Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4254

Appeal MA20-00207

County of Norfolk

September 22, 2022

Summary: This order deals with an access request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the appellants, their property and alleged infractions of the County of Norfolk's (the county) forestry and roads by-laws by the appellants. The county denied access to the records in full. The county claimed a number of exemptions, including the discretionary exemption in section 38(a) in conjunction with sections 8(1)(b), 8(1)(c), 8(1)(d), 8(1)(g), 8(2)(a) and 8(3). The county also claimed that the appellants' entire request was frivolous and vexatious and that portions of the records were not responsive to the access request. During the mediation of the appeal, the appellants raised the issue of reasonable search, believing that further records responsive to the request exist.

In this order, the adjudicator finds that the request is not frivolous or vexatious, and that some of the records are not responsive to the request. In terms of the exemptions claimed by the county, the adjudicator finds that only portions of by-law officers' notes are exempt from disclosure under section 8(1)(d) (confidential source), but that the remaining exemptions in section 8 do not apply to the records, including section 8(3) (refuse to confirm or deny). The adjudicator orders the non-exempt information to be disclosed and orders the county to issue another decision for the records, if any, that exist in relation to its section 8(3) claim. Lastly, the county's exercise of discretion to withhold the exempt information and its search for records are upheld.

Statutes Considered: The *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of personal information), 4(1)(b), 8(1)(b), 8(1)(c), 8(1)(d), 8(1)(g), 8(2)(a), 8(3), 17, 38(a), and section 5.1 of Regulation 823.

Orders Considered: Orders MO-2343, MO-2882, MO-3214-I, MO-3615, MO-3887, MO-4188. MO-4221, P-23, PO-1959, PO-2151, PO-2455, PO-3999, PO-4035, PO-4080.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the County of Norfolk (the county) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for records relating to one of the appellants' properties and Forestry by-law violations for a 13 year time period.

[2] The county located records responsive to the appellants' request and denied access to them in full. The county withheld incident reports, complaints, follow-up of complaints and follow-up reports under the discretionary law enforcement exemptions in sections 8(1)(b) (law enforcement investigation), (c) (reveal investigative techniques and procedures), (d) (confidential source of information), and (g) (intelligence information) and 8(2)(a) (law enforcement report). The county denied the appellants access to any information relating to logbooks that may exist, claiming section 8(3) (refuse to confirm or deny the existence of a record). Finally, the county denied the portion of the appellants' request relating to correspondence sent by the Forestry Department to the appellants pursuant to section 4(1)(b)(frivolous or vexatious request) of the *Act*.

[3] The requesters (now the appellants) appealed the county's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] During the mediation of the appeal, the appellants confirmed they are no longer seeking access to emails, correspondence and stop work orders they received from the county's Forestry Department. Therefore, these records are no longer at issue in the appeal.

[5] The appellants also advised the mediator that they seek access to complaint records with both the Forestry and Roads Departments. However, they do not require a tally of the number of complaints (which was part of their access request). The appellants confirmed their intent to challenge the remainder of the county's access decision and raised the possible application of the public interest override in section 16 of the *Act*. Finally, the appellants take the position that there ought to be additional responsive records, thereby raising the issue of reasonable search.

[6] The county claimed it located all of the records responsive to the appellants' request. The county also advised that portions of the records were withheld as not responsive to the appellants' request, although that was not indicated in the original access decision. Finally, the county confirmed its section 8 exemption claim, and that it was also relying on section 38(a), in conjunction with section 8 of the *Act,* for the records that contain the appellants' personal information.

[7] No further mediation was possible and the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. During the inquiry, the county issued a supplementary access decision to the appellants, advising that it was now taking the position that the appellants' entire request was frivolous and vexatious. The county referred to section 5.1(a) of Regulation 823 to support its frivolous and vexatious claim. At the same time, the county continued to claim the application of section 38(a) in conjunction with section 8 to the records.

[8] The adjudicator initially assigned to the file began her inquiry by inviting the county to make representations. The county submitted representations and it appeared that it was raising the application of section 38(b). As a result, the previous adjudicator raised the issue of section 38(b) and invited the county to make supplementary representations on this issue.

[9] The adjudicator also requested a copy of the records at issue and an Index of Records. The county provided records on a USB key, as well as an Index of Records.

[10] The adjudicator then provided the appellants the opportunity to provide representations on all of the issues. The appellants provided representations.

[11] The file was then transferred to me to continue the inquiry. As noted above, during the mediation of the appeal, the appellants removed emails, correspondence and stop work orders they received from the county's Forestry Department from the scope of the appeal. On my review of the records themselves, I find that Records 1-6, 15-22, 259 and 370-371 qualify as emails, correspondence and stop work orders and are, therefore, no longer at issue in this appeal.

[12] I also note that in their representations, the appellants allege that the county improperly collected, used and disclosed their personal information without their consent, amounting to a breach of their privacy. The appellants' position on this is reiterated throughout their representations. The issues in this appeal relate to access to information under the relevant sections of the *Act*. Any issues relating to the collection, use and disclosure of the appellants' personal information are not part of the scope of this access appeal, and I will not be referring to them again in this order. However, the appellants are free to make a privacy complaint to the IPC regarding the county's collection, use and disclosure of their personal information, should they choose to do so.

[13] For the reasons that follow, I find that the request is not frivolous or vexatious, and that some of the records are not responsive to the request. In terms of the exemptions claimed by the county, I find that only portions of by-law officers' notes are exempt from disclosure under section 38(a), in conjunction with section 8(1)(d) (confidential source). Since public interest override in section 16 cannot apply to this information, I uphold the county's decision to withhold it. I also find that the remaining exemptions in section 8 do not apply to the records, including the county's reliance on

the refuse to confirm or deny provision in section 8(3). I therefore order the non-exempt information to be disclosed to the appellants and order the county to issue another decision for the records, if any, that exist in relation to its section 8(3) claim. Lastly, I uphold the county's exercise of discretion in relation to the information exempt under section 8(1)(d) and its search for records.

RECORDS:

[14] There are approximately 350 records at issue, including a deed, two agreements, a mortgage statement, a parcel register, officers' notes, photographs, surveys, maps, minutes of a meeting, a by-law inspection report, an inventory list of trees and compilation lists of trees. The majority of the records are photographs of the appellants' property.

ISSUES:

A: Is the request for access frivolous or vexatious?

B: What records are responsive to the request?

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

D: Does the discretionary exemption at section 38(a) in conjunction with the section 8 exemption or the section 8 exemption alone apply to the information at issue?

E: Did the county exercise its discretion under section 38(a)? If so, should I uphold the exercise of discretion?

F: Did the county conduct a reasonable search for records?

DISCUSSION:

Issue A: Is the request for access frivolous or vexatious?

[15] The appellants' access request is as follows:

- Documentation pertaining to one of our properties [address and roll number],
- Forestry Department – incident reports from bylaw enforcement staff attending property for what reason, i.e., but not limited to complaints against the property, of activity on the property by the owners. For example, stop work orders issued by: which forestry by-law enforcement officer, complainants to Forestry Department (names, dates, time of day, and nature of complaint),

- Follow-up of complaint by by-law enforcement officer (name of officer, dates, time) and follow-up report to the Forestry Department,
- All emails, correspondence of the Forestry Department, emails to us, the owners,
- How many different complainants have been recorded by the Forestry Department?
- Logbooks from the Forestry Department of time spent in office and on the mentioned property as well has how many officers did get involved with the investigations, and not just only stop work orders over the years, and
- Logbook of Roads Department – complainant incident reports (dates, time and nature of complaint). Follow-up of Roads Department to owners. How many complainants have been recorded by the Roads Department.

[16] The appellants then clarified with the county that the request was to cover a specified time frame over a 13 year period.

[17] The county argues that the appellants' request is frivolous or vexatious, which is addressed in section 4(1)(b) of the *Act*:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> > the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[18] Section 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the terms "frivolous" and "vexatious". Only part (a) of the section 5.1 is relevant to the present appeal because the county argues that the request is frivolous or vexatious because it is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution.[1] Section 5.1(a) states:

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
>
> > (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution;[2]

[1] Section 5.1(b) of the Regulation deals with requests made in bad faith or purposes other than to obtain access.

[2] I note that section 5.1(b) of the regulation sets out other grounds for a finding that a request is frivolous or vexatious, which are not relevant in this appeal.

[19] Section 4(1)(b) provides institutions with a summary mechanism to deal with frivolous or vexatious requests. This discretionary power can have serious implications on the ability of a requester to obtain information under the *Act*, and therefore it should not be exercised lightly.[3]

[20] An institution has the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious.[4] As noted above, the county is claiming that the access request is frivolous and vexatious on the grounds that the appellants have engaged in a pattern of conduct that amounts to an abuse of the right of access and a pattern of conduct that would interfere with its operations.

[21] The county need only establish one of the patterns of conduct. I will first consider whether a pattern of conduct exists that amounts to an abuse of the right of access, then a pattern of conduct that would interfere with the county's operations.

Pattern of conduct that amounts to an abuse of the right of access

Representations

[22] In the supplementary access letter to the appellants, the county explained the reasons why it was of the view that the access request is frivolous or vexatious. It stated:

> Your request is part of a pattern of conduct that amounts to an abuse of the right of access due to your unwillingness to work with us in clarification, mediation and to specify records you are seeking. In your clarification responses to the County, rather than focusing the request to a specific subset of records, the request was instead expanded upon and widened. During clarification the former County Clerk and I viewed the responses at it related to your prior pattern of conduct. We evaluated that in order to not unreasonably interfere with Norfolk County operations by seeking further clarification from you, we would proceed with the search memo in order to determine the breadth of your request. After receiving the search results back from affected County departments, it was confirmed that your request would unreasonably interfere with Norfolk County operations in order to complete.
>
> Our next usual step would be to apply an interim access decision with request for a deposit in order to complete your request, however in further discussion with the former County Clerk, that due to your past conduct with Norfolk County it was recommended by me that the best course of action would be to apply a final access decision of denied in full. My recommendation was based on the following four considerations:

[3] Order M-850.
[4] Order M-850.

> 1. Part of a pattern of conduct to not cooperate with Norfolk County as described by the former County Clerk but also other current and former staff as it related to the topic of this request.
>
> 2. Part of a pattern of conduct in response to my clarification requests that matched what I had been told by the former County Clerk, current and former staff.
>
> 3. Your anticipated future conduct based on your pattern of prior conduct if I were to apply an interim fee requesting a deposit or a time extension.
>
> 4. The initial review of records retrieved as responsive to the request as well as the request wording precluded that the access decision would be denied in full in accordance with the [specified date] access decision. We concluded that given the extensive amount of time to organize, review and prepare the responsive records along with our inability to effectively work with you or apply extensions or fees in accordance with section 20 and 45 of the *Act*, and without being subject to the anticipated display of your prior pattern of conduct, the best way to provide access to information services for your would be to deny in full which enables you to appeal to the Information and Privacy Commissioner (IPC). . .

[23] In its representations, the county submits that the number of requests is not considered to be excessive by reasonable standards, but that the county considers the access request to be both excessively broad and unusually detailed. For example, the county argues that part of the request was for Forestry Department logbooks of time spent in the office and on the appellants' property, as well as the number of officers who were involved in the investigations.

[24] The county's position is also that this access request is similar to previous requests the appellants submitted to it, and that the timing of the request is connected with the occurrence of related events involving by-law enforcement on the appellants' property for forestry by-law violations.

[25] The county also submits that it applied section 4(1)(b)[5] retroactively because the county is now of the view that the appellants' prior pattern of conduct (being uncooperative with the county) altered how it was able to respond to the request and the "subsequent service quality" able to be provided to the appellants. The county's position is that the entire request was not denied on the ground of frivolous or vexatious at the time it issued the original access decision out of a fear of reprisal on the appellants' part.

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[5] The county refers to section 20.1, which is a section setting out the requirements of a decision letter where an access request is denied under section 4(1)(b).

[26] In their representations, the appellants submit that their access request is not frivolous or vexatious and that it was neither overly broad nor unusually detailed. In addition, the appellants argue that the county did not provide supporting evidence that the timing of the request was connected with events involving by-law enforcement, and that it did not provide any evidence of the appellants' alleged prior pattern of conduct.

[27] The appellants further submit that the purpose of the request was to simply gain access to records relating to them, and that they limited the scope of the request by specifying a time frame and by removing certain records from the scope of the request during mediation.

Analysis and findings

[28] The following factors may be relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access":

- Nature and scope of the requests

  Are they excessively broad and varied in scope or unusually detailed? Are they identical to or similar to previous requests?

- Timing of the requests

  Is the timing of the requests connected to the occurrence of some other related event, such as court proceedings?[6]

[29] The institution's conduct also may be a relevant consideration weighing against a "frivolous or vexatious" finding. However, misconduct on the part of the institution does not necessarily negate a "frivolous or vexatious" finding.[7]

[30] Other factors, particular to the case under consideration, can also be relevant in deciding whether a pattern of conduct amounts to an abuse of the right of access.[8]

[31] The focus should be on the cumulative nature and effect of a requester's behaviour. In many cases, ascertaining a requester's purpose requires the drawing of inferences from his or her behaviour because a requester seldom admits to a purpose other than access.[9]

[32] However, I must first consider whether the county has established a "pattern of conduct" at all. A "pattern of conduct" requires recurring incidents of related or similar requests by a requester under the *Act.*[10] As is evident, no such evidence has been

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[6] Orders M-618, M-850 and MO-1782.
[7] Order MO-1782.
[8] Order MO-1782.
[9] Order MO-1782.
[10] Order M-850.

provided to suggest such a pattern. I find the reasoning of Adjudicator Jaime Cardy in Order PO-4035 to be applicable and relevant to the present circumstances:

> Section 5.1(a) of Regulation 460[11] provides that a request is frivolous or vexatious if it is part of a "pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution." Previous orders have explored the meaning of the phrase "pattern of conduct." In Order M-850, for example, former Assistant Commissioner Tom Mitchinson stated:
>
> > [I]n my view, a "pattern of conduct" requires recurring incidents of related or similar requests on the part of the requester (or with which the requester is connected in some material way).

[33] The county's position is that the appellants' current access request in its nature and scope, in tandem with the county's allegation that the appellants are "uncooperative" is tantamount to a pattern of conduct that amounts to an abuse of the right of access and intended to interfere with its operations. I disagree. In my view, the appellants' current access request, taken into consideration with their previous requests, even if they form a "pattern of conduct,"[12] do not constitute a pattern of conduct that amounts to an "abuse of the right of access." I find that the nature and scope of the request at issue in this appeal is not unreasonable, overly broad or unusually detailed.

[34] Regarding the timing and purpose of the access request, I am not persuaded that the timing of this request is suspect or intended to impact any court proceedings between the parties. The mere fact that the access request took place during a time when there may have been a proceeding between the parties regarding a possible by-law violation demonstrates is not sufficient to establish a pattern of conduct that amounts to an abuse of the right of access. I also note that the appellants' access request is for information about themselves and their property. I am unable to find that the appellants' access request was made for any improper purpose. As I noted above, a finding that a request is frivolous or vexatious cannot be taken lightly as it can impact a requester's ability to access information under the *Act*.

Pattern of conduct that would interfere with the operations of the institution

Representations

[35] The county submits that there are reasonable grounds to conclude that the request is part of a pattern of conduct that would interfere with its operations. It says that the access request was submitted when county staff were redeployed to respond

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[11] The provincial equivalent of Regulation 823.

[12] I make no finding on whether the current request constitutes a pattern of conduct, given that I have not been provided with evidence about the nature and scope of any previous access request(s).

to the COVID-19 pandemic, thus limiting staff's ability to retrieve records and provide timely thorough searches. The county further submits that staff remaining in the office had to take on additional duties related to the pandemic as well as covering for staff that were redeployed. As a result, the county argues, the appellants' pattern of conduct interfered with its ability to provide reasonable search extensions.

[36] The county's position is also that as a small community it does not have the type of resources that a larger municipality would have. The Deputy Clerk is responsible for the entire access to information services program, and on average spends one day per week in responding to access requests and appeals.

[37] The appellants note that the county did not hesitate to count the number of pages of records at issue, despite its claim that it didn't have time to do so. The appellants' position is that the county procrastinated by using all excuses "under the sun" so that it didn't have to process the request during the pandemic while county staff were working from home.

Analysis and findings

[38] A pattern of conduct that would "interfere with the operations of an institution" is one that would obstruct or hinder the range of effectiveness of the institution's activities.[13]

[39] Interference is a relative concept that must be judged on the basis of the circumstances a particular institution faces. For example, it may take less of a pattern of conduct to interfere with the operations of a small municipality than with the operations of a large provincial government ministry, and the evidentiary onus on the institution would vary accordingly.[14]

[40] I find that the county has not demonstrated that the appellants' access request is part of a pattern of conduct that would "interfere with the operations of an institution." In Order PO-2151 Adjudicator Laurel Cropley canvassed what may constitute an unreasonable interference with the operations of an institution.[15] She noted from past orders that it appeared that in order to establish "interference" an institution must, at a minimum, provide evidence that responding to a request would "obstruct or hinder the range of effectiveness of the institution's activities.[16]" I agree with Adjudicator Cropley's analysis and adopt it for the purposes of this appeal.

[41] In my view, the appellants' access request is not one that would obstruct or

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[13] Order M-850.
[14] *Ibid.*
[15] While one of the issues in Order PO-2151 was whether a record could be created, the order considered the meaning of the term "unreasonable interference with the operations of an institution" in the context of claims that an access request is frivolous or vexatious.
[16] Order M-850.

hinder the range of effectiveness of the county's activities. In response to the current access request, the county was able to locate records responsive to the request and was able to issue an access decision and a supplementary access decision to the appellants in a fairly timely fashion without any interference to its operations. The county claims that the request was intended to interfere with its operations but has not provided me with any evidence to establish that responding to the current access request obstructed or hindered the range of effectiveness of its activities. In my view, the appellants should not be affected by the fact that there were staffing issues at the county due to the pandemic. The county had tools at its disposal to mitigate any strain on its resources, such as time extensions[17] and fee estimates.[18] I do not accept the county's argument that is was in fear of reprisal by the appellants.

[42] In sum, I find that the county has not shown that the appellants' access request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with its operations within the meaning of section 5.1(a) of the Regulation. As a result, I do not uphold its reliance on section 4(1)(b) to deny the access request.

Issue B: What records are responsive to the request?

[43] The county claims that some of the records identified in its searches are not, in fact, reasonably related – or are, "not responsive" – to the request. To address this issue, it is necessary to consider section 17 of the *Act,* which imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[44] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be

[17] See section 20.
[18] See section 45(3).

resolved in the requester's favour.[19]

[45] To be considered responsive to the request, records must "reasonably relate" to the request.[20]

Representations

[46] The county submits that the request did not provide sufficient detail to identify the records responsive to the request. The county further submits that it contacted the appellants and offered to reformulate the request. In response, the appellants provided a specific time period for the records that form the subject matter of the request.

[47] The appellants' position is that they were prepared to cooperate with the county in reformulating their access request and that the county was able to identify approximately 350 records that were responsive to the access request.

Analysis and findings

[48] I am satisfied that the appellants' access request was sufficiently detailed to enable the county to identify approximately 350 records responsive to the access request. I am also satisfied and I find, based on my review of all of the records and the wording of the access request itself, that three of the records are outside the scope of the request because they not reasonably related to the request, as follows:

- Record 7 is a survey that is outside the scope of the request as it predates the beginning of the specified time frame in the request by four years,
- Record 10 is an agreement that is outside the scope of the request in that it predates the beginning of the specified time frame in the request by over 20 years, and
- Record 11 is an agreement that outside the scope of the request in that it predates the beginning of the specified time frame in the request by six years.

[49] As a result, I find that these records that are not reasonably related to the request and are therefore outside the scope of it and I uphold the county's decision not to disclose them to the appellants.

[50] I find that one record the county identified as not being responsive to the request is, in fact, responsive to the request. Record 369 consists of minutes of a by-law appeals committee meeting at which the appellants were present. The meeting relates to a forestry department stop work order issued against the appellants. I find that this record not only reasonably relates to the access request, but falls squarely

[19] Orders P-134 and P-880.
[20] Orders P-880 and PO-2661.

within it. As a result, I will order the county to issue an access decision to the appellants regarding this record, without recourse to finding the request to be "frivolous or vexatious."

[51] Having determined that all of the records are responsive to the appellants' access request, with the exception of the three noted above, I find that there are certain responsive records pertaining to the appellants' property that the county claimed were part of the appellants' "frivolous or vexatious" request. The county did not claim any exemptions for these records, which are Records 8 (a survey), 9 (a mortgage statement), 12 (a deed), 13 (a parcel register) and 14 (a map attached to the parcel register). Having found that the request for these records is not frivolous or vexatious and that they are responsive to the request, and having noted that the county did not claim any exemptions with respect to these records, I will order the county to issue another access decision for them.

Records remaining at issue

[52] Before I determine whether the records contain "personal information," it is important to clarify the remaining records at issue, given that some records were either removed from the scope of the appeal during mediation, were found by me above not to be responsive to the request, or will be the subject of another access decision (because I have not upheld the county's claims of non-responsiveness or frivolous or vexatious.

[53] The records remaining at issue are records 23 through 368.

Record Number	**Description of the Record**
23, 29-32, 35-97, 115-258, 260-361	Photographs
24, 25, 98, 362-368	Maps
26	By-law Inspection Report
27, 28, 34	Compilation Forms of Trees
33, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114	Officers' Notes
99	List of Inventoried Trees

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

[54] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates.

[55] In particular, in this appeal, I must decide whether the records contain the appellants' own personal information. If the records contain personal information

relating to the appellants, access must be considered under Part II of the *Act* and any exemptions would be considered under section 38. If the records do not contain personal information relating to the appellant, access will be considered under Part I of the *Act*.

[56] I must also decide whether the records contain the personal information of other individuals, given the township's apparent position that some information is exempt under one of the personal privacy exemptions.

[57] The term "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,
> >
> > (d) the address, telephone number, fingerprints or blood type of 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;

[58] 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.[21]

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

> (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

[21] Order 11.

> dwelling and the contact information for the individual relates to that dwelling.

[60] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[22]

[61] 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.[23]

[62] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[24]

Representations

[63] As set out above, in response to the initial Notice of Inquiry, the county appeared to take the position that the records contain the personal information of both the appellants and another individual:

> The types of records requested contain personal information of the complainant and the appellant[s] in personal capacities.
>
> It is reasonable to expect that an individual may be identified if the information is disclosed. Norfolk County does not know the relationship between the complainant and the appellant, if or how well they know each other. Norfolk County is a rural municipality and the community is well connected. Contents of complaints towards the appellant may reasonably identify the complainant, which staff reviewing the record may not detect even though the appellant may be able to detect.

[64] The adjudicator previously assigned to the file was of the view that it appeared the county was raising the application of the personal privacy exemption to some of the information contained in the records. Given these circumstances, the adjudicator sent a Supplementary Notice of Inquiry to the county, inviting it to make supplementary representations on the application of the personal privacy exemption in either section 14(1) or 38(b).

[65] The county declined to make submissions in response to the Supplementary Notice of Inquiry. However, it sent an email to the IPC, stating:

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[22] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[23] Orders P-1409, R-980015, PO-2225 and MO-2344.
[24] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

> In review of the records there is one record containing a complainant's phone number. Complainants names are cited however Norfolk County is in the view that section 8(1)(d) (Law Enforcement) applies as the name itself does not reveal personal information. The only record containing personal contact information has been noted in the index of records. Norfolk is in the view that section 8(1)(d) (Law Enforcement) applies and should be denied in full.

[66] The county also stated in its discussion with the mediator that it was claiming section 38(a) in conjunction with section 8, implying that the county's position is that the records contain the appellants' personal information.

[67] The appellants submit that they are unsure if information about complainants qualifies as their personal information, but if it does, they confirm that they wish to pursue access to this personal information, including their names and phone numbers with dates and times of complaints.

Analysis and findings

[68] I find that some of the records contain the personal information of the appellants and that of other individuals. In particular, all of the officers' notes contain the names of the appellants along with other personal information about them, qualifying as their personal information under paragraph (h) of the definition of personal information in section 2(1). Further, some of the officers' notes also contain the names of individuals other than the appellants, along with personal information about them, qualifying as their personal information under paragraph (h) of the definition.

[69] I also find that the by-law inspection report contains solely the personal information of the appellants, as it contains the names of the appellants with other personal information about them, thus qualifying as their personal information under paragraph (h) of the definition.

[70] Conversely, I find that other records such as the maps, photographs, compilation forms and inventory list of the trees on the appellants' property do not contain personal information. There is a distinction between information *about* an identifiable individual, which may be personal information and information *about* a property. Previous orders of the IPC have held that information about a property does not qualify as personal information as defined in section 2(1) of the *Act* if it does not reveal information *about* an identifiable individual.[25]

[71] In Order P-23, former Commissioner Sidney B. Linden considered the distinction between "personal information" and information concerning residential property in an appeal arising from a request for market value estimations for properties in

[25] Orders P-23, M-175, MO-2053, MO-2081, PO-2322, MO-2695, MO-2792, MO-2994, MO-3066, MO-3125 and MO-3321.

Metropolitan Toronto. The records at issue in that appeal contained municipal property addresses and corresponding property market values. One of the issues to be decided was whether information in the records qualified as the individual property owners' "personal information." The Commissioner held that:

> In considering whether or not particular information qualifies as "personal information" I must also consider the introductory wording of section 2(1) of the *Act*, which defines "personal information" as "… any recorded information about an identifiable individual…". In my view, the operative word in this definition is "about". The *Concise Oxford Dictionary* defines "about" as "in connection with or on the subject of". Is the information in question … **about** an identifiable individual? In my view, the answer is "no"; the information is **about a property** and not **about an identifiable individual**. [emphasis in original]
>
> The institution's argument that the requested information becomes personal information about an identifiable individual with the addition of the names of the owners of the property would appear to raise the potential application of sub-paragraph (h) of the definition of "personal [information]".
>
> Subparagraph (h) provides that an individual's name becomes "personal information" where it "…appears with other personal information **relating to the individual** or where the disclosure of the name would reveal other information **about the individual**" (emphasis added). In the circumstances of these appeals, it should be emphasized that the appellants did not ask for the names of the property owners, and the release of these names was never at issue. However, even if the names were otherwise determined and added to the requested information, in my view, the individual's name could not be said to "appear with other personal information relating to the individual" or "reveal other personal information about the individual", and therefore subparagraph (h) would not apply in the circumstances of these appeals.

[72] I agree with the former Commissioner's approach that distinguishes information about a property from information about an identifiable individual. I find the photographs, maps, inventory list and compilation lists contain information that is predominantly *about* the property specified in the request and the information is not *about* an individual. I find, therefore, that these records do not contain information "about" the appellants.

[73] Because the photographs, maps, compilation forms and the inventory list do not contain personal information, any consideration of exemptions pertaining to them falls under Part I of the *Act*. As a result, these records will be properly considered under the discretionary exemption in section 8 alone.

Issue C: Does the discretionary exemption at section 38(a) in conjunction with the section 8 exemption or the section 8 exemption alone apply to the information at issue?

[74] 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.

[75] 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.

[76] 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.[26]

[77] 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.

[78] In this case, the institution relies on section 38(a) in conjunction with section 8. Specifically, the institution referred to sections 8(1)(b), (c), (d), and (g), 8(2)(a) and 8(3) in its original access decision.

[79] Sections 8(1) and (2) state:

> (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
> >
> > (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
> >
> > (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

[26] Order M-352.

> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
>
> (2) A head may refuse to disclose a record,
>
> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

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

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
>
> (c) the conduct of proceedings referred to in clause (b)

[81] The term "law enforcement" has covered a municipality's investigation into a possible violation of a municipal by-law.[27]

[82] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[28]

[83] It is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[29] The institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[30]

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[27] Orders M-16 and MO-1245.
[28] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[29] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[30] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

Section 8(1)(b): law enforcement investigation

Representations

[84] The county submits that the records are the result of an investigation into a possible violation of a municipal by-law, and that it applied section 8(1)(b) because the records may have been related to an ongoing investigation at the time the access request was submitted. The disclosure of the records, the county argues, could have been reasonably expected to interfere with the law enforcement investigation. However, the county goes on to state:

> Norfolk County is seeking adjudication on how much and what kind of evidence is needed based on the issue of the appellant[s] violating a Forestry By-Law and the seriousness of consequences with regards to the matter of cutting trees or tree harvesting in violation of its Forestry By-Law. Section 8(1)(b) (Law enforcement) of MFIPPA was used for this reason since that indication is unclear and inadequately defined to determine whether this section should be used.

[85] The appellants submit that there was not a specific and ongoing investigation at the time of the access request and, in any event, they deny any reasonable potential for harm to the public, should the records be disclosed.

Analysis and findings

[86] At the outset, I find that any investigation(s) conducted by the county of the appellants' alleged activities as they relate to the county's forestry and/or roads by-laws qualify as "law enforcement" matters for the purposes of section 8 because the term "law enforcement" has covered a municipality's investigation into a possible violation of a municipal by-law.

[87] In order for section 8(1)(b), or 38(a) read with 8(1)(b) to apply to records, two requirements must be met. First, there must be a specific, ongoing investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result. In this case, I accept that any investigations regarding the appellants' alleged activities on their property relating to trees would qualify as "law enforcement" investigations because that term has covered, for example, a municipality's investigation into a possible violation of a municipal by-law.[31] However, I reiterate that past orders of the IPC have also found that there must be a specific, ongoing investigation in order for section 8(1)(b) to apply.[32]

[88] The second requirement for section 8(1)(b) to apply is that the county must establish that disclosing the records could reasonably be expected to interfere with the

[31] See Orders M-16 and MO-1245.
[32] See, for example, Order PO-999.

ongoing investigation.[33]

[89] Applying the requirements of section 8(1)(b) to the facts in this appeal, I find that even if the county met the first requirement in section 8(1)(b), it has failed to provide sufficient evidence that disclosing the records at issue could reasonably be expected to interfere with any investigation. The county's evidence is that the records at issue *may* have been related to an ongoing investigation that was taking place at the time the access request was submitted, and that the disclosure of these records "could have been reasonably expected to interfere with the law enforcement investigation." In other words, the county is not sure if the records at issue relate to an ongoing and specific law enforcement investigation. Further, I find that the county has not provided sufficient evidence as to how the disclosure of the records could reasonably be expected to interfere with the ongoing investigation, if there was an investigation. It is not enough for the county to simply state that the disclosure of the records could cause the harm in section 8(1)(b) without indicating how that could happen. As a result, I find that section 8(1)(b), alone or in conjunction with section 38(a), does not apply to any of the records at issue.

Section 8(1)(c): investigative techniques and procedures

[90] In order to meet the "investigative technique or procedure" test, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.[34]

[91] The techniques or procedures must be "investigative." The exemption will not apply to "enforcement" techniques or procedures.[35]

Representations

[92] The county submits that the investigation techniques used to determine violations of its forestry by-law are currently in use, and likely to be used in law enforcement. The county goes on to argue that these techniques or procedures are not generally known to the public, and that the appellants could compromise the effective utilization of these techniques if the records inadvertently revealed how to avoid detection of violating its forestry by-law. The appellants deny and reasonable potential for harm to the public should the records be disclosed. Further, the appellants argue that investigative techniques and procedures are outlined in By-law 2006-170, which is a publicly-available document.

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[33] *Ibid*
[34] Orders P-170, P-1487, MO-2347-I, PO-2751 and MO-3615.
[35] Orders PO-2034 and P-1340.

Analysis and findings

[93] The county's position is that the records contain investigative techniques used in law enforcement that are not generally known to the public, and that the disclosure of the records could inadvertently reveal to the appellants how to avoid detection of a violation of the forestry by-law. The county's evidence on this exemption consists of merely a re-statement of section 8(1)(c), followed by a general statement that the records contain techniques that could be used by the appellants to avoid detection of a violation of the forestry by-law. The county has not identified the technique or procedure in question. In the absence of sufficient evidence from the county, I am not satisfied that the information in the records describes any investigative techniques or procedures that would not generally be known to the public, nor do the records contain information that could reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used in law enforcement. I further find that even if the records did contain investigative techniques used in law enforcement, the county has not persuaded me that there is a risk of harm "well beyond the merely possible or speculative" to any law enforcement techniques that could reasonably result from the disclosure of the information in the records. As a result, I find that section 8(1)(c), either alone or in conjunction with section 38(a), does not apply to the records at issue.

Section 8(1)(d): confidential source

Representations

[94] The county submits that disclosure of the officers' notes can reasonably be expected to disclose the identity of confidential sources of information, as well as the information provided by them. The county further argues that it does not know the relationship between the appellants and any complainant(s) or if they even know each other, but notes that Norfolk County is a rural community and "well connected." As such, the county's position is that the appellants may be able to identify the confidential sources, should the information these sources provided to the by-law officers be disclosed.

[95] The appellants submit that they feel the county must give the complainants the reassurance that their information remains confidential at all times. At the same time, the appellants argue that if parties are in litigation, complainants must testify in court, thereby revealing their identity, and that the county should inform people of this fact at the time any complainants are providing information to it.

Analysis and findings

[96] The section 8(1)(d) exemption is intended to protect the identity of people who provide information to an institution in the context of a law enforcement matter. The institution must show that it was reasonable to expect that the identity of the source or

the information given by the source would remain confidential in the circumstances.[36] The exemption also protects the information given by the confidential source.

[97] Past IPC orders have found that complaints made about by-law infractions qualify as law enforcement matters. In this case, having reviewed the county's representations, the officers' notes themselves and the county's website on filing by-law complaints,[37] I find that the identity of complainants and the substance of their complaints is exempt from disclosure under section 8(1)(d). In particular, I note that the information on the county's website regarding filing a by-law complaint states that all complaints are confidential until such time as the complainant may be asked to testify in support of the complaint. In my view, in these circumstances, it would be reasonable for a complainant to expect that their identity and the substance of their complaint would be held in confidence,[38] unless they are asked to testify. In this case, I have no evidence before me that any complainants have been asked to testify about their complaints. I also find, based on my review of the relevant officers' notes, that the complainant(s) had an expectation that their identity and information they provided to the county would be kept confidential. I note that the identity of any complainants and the substance of the complaint(s) form only a part of the officers' notes. The remainder of the officers' notes consists of the actions taken by the officers in response to the complaint(s). As a result, to be clear, I find only the identity of any complainants and the information they provided to the county is exempt from disclosure.

[98] During the mediation of the appeal, the appellants raised the possible application of the public interest override in section 16. However, section 8 is not listed in section 16 as an exemption to which the public interest override may apply. If there were a public interest in disclosure of this information, the county should consider it in exercising its discretion (which I address under Issue D below). In my view, however, disclosure the identity of the complainants and the information provided by them is of a private rather than public nature, as the complaints are limited in scope to only the appellants and their property.

[99] In sum, I find that the identity of any complainants along with the substance of their complaints is exempt from disclosure under section 38(a), in conjunction with section 8(1)(d), subject to my findings regarding the county's exercise of discretion.

[100] I note that these records are the only ones that contain the personal information of other individuals (the complainant(s)) and that given my finding that the personal information of these individuals is exempt under section 38(a), it is not necessary for me to decide if this information is also exempt under section 38(b).

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[36] Order MO-1416.
[37] www.norfolkcounty.ca. By-law Complaint Form.
[38] See, for example Orders MO-2238 and Interim Order MO-3214-I.

Section 8(1)(g): law enforcement intelligence information

Representations

[101] The county submits that disclosure of the records can reasonably be expected to interfere with the gathering of law enforcement intelligence information or reveal law enforcement information about the appellants because the information is gathered in a confidential or covert manner with respect to ongoing efforts devoted to the detection, prosecution and prevention of the possible violation of its forestry by-law. In addition, the county argues that the records are not for a specific incident or complaint, but rather of all incidents related to the appellants. The appellants' representations do not address this exemption.

Analysis and findings

[102] In order for a record to qualify for exemption under section 8(1)(g) of the *Act*, the county must establish that disclosure of the record could reasonably be expected to interfere with the gathering of law enforcement intelligence information respecting organizations or persons, or reveal law enforcement intelligence information respecting organizations or persons.[39]

[103] The term "intelligence information" has been defined in past orders and the case law as:

> Information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violations of law. It is distinct from information compiled and identifiable as part of the investigation of a specific occurrence.[40]

[104] As was the case for section 8(1)(c), I find that the county has not provided sufficiently detailed evidence as to how disclosure of the records could reasonably be expected to interfere with the gathering of law enforcement intelligence information about organizations or persons or reveal law enforcement intelligence information respecting same under section 8(1)(g). In particular, as set out above, the county has submitted a blanket statement that the disclosure of the records can reasonably be expected to interfere with the gathering of law enforcement intelligence information or reveal law enforcement information about the appellants because the information relating to its forestry by-law is gathered in a confidential or covert manner. I find that the county has not provided evidence as to how disclosure of any of the records could reasonably be expected to reveal law enforcement intelligence information. As a result,

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[39] See, for example, Order PO-2455.

[40] Orders M-202, MO-1261, MO-1583 and PO-2751; see also Order PO-2455, confirmed in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.) and Orders PO-4080 and MO-4188.

I find that section 8(1)(g) does not apply to any of the records at issue in this appeal.

Section 8(2)(a): law enforcement report

[105] In order for a record to qualify for exemption under section 8(2)(a) of the *Act*, the institution must satisfy each part of the following three-part test:

1. the record must be a report; and

2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.[41]

[106] The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact.[42] The title of a document does not determine whether it is a report, although it may be relevant to the issue.[43]

Representations

[107] The county submits that the "incident reports and follow-up reports" qualify as a report prepared during its forestry by-law enforcement. The county's by-law department prepared the record and has the function of enforcing and regulating compliance with the by-laws. The appellants' representations do not address this issue.

Analysis and findings

[108] The record for which the county is claiming section 8(2)(a) is Record 26, which is a 12-page document entitled "by-law inspection report." The first-part of the three-part test in section 8(2)(a) hinges on whether the record qualifies as a "report" for the purposes of section 8(2)(a). Past IPC orders have found that, for the purposes of section 8(2)(a), a report is a formal statement or account of the results of the collation and consideration of information, which does not merely recount statements of fact, but contains an evaluation and conclusion based on an investigation.[44]

[109] I find that Record 26 does not qualify as a "report" for the purposes of section 8(2)(a). First, I find that the county's representations on this issue are of a general nature and do not explain precisely how Record 26 qualifies as a report, within the meaning of section 8(2)(a). I also find on my review of the record itself that, although it is titled as a report, it does not qualify as a report within the meaning of section 8(2)(a)

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[41] Orders P-200 and P-324.
[42] Orders P-200, MO-1238 and MO-1337-I.
[43] Order MO-1337-I.
[44] See, for example, Orders 200, P-324 and PO-4205-I.

and, therefore, does not meet the first part of the three-part test in section 8(2)(a). In particular, I find that the record contains only factual information including county by-laws, information from occurrence reports,[45] a description of the investigation including its methodology, factual observations and summary, all of which I find are of a factual nature, as opposed to evaluative.

[110] For these reasons, I find that Record 26 is not exempt from disclosure under section 8(2)(a).

Section 8(3): refusal to confirm or deny the existence of a record

[111] Section 8(3) states:

> A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) applies.

[112] This section acknowledges the fact that in order to carry out their mandates, law enforcement agencies must sometimes have the ability to withhold information in answering requests under the *Act*. However, it is the rare case where disclosure of the mere existence of a record would frustrate an ongoing investigation or intelligence-gathering activity.[46]

Representations

[113] The county's position is that if forestry and road department logbooks exist, they would be subject to the discretionary exemptions in sections 8(1)(c) and 8(1)(d), as they would reveal investigative techniques, such as officers' time spent in the office and on the property referred to in the access request (section 8(1)(c)), and would disclose the identity of confidential sources of information or disclose information furnished only by the confidential source (section 8(1)(d)). The county goes on to state:

> Disclosure of the fact that roads or forestry logbooks exist or not exist itself may convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity. The legitimacy and methodology of County law enforcement practices and procedural activities could be challenged by the appellant[s] if they know the type of records kept and the detail to which they are kept on the existing law enforcement activity related to them. The County could be subject to interference of law enforcement activities

[45] For example, in Order PO-1959, the adjudicator found that, generally, occurrence reports and similar records of police agencies have been found not to meet the definition of a "report" under the *Act*, in that they are more in the nature of recordings of fact rather than formal, evaluative accounts of investigations.
[46] Orders P-255 and PO-1656.

> or expose vulnerability to having its By-Law's be effectively circumvented with the release of the type of information kept or not kept.

[114] The appellants submit that the county is not justified in refusing to confirm or deny the existence of records, and that the county refuses to acknowledge that any investigations have been completed.

Analysis and findings

[115] In order for section 8(3) to apply, the county must demonstrate that:

1. the records (if they exist) would qualify for exemption under sections 8(1)[47] or (2), and

2. disclosure of the fact that records exist (or do not exist) would itself convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity.[48]

[116] For the following reasons, I find that section 8(3) does not apply in the circumstances of this appeal, and I order the county to issue a new access decision regarding any forestry and roads logbooks that may exist, without relying on section 8(3) or claiming that the request is frivolous or vexatious.

[117] Turning to the first part of the two-part test in section 8(3), I find that the county has not provided sufficient evidence that either section 8(1)(c) or 8(1)(d) would apply to the logbooks, if they exist. With respect to both exemptions, the county has simply re- stated sections 8(1)(c) and 8(1)(d) of the *Act*, without supporting evidence that the harms in these sections could reasonably be expected.

[118] Concerning the second part of the two-part test in section 8(3), the county's position is that disclosure of the fact that the logbooks may or may not exist could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity. The county then appears to argue why the contents of the logbooks, if they exist, are exempt from disclosure under the law enforcement exemption in section 8. I find that the county has not established that disclosure of the mere fact that logbooks exist (or do not exist) would itself convey information that could reasonably be expected to harm one of the interests sought to be protected by sections 8(1)(c) or 8(1)(d). For section 8(1)(c) to apply, the county must demonstrate that *confirming or denying the mere existence* of logbooks could reasonably be expected to disclose a technique or procedure, and hinder or compromise its effective use.[49] For section 8(1)(d) to apply, the county must demonstrate that confirming or denying the mere existence of logbooks could

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[47] In this case, sections 8(1)(c) and 8(1)(d).
[48] Order PO-1656.
[49] For example, see Orders 170, PO-2751 and PO-3998.

reasonably be expected to disclose the identity of a confidential source or disclose information furnished only by that confidential source. As stated above, I find that the county has not provided sufficient evidence to demonstrate that the existence, or not, of logbooks could reasonably be expected to cause the harms in sections 8(1)(c) or 8(1)(d).

[119] For these reasons, I find that the county has not established that part two of the test in section 8(3) is met and, therefore, I do not uphold the county's reliance on section 8(3) in relation to the request for forestry and road logbooks.

Issue D: Did the county exercise its discretion under section 38(a)? If so, should I uphold the exercise of discretion?

[120] Because I have found that portions of the officers' notes are exempt under section 38(a), in conjunction with section 8(1)(d), it is necessary to review the county's exercise of discretion.

[121] The exemption in section 38(a) is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, I may determine whether the institution failed to do so. In addition, I 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.

[122] In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations.[50] I may not, however, substitute its own discretion for that of the institution.[51]

[123] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[52]

- 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, and 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,

[50] Order MO-1573.
[51] Section 43(2).
[52] Orders P-344 and MO-1573.

- 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, and
- the historic practice of the institution with respect to similar information.

Representations

[124] The county submits that it properly exercised its discretion in good faith, taking into consideration all relevant factors and not taking into consideration irrelevant factors. It submits that it took into account the purpose of the *Act* and that its best practice is to, where possible, make information available to the public and to provide requesters with their own personal information, where available. It also considered that exemptions from the right of access should be limited and argues that in this case only the exemption in section 8 was considered. The county also submits that it took into consideration the wording of section 8 and the interests of effective by-law enforcement, and that it was of the view that the appellants did not have a valid sympathetic or compelling need to receive the information they requested.

[125] Further, the county's position is that the decision to deny the information will increase public confidence in its operations because most of the information denied relates only to the appellants and, as a result, does not affect public confidence in the county's law enforcement operations. The county also submits that its historic practice with respect to similar information was taken into consideration, acknowledging however, that more information has been released in the past when there were more resources available to respond to requests.

[126] Concerning the appellants in particular, the county states:

> The appellants' historical practices were also considered as they have requested similar, repetitive, and sometimes identical information to records they have already received. With repetitive information and that the County has already released some of the requested information to the appellants, the County used discretionary exemptions with more rigor to

prevent abuse of the right of access on repetitive requests from the same requesters.

[127] Lastly, with respect to information relating to any complainants in the records, the county's position is that the privacy of the complainant's information should be protected and this was a major consideration in applying section 8(1)(d) to any information about complainants. Further, the county argues that the extent of the sensitivity and significance of this information to the appellants and subsequent "negative impacts" on complainants was a strong consideration in denying the law enforcement information.

[128] The appellants' position is that the county exercised its discretion in bad faith and was biased against the appellants when it denied them access to the records by favouring complainants over them. They submit that the reason for the county's access decision is unclear, not based on facts and unsupported by evidence. Concerning whether the public will have confidence in the county, the appellants submit that public confidence can only be increased when institutions show that they are abiding by their by-laws, show transparency in their dealings with the public, and abide by their own mission and vision policies and that, in this case, the county has not done so.

Analysis and findings

[129] As previously stated, I may send a matter back to the county for an exercise of discretion based on proper considerations.[53] I may not, however, substitute my own discretion for that of the institution.[54]

[130] Based on the county's representations, I am satisfied that it took into account relevant considerations. In particular, I am satisfied that the county took into consideration the purposes of the *Act*, including the principle that exemptions from the right of access should be limited and specific, and that it also took into consideration the purpose of the law enforcement exemption in section 8(1)(d), which is to ensure the protection of confidential sources of information in a law enforcement context. I find that the county considered if disclosure of the information at issue would promote public confidence in it, and I am satisfied with its explanation that the non-disclosure of the information at issue would not undermine public confidence in it.

[131] Consequently, for all of these reasons, I uphold the county's exercise of discretion under section 8(1)(d) in withholding the portions of the officers' notes that I found to be exempt from disclosure under section 8(1)(d).

Issue E: Did the county conduct a reasonable search for records?

[132] The appellants claim that additional records exist. Where a requester claims that

[53] Order MO-1573.
[54] See section 54(2).

additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[55] If I am is satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. Otherwise, I may order the institution to conduct another search for records.

[133] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[56]

[134] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[57]

[135] A further search may be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[58]

[136] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[59]

[137] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.[60]

Representations

[138] The county submits that searches for records responsive to the request were reasonable and sufficient. Searches were conducted by the Director of Roads, the Chief Building Officer, the General Manager of Community Services, the Director of Parks and the Forestry Supervisor. The appellants' property file was searched for stop work orders. The email accounts of the Director of Roads, the General Manager of Community Services and the Forestry Supervisor were searched for emails sent between them and the appellants. In addition, the Forestry Supervisor searched for emails with respect to complaints and in department file repositories for officers' notes and reports related to incidents involving the appellants from the date of the time period prescribed in the request. The county also argues that there is no evidence to suggest that records responsive to the request existed but no longer exist. Finally, the

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[55] Orders P-85, P-221 and PO-1954-I.
[56] Orders P-624 and PO-2559.
[57] Orders M-909, PO-2469 and PO-2592.
[58] Order MO-2185.
[59] Order MO-2246.
[60] Order MO-2213.

county submits that a complete affidavit could not be provided to the IPC because some of the staff who performed the searches are no longer working with the county.

[139] The appellants submit that the county has not submitted evidence that it conducted a reasonable search for records and that if it had conducted a reasonable search, it would have disclosed the records to them. They state:

> . . . The purpose of claiming that one has located all the records responsive to the appellants' request and then in return refuse to make them available to the appellant/adjudicator is unreasonable and a total waste of time.

Analysis and findings

[140] As stated above, the county must provide sufficient evidence to show that it made a reasonable effort to identify and locate records responsive to the appellants' access request. In other words, it must demonstrate that it conducted a reasonable search, which is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.

[141] The searches for records were conducted by five county staff members who worked in the areas that were the subject matter of the request, namely the Forestry and Roads departments, and I am satisfied that these searches were carried out in order to find records that were responsive to the appellants' access request. I further find that the searches were broad in that various types of emails were searched, as well as file repositories. As a result, I find that the county has provided sufficient evidence to demonstrate that it made a reasonable effort to identify and locate records responsive to the appellants' access request.

[142] Another factor to consider in determining whether the county's search was reasonable is that the appellants must provide a reasonable basis for concluding that more records exist than those already identified by the county. The appellants' position is that the county's search was not reasonable because if it had been, the county would have then disclosed the records to them. They are of the view that the unreasonableness stems from the fact that the county did not disclose the records to them. However, the test is whether the appellants have established a reasonable basis for concluding that further records beyond those already identified by the county exist and, in this case, the appellants have not done so.

[143] For these reasons, therefore, I am satisfied that the county's search for records that are responsive to the appellants' access request was reasonable, and I uphold its search.

ORDER:

1. I order the county to disclose Records 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35-97, 98, 99, 100, 105, 107, 111, 113-258 and 260-368, in full to the appellants by **October 29, 2022** but not before **October 24, 2022**.

2. I order the county to disclose Records 33, 101, 102, 103, 104, 106, 108, 109, 110 and 112, in part to the appellants by **October 29, 2022** but not before **October 24, 2022**. I have provided a copy of these records to the county, and have highlighted the portions of them that are not to be disclosed to the appellants.

3. I do not uphold the county's reliance on section 8(3) in respect of the request for Forestry or Roads logbooks. I order the county to issue an access decision in relation to this portion of the access request, without claiming that the request for these records is frivolous or vexatious, and without claiming the application of section 8(3). This decision is to be issued within **30 days** of the date of this order.

4. I order the county to issue an access decision to the appellants regarding Records 8, 9, 12, 13, 14 and 369 within **30 days** of the date of this order.

5. I reserve the right to require the county to provide a copy of the records to the IPC that it discloses to the appellants.

Original Signed by: September 22, 2022

Cathy Hamilton
Adjudicator