionary exemption at section 38(a) (discretion to refuse a requester's own information) was added as an issue, as the record may contain the appellant's personal information. In this order, the adjudicator finds that the email, which includes the withheld portion, contains the appellant's personal information. Therefore, the appropriate exemption to consider is the discretionary exemption at section 38(a) read with section 7(1) of the *Act*. She also finds that the section 38(a) exemption read with section 7(1) applies to the withheld information and the conservation authority exercised its discretion properly. She dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2, 3, (definitions of "head" and "personal information"), 4, 7(1), 38(a) and 49(1).

Orders Considered: Orders M-352, MO-2053, P-1054, PO-2381 and PO-3656.

Case Considered: *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 SCR 624, 2003 SCC 58 (CanLII).

OVERVIEW:

[1] The Kettle Creek Conservation Authority (the conservation authority) received an access request under the *Act* for all emails between two named employees dated November 12, 2014.

[2] As background, this appeal arises out of a dispute between the conservation authority and the owners of a property about their erosion protection application for their property (application for development) filed with the conservation authority. The appellant is one of the co-applicants.

[3] The conservation authority located responsive records and granted access to the records, except for a portion of one email. It relied on section 7(1) (advice or recommendations) to deny access to the withheld portion of the email.

[4] The appellant appealed the conservation authority's decision to the Office of the Information and Privacy Commissioner (the IPC).

[5] A mediator was assigned to explore the possibility of resolving the appeal. During mediation, the mediator raised the possible application of the discretionary exemption at section 38(a) (discretion to refuse a requester's own information), as the record at issue may contain the appellant's personal information. As a result, the possible application of section 38(a), in conjunction with the section 7(1) exemption, was added as an issue in the appeal.

[6] Mediation did not resolve the appeal and it was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*.

[7] The adjudicator originally assigned to this appeal decided to conduct an inquiry. He sought and received representations from the appellant and the conservation authority, followed by reply representations from the conservation authority and sur-reply representations from the appellant. The representations of the parties were shared in their entirety in accordance with the IPC's *Code of Procedure and Practice Direction 7*.

[8] The appeal was then transferred to me to continue with its adjudication.¹ In this order, I uphold the conservation authority's decision to deny access to the withheld portion of the email but do so pursuant to the discretionary exemption at section 38(a), read with section 7(1) of the *Act*. I do so because I find that the record at issue in this

¹ I have reviewed all the file material and representations and have determined that I do not require further information before making my decision.

appeal contains the personal information of the appellant and therefore, the appropriate exemption to consider is the discretionary exemption at section 38(a), read with section 7(1) of the *Act*. I also find that the conservation authority properly exercised its discretion in making its decision. I dismiss the appeal.

RECORD:

[9] At issue in this appeal is the withheld portion of one email with the subject line "RE: Elgin County Shoreline Management Plan".

ISSUES:

- A. Does the record contain "personal information", as defined in section 2(1), and if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(a), in conjunction with the section 7(1) exemption, apply to the information at issue?
- C. Did the conservation authority exercise its discretion under the *Act*? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Preliminary issues raised by appellant

[10] I begin by addressing two preliminary issues raised in the appellant's representations.

[11] First, the appellant raises the issue of who is the "head" of the conservation authority for the purposes of section 3 of the *Act*

[12] The "head" of an institution has a number of powers and duties under the *Act*, including a duty to respond to access requests from the public for records that are in the custody or under the control of the institution.² The term "head" is defined in section 2(1) of the *Act* as follows:

"head", in respect of an institution, means the individual or body determined to be head under section 3;

² See sections 19 and 22 of the *Act*.

[13] Section 3 of the *Act* sets out the process for establishing or designating the “head” of a board, commission or other body that is an institution other than a municipality, for the purposes of the *Act*. It states, in part:

(2) The members elected or appointed to the board, commission or other body that is an institution other than a municipality may designate in writing from among themselves an individual or a committee of the body to act as head of the institution for the purposes of this *Act*.

[12] Section 49(1) of the *Act* gives the head the discretion to delegate its powers or duties to others. It states:

A head may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution or another institution subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation.

[14] The appellant submits that section 3 states that only a member elected or appointed to the conservation authority can be the “head” of the conservation authority. He submits that the conservation authority staff who wrote the email at issue in this appeal (the assistant manager) cannot be the head of the conservation authority because he is not a member elected or appointed to the conservation authority.³

[15] The conservation authority explains that its Board of Directors (the board) approved the motion FA43/2017 at a special meeting of the full conservation authority. This motion designated the position of Chair of the conservation authority (the chair) as “head” for the purposes of the *Act*, and appointed the position of Director of Operations (director) as the Freedom of Information and Protection of Privacy Coordinator (the FOIC).⁴ It also explains that in 2019, the position of director was renamed “Assistant Manager/Supervisor of Planning and Conservation Areas” (assistant manager).

[16] I find that the “head” of the conservation authority is the chair, pursuant to section 3(2) of the *Act*. I also find that, under section 49(1), the chair delegated his powers and duties to the director (whose title changed to assistant manager in 2019). I note that this delegation is consistent with the fact that, in January 2020, the assistant manager signed the decision letter in response to the appellant’s access request. There is no evidence that the motion or delegation was done improperly.

³ The appellant also raises the fact that the assistant manager signed the conservation authority’s representations to the IPC, which I note were copied to the chair. For the purposes of this inquiry, it is irrelevant who signed the authority’s representations.

⁴ Subsequently, the board removed its staff from all files and matters relating to the appellant. This decision required a re-appointment by the board of the FOIC’s responsibilities back to the chair to deal with active access requests made by the appellant and/or parties in collaboration with the appellant.

[17] The second preliminary issue the appellant raised is whether the assistant manager was in a conflict of interest in making the decision on the appellant's access request.

[18] A "conflict of interest" is commonly understood as a situation in which a person, such as an elected official or public servant, has a private or personal interest sufficient to appear to influence the objective exercise of their official duties.

[19] Previous IPC orders have considered the issue of conflict of interest for staff that make decisions on access requests from the public under the *Act*.⁵ In determining whether there is a conflict of interest, these orders have posed the following questions:

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

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

[21] In carrying out their functions under the *Act*, staff who make decisions on access requests from the public must comply with precise procedural obligations. However, those obligations are not equivalent to the impartiality that is required of a judge or an administrative decision-maker whose primary function is adjudication.⁶

[22] The appellant submits that the assistant manager was in a conflict of interest, as the author of the email at issue in this appeal, when he issued the decision in response to the appellant's request.

[23] The conservation authority did not make specific representations on this issue.

[24] I find that the assistant manager was not in a conflict of interest in making a decision on the appellant's access request. The factual circumstances here are that the assistant manager, who signed the decision letter in response to the appellant's request, is the same individual who wrote the email at issue in this appeal. However, I find that the assistant manager's interest in the record is not sufficient to trigger a conflict of interest on his part.

⁵ See, for example, Orders M-640, MO-1285, MO-2073, MO-2605, MO-2867, MO-3204, MO-3208, PO-2381, MO-3513-I and MO-3672.

⁶ Order PO-2381, which cited *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 SCR 624, 2003 SCC 58 (CanLII) (*Imperial Oil*).

[25] I also agree with the adjudicator in Order PO-2381 that an individual responding to an access request under the *Act* is 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 content of a duty of impartiality may vary depending on the decision-maker's activities and the nature of his or her functions. In this case, the assistant manager was required to respond to the access request in good faith, and there is no evidence that he did otherwise. As a practical matter, and particularly where an institution is small, it is to be expected that the person making the access decision may have a connection to the records at issue. In my view, that fact alone is not sufficient to establish a conflict of interest.

[26] In conclusion, I find that a well-informed person, considering all of the circumstances, could not reasonably perceive a conflict of interest on the part of the assistant manager in making the access decision on the record at issue.

[27] Having dealt with the two preliminary issues raised by the appellant, I will now turn to the remaining issues in this appeal.

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

[28] The conservation authority relied on the exemption at section 7(1) to deny access to a portion the information in the email. However, if a record contains the requester's own personal information, the correct exemption to consider is section 38(a) (discretion to withhold requester's own personal information), read with section 7(1).⁷ Therefore, it is necessary to decide whether the records contain the appellant's "personal information." That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

⁷ The distinction is important because, in exercising its discretion to withhold information under section 38(a), an institution must take into account the fact that the record contains the requester's own personal information.

- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[29] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.⁸

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

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(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.

[31] 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

⁸ Order 11.

professional, official or business capacity will not be considered to be “about” the individual.⁹ However, 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.¹⁰

[32] Previous IPC orders have also drawn a distinction between personal information, as opposed to information about a property.¹¹ However, if information about a property reveals something of a personal nature about an individual, that information is considered to be personal information.¹²

Representations of the parties

[33] The conservation authority submits that the withheld portion of the email does not contain any “personal information”, as defined in section 2(1) of the *Act*. It submits that the withheld portion of the email contains the advice of the assistant manager on a potential appeal process for an application for development. It also acknowledges that the disclosed portion of the record references the last name of the appellant.

[34] Referring to the full email chain of which the record at issue is part, the appellant submits that the record is about him and his application for development. He also submits that the whole email chain is proof that the conservation authority was developing a way to stop his application for development.

[35] The appellant specifically refers to paragraph (h) of the section 2(1) definition of “personal information” in the *Act* and points out that the second sentence in the disclosed portion of the record mentions his last name and the record refers to specific actions he has taken.

Analysis and findings

[36] For the reasons below, I find that the email at issue in this appeal, which includes the withheld portion, contains the “personal information” of the appellant, as that term is defined in section 2(1) of the *Act*.

[37] Order M-352 establishes that I need to determine whether the email as a whole contains the appellant’s personal information, using a “record-by-record approach”, where “the unit of analysis is the record, rather than individual paragraphs, sentences

⁹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

¹⁰ Orders P-1409, R-980015, PO-2225 and MO-2344.

¹¹ Order PO-3088.

¹² See Order PO-3616.

or words contained in a record".¹³

[38] Based on my review of the email as a whole, it is my view that it contains information about the appellant's application for development, which is information about his property. As noted above, previous IPC orders have drawn a distinction between information that qualifies as "personal information" and information about a residential property, where the guiding principle is ultimately whether the information in the record reveals something of a personal nature about an individual or whether the information has a personal dimension to it.¹⁴ I am of the view that the appellant's application for development reveals that he is seeking to do something to his property because he has concerns about it and therefore, this reveals something of a personal nature about the appellant. It appears that his application in a personal capacity as there is no evidence before me that the application relates to a commercial property or that the application was made in a business context.

[39] Based on my review of the email, it is my view that disclosure of the information in it would reveal something of a personal nature about the appellant. Accordingly, I find that the email at issue in this appeal contains the appellant's personal information.

[40] Having found that the email at issue in this appeal qualifies as the personal information of the appellant, the correct exemption to consider is section 38(a) read with section 7(1) and not section 7(1) alone. Accordingly, I will now consider whether the withheld portion of the email is exempt from disclosure under the discretionary exemption at section 38(a) read with section 7(1) of the *Act*.

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

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

[42] 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. [Emphasis added]

¹³ See Order M-352 at page 7.

¹⁴ Order PO-3656 at para. 25. See Order MO-2053, reviewing jurisprudence following Order 23, addressing the distinction between information about a residential property and "personal information".

[43] 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.¹⁵ 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.¹⁶

[44] In this appeal, the institution relies on the discretionary exemption in section 7(1) of the *Act* to deny access to the portion of the record remaining at issue. 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.

[45] The purpose of section 7(1) 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.¹⁷

[46] "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.

[47] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.¹⁸

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

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

- the information itself consists of advice or recommendations

¹⁵ Order M-352.

¹⁶ See Issue C below.

¹⁷ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

¹⁸ *John Doe v. Ontario (Finance)*, cited above, at paras. 26 and 47.

- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.¹⁹

[50] 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.²⁰

[51] Section 7(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by s. 7(1).²¹

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

- factual or background information²²
- a supervisor's direction to staff on how to conduct an investigation²³
- information prepared for public dissemination.²⁴

[53] 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. Of relevance to this appeal is section 7(2), which states, in part:

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual material;

[54] The section 7(2)(a) exception is an example of objective information, which does not contain a public servant's opinion pertaining to a decision that is to be made but rather provide information on matters that are largely factual in nature. Factual material

¹⁹ Order P-1054.

²⁰ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

²¹ *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

²² Order PO-3315.

²³ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

²⁴ Order PO-2677

refers to a coherent body of facts separate and distinct from the advice and recommendations contained in the record.²⁵ Where the factual information is inextricably intertwined with the advice or recommendations, section 7(2)(a) may not apply.²⁶

Representations of the parties

[55] The conservation authority submits that the withheld portion of the record is the assistant manager providing “advice”, which includes his views to his supervisor and an evaluative opinion on a potential appeal process affecting an application for development. It also submits that the assistant manager’s views and opinion, expressed at the time of drafting the email, are not his current views and opinion.

[56] With reference to the purpose of the advice and recommendations exemption noted above,²⁷ the conservation authority submits that disclosing the withheld portion of the record would reveal the “advice”, either directly or by inference, of the assistant manager regarding a potential appeal process. It also submits that it has disclosed as much of the record as can be reasonably severed without disclosing the material that is exempt.

[57] The appellant submits that the withheld portion of the email, in the context of the full email, contains his personal information and therefore, it cannot be viewed as advice. He maintains that the assistant manager is not providing advice to his supervisor; instead, they are discussing the appellant and his application for development.

[58] The appellant also submits that the conservation authority staff is expressing factual or background information, which is general information and not advice. He submits that the exception in section 7(2)(a) of the *Act* applies.²⁸ They refer to Order PO-3315, where the information at issue in that appeal was found to be merely general information and not advice:

By contrast, I find that the portion of the note withheld under the heading “Implementation” merely sets out general information on how the Expert Panel’s recommendations would be implemented, if adopted, and does not

²⁵ Order 24.

²⁶ Order PO-2097.

²⁷ *John Doe v. Ontario (Finance)*, cited above.

²⁸ The appellant also submits that the exceptions in sections 7(2)(f), (g) and (h) apply. Given that the withheld portion of the email is a few lines in length, it is clear the withheld portion does not contain a feasibility study or other technical study, a field research report, or a final plan or proposal to change a program. Accordingly, I will not be addressing these exceptions further as they do not apply.

reflect any analysis or evaluation on the part of the note's author. The information under this heading is not exempt.²⁹

[59] The appellant also refers to Order MO-3505, which found that

disclosure of the record would not reveal advice. It does not contain a list of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. Nor does it contain the views or opinions of the affected party as to the range of policy options to be considered by the decision maker.³⁰

Analysis and findings

[60] For the reasons outlined below, I find that the withheld portion of the email contains advice or recommendations and is exempt from disclosure under the section 38(a) exemption read with section 7(1) of the *Act*.

[61] I agree with the conservation authority that the withheld portion of the email contains the assistant manager's assessment on what he believes could happen with the appellant's application for development. It evaluates a potential course of action that the appellant could take with respect to his application for development and a potential outcome of such action.

[62] It is clear that the supervisor could consider this information in the decision-making process related to the appellant's application for development, and the recommended course of action for the supervisor to take is implicit, if not explicit. In my view, the withheld portion of the email, if disclosed, would permit the drawing of accurate inferences as to the nature of actual advice or recommendations that are protected from disclosure by section 7(1)³¹. Accordingly, I find that the withheld portion of the email consists of advice or recommendations provided as part of the decision-making process.

[63] I must now consider whether the mandatory exception in section 7(2) of the *Act* applies to the withheld portion of the email. The appellant submits that the assistant manager is expressing factual or background information, which is general information and not advice. I disagree with the appellant. It is my view that the withheld portion of the email is advice (implicit or explicit) that the supervisor could consider in the decision-making process for the appellant's application for development. As a result, I

²⁹ At para. 66.

³⁰ At para. 39.

³¹ Order P-1054.

find that the withheld portion of the email is not factual material and that none of the other exceptions to section 7(1) applies.

[64] Accordingly, I find that section 38(a) of the *Act* read with 7(1) applies to the withheld portion of the email.

Issue C: Did the conservation authority exercise its discretion under section 38(a), in conjunction with section 7(1) of the *Act*? If so, should this office uphold the exercise of discretion?

[65] The exemptions in section 7(1) and 38(a) are discretionary and permit an institution to disclose information subject to these exemptions, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[66] The IPC 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; or
- it fails to take into account relevant considerations.

[67] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.³² However, this office may not substitute its own discretion for that of the institution.³³

[68] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:³⁴

- 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

³² Order MO-1573.

³³ Section 43(2).

³⁴ Orders P-344 and MO-1573.

- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations of the parties

[69] The conservation authority submits that it properly exercised its discretion when applying the section 7(1) exemption to the withheld portion of the email, and that it has disclosed as much of the record as can be reasonably severed without disclosing the portion that is exempt. It also submits that it disclosed additional portions of the email at issue in this appeal than it did in a previous access request, filed by a representative of the appellant.

[70] The appellant submits that the conservation authority has acted in bad faith, pointing to its inconsistent application of the *Act*, where it disclosed less of the email at issue in response to a previous request, and its attempt to hide behind exemptions that are not applicable or appropriate in the circumstances. He also submits that the conservation authority has used poor judgment and underhanded techniques against the appellant in the past.³⁵

[71] The appellant also submits that the whole email chain, including the withheld

³⁵ In their representations, both parties have referred to other proceedings between them, which generally speaking, are not relevant to this inquiry. I note here only that the appellant refers to such proceedings to support his characterization of the conservation authority's behaviour.

portion, is proof that the conservation authority is acting in bad faith³⁶ and for an improper purpose³⁷, in order to stop his application for development.

[72] The appellant submits that I should look at the totality of the conservation authority's actions, by referring to Order MO-2227, where the adjudicator held that:

...the concept of bad faith can encompass not only acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith, but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith. What appears to be an extension of bad faith is, in a way, *no more than the admission in evidence of facts that amount to circumstantial evidence of bad faith where a victim is unable to present direct evidence of it.* [*Emphasis added by the appellant*]

Analysis and findings

[73] As outlined below, I find that the conservation authority exercised its discretion under sections 7(1) and 38(a) of the *Act* in an appropriate manner.

[74] I take this opportunity to address directly some of the representations made by the appellant. First, the conservation authority's decision in response to a previous request is not directly before me. Second, whether there is bad faith or improper purpose associated with the email chain itself or the handling of the appellant's application for development is similarly not at issue before me. The issue before me is whether the conservation authority exercised its discretion under sections 7(1) and 38(a), when deciding to withhold the portion of the email. Nonetheless, I have taken into account the appellant's arguments to the extent that they may be relevant to the conservation authority's exercise of discretion.

[75] I note that the conservation authority decided to disclose the majority of the responsive records. I also note that the conservation authority properly considered that there was no sympathetic or compelling need for the appellant to receive the information. I further note that the appellant has not presented evidence that the conservation authority took into account irrelevant factors when exercising its discretion or did so in bad faith or for an improper purpose. Even though the conservation authority took the position that the withheld portion of the email did not contain the

³⁶ I have not considered the analysis of "bad faith" in MO-3761 referred to by the appellant. That order dealt with an appeal of the conservation authority's decision to deny access to records on the basis that the request was frivolous or vexatious because it was made in "bad faith", under section 4(1)(b) of the *Act*.

³⁷ *John Doe v. Ontario (Finance)*, cited above, at para. 52.

appellant's personal information, I am satisfied it considered that the email relates to the appellant in some way, given its decision to disclose additional portions of the email at issue in this appeal than it did in a previous request.

[76] Accordingly, I find the conservation authority did not err in its exercise of discretion in its decision to deny access to the withheld information. I am satisfied that the conservation authority did not exercise its discretion in bad faith or for an improper purpose. I am also satisfied that the conservation authority took into account relevant factors and did not take into account irrelevant factors in the exercise of discretion.

[77] I find that the conservation authority exercised its discretion under sections 7(1) and 38(a) of the *Act* in an appropriate manner and I dismiss appeal.

ORDER:

I find that the withheld information is exempt from disclosure under section 38(a), read with section 7(1), and I dismiss the appeal.

Original Signed By: _____
Valerie Silva
Adjudicator

_____ October 29, 2021