

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4176

Appeal MA19-00002

City of Mississauga

March 18, 2022

Summary: The City of Mississauga (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the voter spreadsheet from the October 22, 2018 municipal election. The city issued a decision denying access to the responsive record under the mandatory personal privacy exemption in section 14(1) of the *Act*. The requester, now the appellant, appealed the city's decision to the Information and Privacy Commissioner of Ontario. In this order, the adjudicator finds that the *Municipal Elections Act* expressly authorizes the disclosure of the voter spreadsheet and, therefore, the section 14(1)(d) exception to the personal privacy exemption applies. She finds that the voter spreadsheet is not exempt from disclosure under the *Act*, and orders the city to disclose it to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 14(1), 14(1)(d), and 38(b); *Municipal Elections Act, 1996*, S.O. 1996, c. 32, section 88(5), Ontario Regulation 101/97.

Orders Considered: Orders PO-3213 and M-1154.

Cases Considered: *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773, [2002] O.J. No. 1776 (Div. Ct.).

OVERVIEW:

[1] This order determines the issue of access to the voter spreadsheet from the October 22, 2018 Mississauga municipal election. The City of Mississauga (the city) received a request under the *Municipal Freedom of Information and Protection of*

Privacy Act (the *Act*) for access to “the final list of voters who voted in Ward 7 in the Oct 22, 2018 Election.” The requester is a resident of Ward 7 and was a city councillor candidate in the October 22, 2018 Mississauga municipal election.

[2] The city issued a decision denying access to the voter spreadsheet pursuant to the mandatory personal privacy exemption in section 14(1) of the *Act*.

[3] The requester, now the appellant, appealed the city’s decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution.

[4] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I commenced the inquiry by inviting representations from the city, initially. I received representations from the city, which I shared with the appellant. I then invited and received representations from the appellant, which I shared with the city. I then sought and received reply representations from the city.

[5] As the voter spreadsheet contains the information of over 11,000 residents of Mississauga’s Ward 7, I decided that these individuals should be notified and their views on disclosure of the voter spreadsheet sought. To notify these affected individuals about this appeal, the IPC posted a print ad in an August 12, 2021 edition of the Mississauga News. Mississauga has approximately 240,910 households.¹ Based on my correspondence with the Mississauga News, I understand that it has a readership of 440,000 people and it prints 227,000 copies of the newspaper weekly. I have been told by staff at the Mississauga News that the newspaper is distributed to all households in Ward 7, including houses, townhomes, condos, and apartment buildings, unless a household specifically asks not to receive the newspaper. The Mississauga News also told me that there are freestanding boxes available in Mississauga near Ward 7, where residents can obtain a copy of the newspaper.

[6] In addition to the ad in the August 12, 2021 print edition of the Mississauga News, all news pages on the Mississauga News website on August 13, 2021 contained digital ads notifying visitors about this appeal. These ads provided an email address for affected individuals to contact the IPC to obtain a copy of the Notice of Inquiry (NOI), which sets out the issues in this appeal. This NOI invited representations from these affected individuals, referred to as the affected parties in this order. Four affected parties submitted representations for my consideration.

[7] While the city claims that the section 14(1) personal privacy exemption applies to the voter spreadsheet at issue, I reviewed the application of the section 38(b) personal privacy exemption to the voter spreadsheet for reasons that I will explain below. In this order, I find that the voter spreadsheet at issue is not exempt from disclosure under the relevant personal privacy exemption, because the section 14(1)(d) exception applies to it. I order the city to disclose the voter spreadsheet in its entirety to the appellant.

¹ Statistics Canada Census Profile, 2016 Census for Mississauga, Ontario, Canada.

RECORD:

[8] The record at issue is a list of persons who actually voted in the election for Mississauga Ward 7 (the voter spreadsheet) which consists of a Microsoft Excel spreadsheet on a CD. The record at issue in this appeal is to be distinguished from the "voters' list" (voters' list) compiled from a list of qualified electors and revised in accordance with the "Voters' List" provisions of 17 to 28 of the *Municipal Elections Act, 1996* (the *MEA*) for use by returning officers at polling stations.³

[9] The voter spreadsheet is named "All actual voters Ward 7" and contains the following columns: Voted On, Ward, Poll, Street Name, Street No., Unit, Postal Code, Voter ID, Full Name, Last Name, First Name, Middle Name, Resident, Occupancy, and School.

[10] The voter spreadsheet contains the following information about each voter: the voter's full name, address, ward, voter ID number, residency, type of occupancy, school designation, the date the voter attended a polling station and received a ballot, and which polling station the voter attended. The voter spreadsheet does not contain information about which candidate(s) a voter voted for.

[11] While the record at issue is not expressly prescribed by the *MEA*, it appears to have been prepared by the clerk from other records prepared pursuant to the clerk's role under section 55 of the *MEA* in determining the results of the election, declaring the winning candidate, and publishing the number of votes for each candidate and the number of declined or rejected ballots on a website or other electronic format.⁴

ISSUES:

- A. Does the voter spreadsheet contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- B. Does the discretionary personal privacy exemption at section 38(b) apply to the voter spreadsheet?

DISCUSSION:

Issue A: Does the voter spreadsheet contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[12] The city withheld the voter spreadsheet under the personal privacy exception in

² 1996, S.O. 1996, c. 32.

³ Because the voter spreadsheet contains much of the same information appearing on the voters' list prepared under sections 17 to 28 of the *MEA*, in my view, it would remain subject to the restrictions on publication set out at section 88(11) of the *MEA*, as discussed below.

⁴ Section 55 of the *MEA*. For obvious reasons, the record at issue omits any information about which candidates electors voted for.

section 14(1). In order to determine which personal privacy exemption in the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. If the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.⁵ If the record contains the requester's own personal information, the correct personal privacy exemption to consider is section 38(b) and not section 14(1).

[13] Personal information is defined in section 2(1) as follows:

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

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

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

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

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

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[14] 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

⁵ Sections 14(1) and 38(b), as discussed below.

personal information.⁶

[15] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁷

Representations

[16] The city submits that the record at issue contains “personal information” as defined in section 2(1) of the *Act*. The city refers to the column titles in the spreadsheet at issue, and submits that the record contains the following information that constitutes the personal information of identifiable individuals: the date the resident attended a polling station and received a ballot, their ward, their address, their voter ID number, their full name, their residency, their type of occupancy, and their school designation. The city submits that each of the above types of information relates to identifiable individuals, both individually and together with the other types of information. The city submits that, with the exception of the date of polling station attendance, this information fits into paragraphs (a), (b), (c), (d), and (h) of the definition of personal information in section 2(1).

[17] The city submits that while the date the resident attended a polling station and received a ballot is not captured by paragraphs (a)-(h), the list of examples of personal information is not exhaustive and the information can still qualify as personal information. The city submits the “Voted On” column (the date the resident attended a polling station and received a ballot) reveals one of several pieces of information about an identifiable individual: (1) whether the individual proactively attended an advance polling station prior to the October 22nd election date, (2) whether the individual attended a polling station on October 22nd, or (3) whether the individual abstained from voting (because individuals who did not attend a polling station did not register a vote).

[18] The appellant acknowledges that the information the city lists above is contained in the record at issue, but does not specifically address whether the information is “personal information” as defined by section 2(1) of the *Act*.

[19] Generally, the affected parties submit that the voter spreadsheet contains their personal information.

Analysis and findings

[20] After reviewing the record and the representations of the parties, I find that the voter spreadsheet at issue contains the personal information of the appellant and all eligible Ward 7 voters for the October 2018 Mississauga municipal election. I find that this personal information consists of each individual’s full name, address, ward, voter ID number, residency, type of occupancy, school designation, the date they attended a

⁶ Order 11.

⁷ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

polling station and received a ballot, and which polling station they attended. I find that this personal information fits within paragraphs (a), (b), (c), (d), and (h) of the definition in section 2(1) of the *Act*.

[21] With respect to the "Voted On" column contained in the record, while the city submits that this type of information is not captured within paragraphs (a)-(h) of the definition of "personal information" under the *Act*, I find that it is. Adjudicator Donald Hale dealt with similar information in Order PO-3213, where he states:

In my view, the information contained in the list of individuals who voted constitutes the personal information of these individuals. I find that the fact that they participated in the election, when taken with their names, constitutes their personal information within the meaning of paragraph (h) of the definition as it represents the individual's name, along with other personal information relating to him or her, specifically the fact that they voted in the election.

[22] I agree with Adjudicator Hale's reasoning and adopt it in this appeal. I find that the information contained in the "Voted On" column in conjunction with the individuals' names fits within paragraph (h) of the definition in section 2(1) of the *Act*. I find that disclosure of this information would reveal something of a personal nature about the individuals, because it indicates whether the individual obtained a ballot and, presumably, voted in the election. Therefore, I find that this information qualifies as personal information under the *Act*.

[23] As noted above, the city claims that the section 14(1) personal privacy exemption applies to the voter spreadsheet at issue. However, since I find that the voter spreadsheet also contains the personal information of the appellant, the relevant personal privacy exemption is the discretionary one in section 38(b). Therefore, I must review the application of the section 38(b) personal privacy exemption to the voter spreadsheet.⁸ However, the end result in this appeal is the same either way because of the application of the section 14(1)(d) exception to the exemption, which I consider below.

Issue B: Does the discretionary personal privacy exemption at section 38(b) apply to the voter spreadsheet?

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

[25] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may

⁸ Only when a record does not contain a requester's personal information is the applicable personal privacy exemption the mandatory one in section 14(1).

refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[26] If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).⁹

[27] In this appeal, the appellant argues that section 14(1) of the *Act* applies because the *MEA* authorizes the disclosure of the voter spreadsheet at issue, while the city argues that it does not.

[28] Section 14(1)(d) of the *Act* states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, under an Act of Ontario or Canada that expressly authorizes the disclosure;

[29] The relevant sections of the *MEA* are as follows:

88(5) Despite anything in the *Municipal Freedom of Information and Protection of Privacy Act*, documents and materials filed with or prepared by the clerk or any other election official under this Act are public records and, until their destruction, may be inspected by any person at the clerk's office at a time when the office is open.

88(7) A person inspecting documents under this section is entitled to make extracts from them and, on payment of the fee established by the clerk, to make copies of them.

88(10) No person shall use information obtained from public records described in subsection (5), except for election purposes.

88(11) A voters' list prepared under this Act shall not be,

(a) posted in a public place; or

(b) made available to the public in another manner that is prescribed.

[30] Section 9 of Ontario Regulation 101/97 identifies the prohibited means of making a voters' list available to the public, as follows:

⁹ Sections 14(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy. If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). Because I find here that the exception at section 14(1)(d) applies, I do not need to address section 14(2), (3) or (4).

9. For the purpose of clause 88 (11) (b) of the Act, the following methods of making a voters' list prepared under the Act available to the public are prescribed:

1. Posting on an Internet website.
2. Any other print or electronic medium of mass communication.

Representations of the city and the affected parties

[31] The parties provided comprehensive representations that included arguments with respect to the application of other paragraphs of section 14 which I have reviewed in full. However, I only summarized portions of the parties' representations relevant to my determination below.

[32] The city argues that the section 14(1)(d) exception does not apply to the voter spreadsheet at issue, because the *MEA* does not expressly authorize the disclosure of the voter spreadsheet. The city acknowledges that section 88(5) of the *MEA* expressly authorizes the disclosure of information prepared under that act, and that section 88(5) confers a limited right to inspect "documents and materials" for 120 days after the clerk declares the results of an election.¹⁰ The city notes that the request in this appeal was submitted within 120 days of the election.

[33] The city submits that section 88(11) of the *MEA* limits how a voters' list can be displayed, such that the exception in section 14(1)(d) of the *Act* does not apply to the voter spreadsheet at issue. The city submits specifically that section 88(11) of the *MEA* prescribes a limitation on the right to the voter's list, and by extension the voter spreadsheet, under section 88(5) that conflicts with section 14(1)(d). The city submits that this provision expressly prohibits posting a voters' list in any public place and, as set out in section 9 of Ontario Regulation (O Reg) 101/97 under the *MEA*, a voters' list may also not be made available to the public. The city further submits that section 88(10) of the *MEA* also prohibits the use of any information obtained under section 88(5) for a non- election related purpose. The city submits, therefore, that the right to the voter spreadsheet under section 88(5) is substantially and expressly limited.

[34] The city submits that another limitation on the right provided for by section 88(5) is section 88(7), which entitles a person inspecting documents under section 88(5) to make extracts of them, but does not confer an entitlement to disclosure of the records as a whole. The city argues that section 88(7) expressly limits the scope of section 88(5) and must be given the plain and ordinary meaning of the words. The city submits, without explanation or supporting arguments, that the determination of which extracts can be disclosed under the *MEA* is left to the discretion of the municipality.

¹⁰ Section 88(1) of the *MEA* states: "The clerk shall retain the ballots and all other documents and materials related to an election for 120 days after declaring the results of the election under section 55." Section 88(2)(b) states: "When the 120-day period has elapsed, the clerk may destroy any other documents and materials related to the election."

[35] The city argues that sections 88(7), 88(10), and 88(11), independently and in tandem, protect the privacy interests of the individuals whose personal information is contained in the voter spreadsheet. The city submits that it is particularly telling that the legislature carved out additional protections with respect to a voters' list, which contains the personal information of a large number of individuals.

[36] The city submits that the analysis as to whether the exception to the personal privacy exemption in section 14(1)(d) of the *Act* applies requires a consideration of the nature of access rights conveyed under the *Act*. The city submits that disclosure under the access procedures of the *Act* constitutes a disclosure to the public at large which equates to publication. The city further submits that information disclosed under the *Act* is not subject to limitations with respect to use or subsequent disclosure or publication.

[37] The city argues that the limited and conditional nature of the right under section 88(5) of the *MEA* conflicts with the requirement that the section 14(1)(d) exception in the *Act* applies where a statute "expressly authorizes" the disclosure. The city submits that it would be improper to apply section 14(1)(d) where the information requested under the *Act* is only partially authorized to be disclosed under section 88(5) of the *MEA* subject to express conditions.

[38] The city submits that the purposes of the *Act* favour nondisclosure of the voter spreadsheet. The city submits that the *Act's* twin purposes are to provide a right of access and to protect the personal information of individuals whose information is held by public institutions. The city argues that the IPC is bound to interpret the provisions in accordance with both of these purposes. The city further argues that if the IPC determines that section 14(1)(d) applies to permit disclosure of the voter spreadsheet in the circumstances of this appeal, then voters lose the full protections set out in both the *MEA* provisions safeguarding the privacy of voters and the *Act's* section 14 provisions safeguarding the privacy of affected parties.

[39] The city submits that, pursuant to section 43(3) of the *Act*, the order resolving an appeal may contain any conditions the IPC considers appropriate. The city requests that if the IPC orders disclosure of the information at issue, the IPC should exercise its discretion under section 43(3) to order that the disclosed information only be used for election-related purposes and that it not be publicly shared in any manner.

[40] Generally, the affected parties who responded, after being notified of the appeal and its issues, submit that disclosure of the voter spreadsheet would constitute an unjustified invasion of their personal privacy. Some of the affected parties also submit that the *MEA* does not expressly authorize disclosure of the voter spreadsheet, especially in electronic format.

Representations of the appellant

[41] The appellant submits that he initially reached out to the city's Elections Office to obtain the information under section 88(5) of the *MEA*, and that the city refused his

request and told him to make a request under the *Act* instead.¹¹

[42] The appellant submits that he, along with the other Ward 7 city councillor candidates, were given the voters' list (list of registered voters) in electronic form via the city's Candidate Portal. The appellant submits that he and the other candidates were also given access to another list that contained the same data elements as the voter spreadsheet at issue in this appeal (outlined above), but only for 3,465 Ward 7 voters who voted on advance polling days or on election day prior to 2 p.m. The appellant submits that he is only requesting access to the information of the remaining 7,603 voters, who voted after 2 p.m. on election day.

[43] The appellant submits that section 88(5) of the *MEA* permits the inspection of documents and materials by any person. The appellant further submits that the information requested constitutes "information filed with or prepared by the clerk or any other election official," because persons who voted in Ward 7 at any polling station on any voting day were added to the voter spreadsheet and, clearly, such a list would need to be created for the purposes of the election. The appellant submits that the city does not deny having created such a document, and information from it was disclosed to candidates.

[44] The appellant submits that the Divisional Court in *Gombu v. Ontario (Assistant Information and Privacy Commissioner)*¹² (*Gombu*) also considered section 88(5) of the *MEA*, which has not been amended since that decision. The appellant submits that in *Gombu*, the Court concluded that section 88(5) of the *MEA* required the disclosure of the information in that case for the purposes of section 14(1)(d) of the *Act*, and that reasoning applies to the facts of this appeal.

[45] The appellant acknowledges that section 88(11)(a) of the *MEA* provides that a voters' list must not be posted in a public place, and that section 9 of O Reg 101/97 under section 88(11)(b) prescribes that posting on the internet or through other media of mass communication to make a voters' list available to the public is prohibited. The appellant argues, however, that the city's position that the voter spreadsheet is not subject to the section 14(1)(d) exception is not supported in this appeal, because he has not asked or sought to post the information in a public place or as prohibited by the regulation. The appellant reiterates that, as he was a city councillor candidate, the city has already disclosed a partial version of the voter spreadsheet to him.

[46] The appellant submits that contrary to the city's representations, section 88(7) of the *MEA* does not limit the right set out in section 88(5); it only clarifies the scope of the right, including the right to make extracts and copies. The appellant further submits that contrary to the city's assertion that section 88(10) limits his rights to the information under section 88(5), section 88(10) only places limits on the uses of the information, not its disclosure to him. The appellant submits that section 88(10) of the

¹¹ I note that the city erred when it advised the appellant that it could not respond directly under section 88(5) of the *MEA*.

¹² 59 O.R. (3d) 773, [2002] O.J. No. 1776 (Div. Ct.).

MEA makes clear that disclosure for election purposes is contemplated.

[47] The appellant submits that he is requesting the information at issue for election purposes. The appellant submits that it is useful to be able to compare the voter spreadsheet with his list of confirmed votes to better understand the election process and results. The appellant submits that there were technical problems at polling stations, resulting in voters having to wait for extended periods to vote, and the city released its election results late in relation to other municipalities in Ontario. The appellant argues that disclosure of the information at issue would facilitate his review of such issues and others to determine whether the city fulfilled its responsibilities in running and overseeing the election.

[48] The appellant submits that while the city asserts that disclosure of the voter spreadsheet would constitute an unjustified invasion of the privacy of the individuals on the list, the city has not explained why it takes this position when it has already disclosed the same types of information to him for 3,465 of those individuals without any consent or notice to the voters in question. The appellant further submits that the city has not explained how disclosure of the information in the voter spreadsheet at issue is any different from the previous disclosure.

[49] The appellant submits that section 88(5) of the *MEA* in conjunction with section 14(1)(d) of the *Act*, requires the city to disclose the information at issue, and the policy underlying the *MEA* as a whole supports this disclosure.

Reply representations of the city

[50] The city submits that *Gombu* is distinguishable from the current appeal. The city submits that the record (a database) at issue in *Gombu* contained the names, addresses and telephone numbers of municipal election campaign contributors. The city submits that in *Gombu*, unlike here, other provisions did not expressly fetter the right to those records under the *MEA*. The city submits that as those records were required to be filed with the clerk by the *MEA*, they were subject to section 88(5) and the *MEA* did not contain special restrictions specific to those records.

[51] The city argues that, in contrast, the *MEA* contains several provisions that expressly limit rights to the voters' list, and by extension the voter spreadsheet, specifically, and that both the *MEA* and O Reg 101/97 contain provisions that protect the information in the voter spreadsheet by expressly restricting the use of voters' list information. The city argues that section 88(11)(a) states that a voters' list cannot be posted in a public place; and section 9 of O Reg 101/97 states that it cannot be posted on an Internet website or distributed by print or electronic mass communication. The city further argues that an individual who inspects information from a voters' list under section 88(5) must abide by these restrictions.

[52] The city argues that the application of section 14(1)(d) to the voter spreadsheet would have the effect of depriving individuals of the protections in both the personal privacy exemption under the *Act* and the restrictions on use in the *MEA*. The city

submits that personal information in the voter spreadsheet is protected under the *MEA* by the restrictions specific to voters' list information noted above, and the restriction that all information obtained under section 88(5) may only be used for election purposes.

[53] The city argues that the *Gombu* decision is therefore distinguishable from the matter at hand for the same reason that section 14(1)(d) of the *Act* ought not to apply: the conditional right to the voter spreadsheet under the *MEA* is inconsistent with the right of access under the freedom of information (FOI) framework.

[54] With respect to the appellant's submission that the city previously disclosed similar information during the course of the election, the city submits that the disclosure of voting records under the *MEA* fundamentally differs from the disclosure of information, including personal information, under the *Act*. The city submits that the clerk has the discretion to disclose voters' lists in accordance with sections 12(1)(a) and 88(5) of the *MEA*, and that under this statutory authority, the clerk provided the voters' list and partial voter spreadsheet to the candidates.¹³

[55] The city argues that, in contrast, the city is obligated to consider the personal privacy exemption under section 14 when responding to a FOI request. The city submits that this is why the city maintains that disclosure of the voter spreadsheet under the *Act* is an unjustified invasion of personal privacy, in light of the conditional right provided for by section 88(5), given the privacy protections at section 88(10) and 88(11) of the *MEA*, and sections 9.1 and 9.2 under O Reg 101/97.

Analysis and findings

[56] At the outset, I find that the city has not satisfactorily addressed or provided a sufficient basis for distinguishing between disclosure of the voter spreadsheet in this appeal and the city's previous disclosure of the partial voter spreadsheet to the appellant and other city councillor candidates. I note that the city did not raise section 43(6) of the *MEA*, which requires the disclosure of the list of advance voters to any registered candidate upon request.¹⁴ The city submits that disclosure differs under the *MEA* and the *Act*, and that the clerk used their discretion to provide the partial voter spreadsheet to the city councillor candidates under sections 12(1)(a) and 88(5) of the *MEA*. However, as I noted previously, the city erred when it advised the appellant that it could not respond to his request directly under section 88(5) of the *MEA* and he should file an access request under the *Act* instead. In light of the city's advice to the appellant, the appellant's right of access to the voter spreadsheet is properly before me

¹³ Section 12(1)(a) of the *MEA* states: "A clerk who is responsible for conducting an election may provide for any matter or procedure that ... is not otherwise provided for in an Act or regulation[.]"

¹⁴ Section 43(5)(b) of the *MEA* states: "On each day of the advance vote the deputy returning officer of the voting place shall, ... (b) as soon as possible after the close of voting, (i) prepare a list showing the name of each person who has voted on that day and identifying his or her voting place, and (ii) deliver to the clerk for safekeeping the ballot box, the list of names, and all other materials and documents related to the advance vote." Section 43(6) of the *MEA* states: "The clerk shall, on the request of a scrutineer or certified candidate, give him or her a copy of any list referred to in subclause (5)(b)(i)."

for determination under the *Act* in the same way access to section 88(5) records was properly addressed under the *Act* in *Gombu*.

[57] The appellant argues that the *MEA* in conjunction with section 14(1)(d) of the *Act* authorizes the disclosure of the voter spreadsheet at issue, while the city and the affected parties argue that it does not.

[58] As noted above, if the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b) of the *Act*.

[59] Based on my review of the voter spreadsheet and the representations of the parties, I find that the section 38(b) personal privacy exemption does not apply to exempt it from disclosure. Specifically, I find that section 14(1)(d) applies to the voter spreadsheet at issue because its disclosure is "expressly authorized" by section 88(5) of the *MEA* and, therefore, the voter spreadsheet is not exempt from disclosure under the *Act*. My reasons are set out below.

[60] Section 14(1)(d) states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, under an Act of Ontario or Canada that expressly authorizes the disclosure;

[61] In order for section 14(1)(d) to apply, there must either be specific authorization in the statute for the disclosure of the type of personal information at issue, or there must be a general reference to the possibility of such disclosure in the statute together with a specific reference to the type of personal information to be disclosed in a regulation.¹⁵

[62] In support of his argument that the exception in section 14(1)(d) applies because section 88(5) of the *MEA* expressly authorizes the disclosure of the voter spreadsheet, the appellant relies on the Divisional Court decision in *Gombu*, cited above.

[63] In *Gombu*, the Divisional Court considered a judicial review application in respect of Order MO-1366. Order MO-1366 determined the issues related to a request submitted under the *Act* to the City of Toronto (Toronto) by a reporter for the Toronto Star for access to a list of donors to municipal election candidates in electronic format. In order to administer a donation rebate program, Toronto had created an electronic database which contained information additional to that found in publicly available paper copies of the records relating to donors. Toronto denied access to the electronic database stating that the information was published or available to the public in paper copy in accordance with the *MEA*, and therefore did not have to be disclosed under the *Act*. The requester appealed Toronto's decision to the IPC.

¹⁵ Orders M-292, MO-2030, PO-2641 and MO-2344.

[64] In Order MO-1366, former Assistant Commissioner Mitchinson found that disclosing the electronic database created by Toronto to administer the donation rebate program was not authorized under section 88(5) of the *MEA* because the database “is not required to be prepared by the clerk” under the *MEA* or by any regulation or by-law under the *MEA*. Consequently, the exception to the exemption at section 14(1)(d) did not apply. Applying the factors set out at section 14(1)(f), the former Assistant Commissioner found that disclosure of the electronic database would be an unjustified invasion of personal privacy under the *Act* under the mandatory personal privacy exemption in section 14(1) and upheld Toronto’s decision to deny access to it. The requester sought judicial review at the Divisional Court.

[65] In *Gombu*, the Divisional Court allowed the application for judicial review and quashed Order MO-1366. The Court stated that “the issue is not whether the Clerk is ‘required’ to prepare the database, but whether, as section 88(5) provides, the material is, in fact, prepared ‘under the Act.’” The Court held that the electronic database was prepared under the *MEA* and therefore was a public record. The Court held that section 88(5) of the *MEA* required disclosure of the database and that the exception in section 14(1)(d) of the *Act* applied. The Court further held that the distinction between electronic records and paper records was immaterial and that disclosure of the entire database was necessary for public scrutiny of the election process.

[66] In its reply representations in this appeal, the city argues that *Gombu* is distinguishable from the current appeal, because the records at issue in *Gombu* were subject to a right of access under section 88(5) of the *MEA*, and the *MEA* did not contain special restrictions specific to the records at issue in that case. The city argues that, in contrast, the *MEA* contains several provisions that expressly restrict what can be done with the voters’ list, and by extension the voter spreadsheet, specifically. The essence of the city’s argument appears to be that, because disclosure under the access provision of the *Act* amounts to disclosure to the public at large, the restrictions on the subsequent use and publication of a voters’ list set out at sections 88(10) and 88(11) of the *MEA* must mean that the voter spreadsheet at issue cannot be considered a public record under section 88(5) of the *MEA*.

[67] The principle that disclosure under the *Act* is effectively disclosure to the public at large, such that a party receiving disclosure under the *Act* may do what they wish with the records, is qualified. The subsequent use or disclosure of information obtained under the access provisions of the *Act* is subject to any other restrictions imposed by law outside of the *Act*.¹⁶ Such restrictions would include the limitation on subsequent use under section 85(10) of the *MEA* and the prohibitions against public posting under section 85(11) of the *MEA* and section 9 of O Reg 101/97. These provisions do not, as the city appears to argue, limit the scope or categories of records considered “public records” under section 88(5). They only limit what can be done with the records once disclosed.

¹⁶ See Reconsideration Order MO-3730-R, *Oro-Medonte (Township) (Re)*, [2019] O.I.P.C. No. 17, at para. 19; Final Order PO-3268-F, *Ontario Power Authority (Re)*, [2013] O.I.P.C. No. 266, at para. 39

[68] I sought representations from the city on the possible relevance of Order M-1154, another order addressing these provisions, to the determination in this appeal, but the city declined to provide any.¹⁷ In Order M-1154, former Assistant Commissioner Goodis considered whether section 88(5) of the *MEA* expressly authorized disclosure of the records at issue in that appeal for the purposes of the section 14(1)(d) exception under the *Act*. In Order M-1154, the records at issue were forms filed by mayoral candidates under the *MEA* containing (among other information) a list of contributors, including the name, address and amount of contribution for each contributor. The Corporation of the County of Prince Edward argued that section 88(5) only permits inspection at the clerk's office during office hours, and that section 88(10) of the *MEA* did not allow the use of the information filed under it to be used for non-election purposes. The former Assistant Commissioner did not accept the argument, and went on to distinguish between the disclosure of personal information pursuant to the *Act* and the subsequent use of the personal information (section 88(10) of the *MEA*), as follows:

With respect to the method of access, section 88(5) allows any member of the public to inspect the records at the clerk's office at a time when the office is open. While this provision does not specifically address other methods of access which may be permitted under the *Act*, such as the provision of copies of the records, there is nothing in section 88(5) or any other provision of the *MEA* which prevents municipalities from granting access to public records in a manner other than that set out in section 88(5). The fact that Forms 4 and 5 [filed by the mayoral candidates] are in effect "public records" under section 88(5) is sufficient authorization under section 14(1)(d) of the *Act*. Barring any other exemption applying, the methods of access set out in section 23 of the *Act*¹⁸ are available to the appellant.

In my view, section 88(10) of the *MEA* does not take the records outside the exception at section 14(1)(d) of the *Act* merely because it restricts the "use" to which the information is put. A distinction must be drawn between disclosure and use in this context. Both the *Act* and the *MEA* distinguish between the two concepts of "use" and "disclosure". Section 31 of the *Act* prohibits the use of personal information (with certain listed exceptions), while section 32 prohibits the disclosure of personal information (also with certain listed exceptions). Similarly, section 88(5) of the *MEA* addresses disclosure, while section 88(10) is concerned with how the information, once disclosed, is subsequently used. Section 88(10) does not, in my view, place a limitation on the extent to which the public may access information under section 88(5) of the *MEA* or under the *Act*.

¹⁷ Order M-1154 (1998) preceded Order MO-1366 (2000) and *Gombu*.

¹⁸ Section 23 of the *Act*, both then and now, relates to obtaining copies of records disclosed under the *Act*, or examining the original records.

In short, for the purpose of determining the issue of access under the *Act*, the use to which the appellant intends to put the information is not relevant. To be clear, my finding should not be construed as a determination of whether or not the appellant's intended use, or any other use, of the information in question is permitted or not permitted under section 88(10) of the *MEA*.

[69] I agree with the former Assistant Commissioner's reasoning in Order M-1154 and adopt it in this appeal. While the city argues that sections of the *MEA*, in conjunction with O Reg 101/97, apply to restrict access to the voter spreadsheet, I find that they do not. I find that the sections of the *MEA* relied upon by the city restrict the use and further publication of the voter spreadsheet and not access to or disclosure of it. Therefore, I am not persuaded by the city's argument that *Gombu* can be distinguished from the appeal before me because of the limitations specifically placed on the use and further publication of the voter spreadsheet by the *MEA*. I find that the appellant's intended use of the voter spreadsheet is not relevant to my determination of his right to access it under the *Act*.

[70] With respect to the appellant's right of access to the voter spreadsheet under section 88(5) of the *MEA*, I find that the circumstances of *Gombu* are analogous to the facts before me in this appeal, and I adopt the Court's reasoning. In *Gombu*, the Court held, at paragraph 28:

In a contextual consideration of the overall legislative scheme, it must be remembered that s. 88(5) of the *MEA*, when read with the accompanying regulations, specifically overrides the privacy interests otherwise required to be considered under the *MFIPPA*, and mandates disclosure of campaign contributors' names, addresses and amounts given.

[71] I will set out again, for emphasis, section 88(5) of the *MEA*, which states:

88(5) Despite anything in the *Municipal Freedom of Information and Protection of Privacy Act*, documents and materials filed with or prepared by the clerk or any other election official under this Act are public records and, until their destruction, may be inspected by any person at the clerk's office at a time when the office is open.

[72] As the Court found in *Gombu*, I find that section 88(5) of the *MEA* explicitly overrides the privacy interests otherwise required to be considered under the *Act*.¹⁹ While section 88(5) only provides for in-person inspection by members of the public while the clerk's office is open and does not expressly contemplate disclosure in the context of an access request, it broadly indicates that documents and materials

¹⁹ I note that section 88(6) of the *MEA* provides that section 88(5) no longer applies after the expiry of the 120 day retention period referred to at sections 88(1) and (2); and, further, that section 88(6.1) of the *MEA* protects the contents of the ballot box within this retention period. However, neither of these provisions are applicable here.

prepared under the *MEA*, such as the voter spreadsheet, are intended to be available to the public. This public availability is sufficient to establish that disclosure of the voter spreadsheet in the context of an access request is “expressly authorized” by section 88(5) of the *MEA*. Therefore, I find that section 14(1)(d) applies and disclosure is not an unjustified invasion of personal privacy. Consequently, I find that the voter spreadsheet is not exempt from disclosure under section 38(b).

[73] The city argues that the IPC should exercise its discretion under section 43(3) of the *Act* to order that the voter spreadsheet only be used for election-related purposes and not be shared publicly. While I appreciate the city’s concerns, based on the circumstances of this appeal, I find that it is not necessary for me to make such an order, because sections 88(10) and (11) of the *MEA* along with section 9 of O Reg 101/97 already impose these conditions. The subsequent use or disclosure of information obtained under the access provisions of the *Act* is subject to any other restrictions imposed by law outside of the *Act*.²⁰ Furthermore, as noted above, the appellant submits that he is requesting the voter spreadsheet for election purposes, and he is aware of the restrictions placed on its use by the *MEA* and O Reg 101/97.

[74] While the determination of compliance with and enforcement of the provisions of the *MEA* are outside of the IPC’s jurisdiction,²¹ I note that pending amendments to the *MEA*, slated to come into effect on January 1, 2023, specifically the addition of sections 23(7) and (8), impose restrictions on election officials and certified candidates who receive copies of the voters’ list, as well as on those persons they share the voters’ list with. Section 23(7) requires a written acknowledgement from persons provided with a copy of the voters’ list that they will follow the restrictions in section 23(7) and the rules in section 23(8). Another addition, section 88(7.1), prohibits the making of extracts or copies of the voters’ list under section 88(7), unless authorized by a court order. I note, however, that the legislature has chosen not to put these restrictions in place at the present time. It is not the role of this office to pre-empt the legislature by prematurely imposing similar restrictions which, in any event, are already addressed in general terms by the current limitations at sections 88(10) and 88(11) of the *MEA*. Accordingly, I reject the city’s submission that I should order restrictions on the use of the voter spreadsheet at issue, once it is disclosed to the appellant.

[75] For the reasons above, I find that the section 14(1)(d) exception applies to the voter spreadsheet at issue and it is not exempt from disclosure under section 38(b) of the *Act*. I will order the city to disclose the voter spreadsheet in its entirety to the appellant.

²⁰ See Reconsideration Order MO-3730-R, *Oro-Medonte (Township) (Re)*, [2019] O.I.P.C. No. 17, at para. 19; Final Order PO-3268-F, *Ontario Power Authority (Re)*, [2013] O.I.P.C. No. 266, at para. 39

²¹ The *MEA* contains offence provisions for the enforcement of the *MEA*, including the general offence provision at section 94, which states: A person who contravenes any provision of this Act or a regulation under this Act or a by-law passed by a municipality under this Act is guilty of an offence.

ORDER:

1. I do not uphold the city's decision.
2. I order the city to disclose the voter spreadsheet in its entirety to the appellant by **April 22, 2022** but not before **April 18, 2022**.
3. In order to verify compliance with order provision 2, I reserve the right to require the city to provide me with a copy of the record disclosed to the appellant.

Original signed by: _____

Anna Truong
Adjudicator

March 18, 2022 _____