

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4217

Appeal MA20-00043

Township of Algonquin Highlands

June 22, 2022

Summary: The appellant requested from the township all records related to himself and to his businesses. While the township disclosed a number of records to the appellant, it withheld a small number of records and portions of records under the personal privacy exemption at section 14(1) or 38(b) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), and the discretionary exemptions at sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege) of the *Act*. In this order, the adjudicator dismisses the appellant's appeal of the township's decision. Even assuming the records contain the appellant's personal information within the meaning of the *Act* (so that he has a greater right of access to the information at issue under Part II of the *Act*), the adjudicator finds that the claimed exemptions apply. She also upholds the township's exercise of discretion under the *Act*. As a result, she upholds the township's denial of access.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, sections 2 (definitions), 6(1)(b), 12, 14(1), and 38.

OVERVIEW:

[1] The appellant made a request to the Township of Algonquin Highlands (the township) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information about himself and about businesses he owned:

1. All general and personal records related to [the appellant] and any corporations or businesses owned, operated or directed by [the appellant] from the year 2000 to present and forward for 2 years;
2. All supporting by-laws, resolutions, motions, policy and procedural documents in support of any and all decisions made by the [township] relating to the [appellant] and his businesses.

[2] The appellant specified that the records he seeks include, but are not limited to, handwritten notes, correspondence, drafts, reports, electronic files, emails, voicemail messages, and telephone logs.

[3] The township contacted the appellant to ask for further details to assist in its search for responsive records. Specifically, the township asked the appellant to provide the names of any corporations or businesses he owned, operated, or directed from the year 2000 to the date of his request.

[4] The appellant said that he was unable to provide the requested information.

[5] Based on this, the township conducted a search only for records related to the appellant by his name (including a short version of his first name). As a result of its search, the township identified 202 pages of responsive records, which it identified on an index of records accompanying its decision. The township explained that it would withhold some information about other individuals from the records based on the mandatory personal privacy exemption at section 14(1) of the *Act*. The township also set out a fee for access.

[6] The appellant was dissatisfied with the township's access decision and its fee for access. He also believed the township had not located all records responsive to his request. On this basis, the appellant appealed the township's decision to the Information and Privacy Commissioner/Ontario (IPC).

[7] During the mediation stage of the IPC appeal process, there were a number of developments that resulted in the resolution of some of the issues in the appeal.

[8] The appellant provided the township with the name of one of his businesses so that it could conduct a search for records containing that name. After conducting a further search, the township issued a revised decision, accompanied by a revised index of records (described in the mediator's report as "Index 1"), in which it disclosed additional information to the appellant. The township also waived all fees associated with the appellant's request. In this decision, the township also addressed the continuing access portion of the appellant's request, by setting out a schedule for its further searches and access decisions.

[9] The township later issued another revised decision and index ("Index 2"), disclosing additional information to the appellant. In Index 2, the township identified

records for which it claimed the discretionary exemptions at sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege) of the *Act* to withhold certain information. The township took the position that no further records exist.

[10] After these developments, the issues of fee and the reasonableness of the township's search were no longer in dispute. However, the appellant wished to continue his appeal in respect of the township's severances to the records under sections 6(1)(b), 12, and 14(1) of the *Act*.

[11] During mediation, the mediator raised the potential application of section 38 of the *Act* to certain records that may contain the appellant's personal information. As discussed in more detail below, section 38 is the appropriate exemption to consider in respect of records that contain the requester's own personal information.

[12] As no further mediation was possible, the file was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*.

[13] I conducted an inquiry into this matter, initially by seeking representations from the township. The township provided representations, which I shared with the appellant in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*. The appellant declined to provide representations.

[14] In this order, I uphold the township's decision to deny access to certain records and information under section 6(1)(b) and section 12, in conjunction with section 38(a) of the *Act*, and under the personal privacy exemption at section 38(b) of the *Act*. I dismiss the appeal.

RECORDS:

[15] At issue are the following records identified in the township's Index 1 and Index 2:

Index 1: Records 6, 21, and 24.

Index 2: Records 7, 19, 20, 21, 22, 23, 24, 29, and 32.

ISSUES:

- A. Do any of the records 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 township's severances to Records 6, 21, and 24 of Index 1?

- C. Does the discretionary exemption at section 6(1)(b) relating to closed meetings, in conjunction with section 38(a), apply to Records 7, 19, 20, 21, 22, 23, and 24 of Index 2?
- D. Does the discretionary solicitor-client privilege exemption at section 12, in conjunction with section 38(a), apply to Records 29 and 32 of Index 2?
- E. Did the township exercise its discretion under section 38? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

A. Do any of the records contain “personal information” as defined in section 2(1) and, if so, whose personal information is it?

[16] In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether each record contains “personal information,” and if so, to whom the personal information in the record relates.

[17] This question is relevant because if a record contains the requester’s own personal information, the requester’s rights of access to the record are greater than if it does not. In addition, if the record contains the personal information of other individuals, one of the personal privacy exemptions from the right of access may apply.

[18] Section 2(1) of the *Act* defines “personal information” as “recorded information about an identifiable individual.” Section 2(1) of the *Act* gives a non-exhaustive list of examples of personal information. The list includes:

- 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 [at paragraph (b)]; and
- 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 [at paragraph (h)].

[19] Information is “about” the individual when it refers to the individual in a personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in the individual’s professional, official or business capacity is not considered to be “about” the individual.¹ This is reflected in sections 2(2.1) and (2.2) of the *Act*, which state:

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

(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.

[20] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.²

[21] The township made discrete severances to Records 6, 21, and 24 of Index 1 based on a claim these severances contain the personal information of individuals other than the appellant. (The township does not claim that the other records at issue contain the personal information of other individuals.)

[22] Records 6 and 21 of Index 1 are emails exchanged between township staff. Record 24 of Index 1 is a general ledger that documents certain financial transactions in which the township was involved. The township has severed from these records the names of individuals other than the appellant. There is no evidence before me to suggest the references to these individuals concern them in a professional, official, or business capacity. Given the context in which they appear, I agree that disclosure of these names would reveal other personal information about identifiable individuals. The severed information is therefore the personal information of individuals other than the appellant.

[23] All the records at issue (including Records 6, 21 and 24 of Index 1, discussed above) also contain references to the appellant. This is to be expected considering the wording of the appellant's access request. The responsive records are those that relate to the appellant and his businesses.

[24] It is an open question whether the information relating to the appellant in the records qualifies as his personal information within the meaning of the *Act*.³ Arguably, records concerning the appellant and his business activities relate to the appellant in a professional capacity only, and do not reveal anything of a personal nature about him.

² Orders P-1409, R-980015, PO-2225 and MO-2344.

³ I recognize that after discussions at the mediation stage, the township amended its personal privacy claim for some of the records to reflect that these records contain the appellant's personal information. However, the township did not amend its exemption claims for other records in this manner (i.e., by claiming the exemptions in conjunction with section 38(a) of the *Act*). It may be that the township believes some of the records contain the appellant's personal information, while other records concern the appellant in a professional capacity only. Or the different treatment of certain records may have been an oversight on the part of the township. The township's treatment makes no difference in the way I decide this appeal, as I explain in the next paragraph.

In that case, the appellant's right of access to the records would be the general right of access, under Part I of the *Act*, rather than the greater right of access in Part II to records of the appellant's own personal information.

[25] In the absence of representations from the appellant on this topic, and because in this appeal it makes no difference to the result, I decline to make a definitive finding on whether the information about the appellant in the records goes beyond professional information to reveal something of a personal nature about him. Instead, for the sake of consistency, I will assume without deciding that all the records at issue in this appeal contain the appellant's personal information within the meaning of the *Act*. This means that I will consider the appellant's right of access to the records under section 36(1), in Part II of the *Act*, based on the assumption he is seeking access to his own personal information.

[26] As will be seen below, I find in any event that the township properly withheld the information at issue in this appeal.

B. Does the discretionary personal privacy exemption at section 38(b) apply to the township's severances to Records 6, 21, and 24 of Index 1?

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

[28] Under the section 38(b) exemption, if a record contains the personal information of both the requester and another individual, the institution *may* refuse to disclose the other individual's personal information to the requester if disclosing that information would be an "unjustified invasion" of the other individual's personal privacy.⁴

[29] The section 38(b) exemption is discretionary. This means that the institution can decide to disclose another individual's personal information to a requester even if doing so would result in an unjustified invasion of other individual's personal privacy.⁵

[30] As discussed above, in this appeal, I will assume that the records at issue contain the appellant's personal information. I therefore consider the township's personal privacy exemption claim under the discretionary exemption at section 38(b).⁶

[31] For the reasons that follow, I find that section 38(b) applies to the township's

⁴ However, the requester's own personal information, standing alone, cannot be exempt under section 38(b) as its disclosure could not, by definition, be an unjustified invasion of another individual's personal privacy: Order PO-2560.

⁵ See below under Issue E for discussion of the township's exercise of discretion.

⁶ In contrast, under the mandatory exemption at section 14(1), where a record contains personal information of another individual but not the requester, the institution cannot disclose that information unless one of the exceptions in sections 14(1)(a) to (e) applies, or the section 14(1)(f) exception applies. If applicable, these exceptions provide that disclosure would not be an "unjustified invasion" of the other individual's personal privacy.

severances of the names of individuals (other than the appellant) in Records 6, 21, and 24 of Index 1.

[32] In determining whether disclosure would be “an unjustified invasion of personal privacy” under section 38(b), I have regard to sections 14(1) to (4) of the *Act*. These sections provide guidance in deciding whether disclosure would be an unjustified invasion of the other individual’s personal privacy.

[33] If any of the section 14(1)(a) to (e) exceptions apply, disclosure would not be an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 38(b). Section 14(4) also lists situations where disclosure would not be an unjustified invasion of personal privacy.

[34] I am satisfied that none of the exceptions in paragraph 14(1)(a) to (e), or in section 14(4), applies to the information at issue.

[35] Next, I consider the factors and presumptions in sections 14(2) and (3), which help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b).⁷

[36] Section 14(3) lists several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy under section 38(b). None of the presumptions in section 14(3) appears to be applicable in the circumstances.

[37] Section 14(2) lists several factors that may be relevant to determining whether disclosure of personal information would be an unjustified invasion of personal privacy.⁸ Some of the factors weigh in favour of disclosure, while others weigh against disclosure. The list of factors under section 14(2) is not a complete list. The institution must also consider any other circumstances that are relevant, even if these circumstances are not listed under section 14(2).⁹

[38] The appellant provided no representations in support of his appeal of the township’s decision to deny access to these individuals’ names in the records, and no factors, listed or unlisted, that would favour disclosure are apparent to me from my consideration of the records or the request.

[39] The names at issue in the records appear in connection with these individuals’ dealings with the township. There is no evidence to suggest these individuals have consented to the disclosure of their names to the appellant, or that they would expect their personal information in this context to be disclosed beyond the township. In these circumstances, I find the exemption at section 38(b) applies to the personal information in the records. This finding is subject to my consideration of the township’s exercise of

⁷ Order MO-2954.

⁸ Order P-239.

⁹ Order P-99.

discretion under section 38(b), under Issue E, below.

C. Does the discretionary exemption at section 6(1)(b) relating to closed meetings, in conjunction with section 38(a), apply to Records 7, 19, 20, 21, 22, 23, and 24 of Index 2?

[40] Under this heading, I will consider the township's denial of access to Records 7, 19, 20, 21, 22, 23, and 24 of Index 2. The township withheld these records, in full, on the basis of the discretionary exemption relating to closed meetings at section 6(1)(b) of the *Act*.

[41] As noted above, because I assume in this appeal that all the records contain the personal information of the appellant, I consider the township's section 6(1)(b) claim for these records in conjunction with section 38(a), which provides an exemption from the right of access of individuals to their own personal information held by an institution. [Under Issue D, I also consider the township's section 12 claim for Records 29 and 32 of Index 2 in conjunction with section 38(a).] 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, 9.1, 10, 11, **12**, 13 or 15 would apply to the disclosure of that personal information.

[42] The discretionary nature of section 38(a) ("may" refuse to disclose) 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 own personal information.¹⁰

[43] Section 6(1)(b), on which the township relies, reads:

A head may refuse to disclose a record [...] that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[44] For this exemption to apply, the institution must show that:

1. a council, board, commission or other body, or a committee of one of them, held a meeting,
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.¹¹

¹⁰ Order M-352.

¹¹ Orders M-64, M-102 and MO-1248.

[45] Records 7, 19, 20, and 23 of Index 2 are staff reports that were prepared for discussion by township council at closed (“in camera”) sessions of public council meetings. The titles of these reports reflect their confidential nature and the intention that they be discussed in closed session only. To show that each of these reports was considered in a properly authorized closed meeting, the township provided copies of relevant council meeting agendas (which are public documents) and, for each closed session, the corresponding motion (tabled in open session) for council to move in camera under one of the specified grounds in section 239(2) of the *Municipal Act, 2001*.

[46] Records 21, 22, and 24 of Index 2 are confidential minutes of discussions held during in camera sessions of council meetings. For each of these closed sessions, the township provided the relevant public meeting agenda and the corresponding motion to move into closed session under the appropriate ground in section 239(2) of the *Municipal Act, 2001*. (One portion of Record 22 concerns another matter that is unrelated to the appellant or his businesses, and is not responsive to the appellant’s request.)

[47] The township also provided a copy of its procedural by-law that was in force at the relevant times, to show that in every case the township followed its procedures for proceeding into closed session.

[48] I find all these records qualify for exemption under section 6(1)(b), in conjunction with section 38(a). Each record is connected to a properly held closed meeting of township council, satisfying parts 1 and 2 of the three-part test for the application of section 6(1)(b). In each case, I am also satisfied that disclosure of the record would reveal the actual substance of the closed session deliberations, satisfying part 3. There is no evidence to suggest that an exception in section 6(2) to the application of the exemption applies in this case.

[49] My finding is subject to my consideration of the township’s exercise of discretion under section 6(1)(b), which I consider at Issue E, below.

D. Does the discretionary solicitor-client privilege exemption at section 12, in conjunction with section 38(a), apply to Records 29 and 32 of Index 2?

[50] The township claims the discretionary solicitor-client privilege exemption at section 12 for Record 32 in Index 2. Because Record 29 of Index 2 is similar to Record 32, I will consider both records under this heading.

[51] Section 12 of the *Act* exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It 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.

[52] As noted above, because I assume for the purposes of this appeal that the records contain the appellant's personal information, I consider the township's section 12 claim in conjunction with section 38(a) of the *Act*.

[53] Section 12 contains two different exemptions, referred to in previous IPC decisions as "branches." The first branch ("subject to solicitor-client privilege") is based on common law. The second branch ("prepared by or for counsel employed or retained by an institution...") is a statutory privilege created by the *Act*. The institution must establish that at least one branch applies.

[54] Solicitor-client communication privilege is addressed in both branches of section 12. This privilege covers records prepared for use in giving legal advice. The rationale for solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.¹² This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.¹³ The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.¹⁴

[55] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.¹⁵

[56] Records 29 and 32 of Index 2 are emails sent by the township Chief Administrative Officer to members of township council. These emails summarize or refer to certain discussions that occurred during closed sessions of township council meetings, and update council members on information and advice received from the township solicitor regarding next steps. These records reveal privileged communications from the solicitor to be shared with the client township council. There is no evidence to suggest the contents of these emails have been shared outside the solicitor-client relationship, or that the privilege over these communications has been otherwise waived or lost.

[57] The solicitor-client privilege exemption therefore applies to Records 29 and 32 of Index 2. My finding is subject to my consideration of the township's exercise of discretion under section 12, which I consider next.

¹² Orders PO-2441, MO-2166 and MO-1925.

¹³ *Descôteaux v. Mierzwinski* (1982), 141 DLR (3d) 590 (SCC).

¹⁴ *Balabel v. Air India*, [1988] 2 WLR 1036 at 1046 (Eng CA); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

¹⁵ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

E. Did the township exercise its discretion under section 38? If so, should the IPC uphold the exercise of discretion?

[58] In this appeal, I have assumed that the records contain the appellant's personal information, so that any exemptions from his right of access must be claimed through section 38 of the *Act*. Section 38 is a discretionary exemption under which an institution may decide to withhold from a requester his own personal information. Under a discretionary exemption, an institution can decide to disclose information even if the information qualifies for exemption, as I have found above.

[59] An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so. In addition, 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.

[60] I am satisfied the township properly exercised its discretion under the *Act*. In response to the appellant's request and throughout this appeal, the township acted cooperatively to identify and to disclose the records of interest to the appellant. I found above that the township appropriately applied exemptions to withhold a small number of records, and to make discrete severances to other records. In amending its exemption claim at the mediation stage, the township accepted and took into account the general principle that individuals should have a right of access to their own personal information. I have no evidence before me to suggest the township acted in bad faith, took into account irrelevant considerations, or otherwise failed to exercise its discretion in a proper manner under the *Act*. I accordingly uphold the township's exercise of discretion.

[61] For all these reasons, I uphold the township's decision to withhold the information at issue. I dismiss the appeal.

ORDER:

I uphold the township's denial of access. I dismiss the appeal.

Original Signed by: _____
Jenny Ryu
Adjudicator

_____ June 22, 2022