

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4349

Appeal MA22-00310

Regional Municipality of Waterloo

March 23, 2023

**Summary:** The Regional Municipality of Waterloo (the municipality) received a request from a media requester under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for residents' emails about the disbanding of a homeless encampment.

The municipality granted access to the responsive emails in part, relying on the application of sections 7(1) (advice or recommendations) and 14(1) (personal privacy) to withhold parts.

In this order, the adjudicator finds that the information at issue in two of the records is not personal information and that, therefore, the personal privacy exemption in section 14(1) cannot apply to exempt this information from disclosure. She orders the municipality to disclose these records to the appellant.

The adjudicator also upholds the municipality's decision to deny access to the information at issue in two other records on the basis of section 7(1) of the *Act* and finds that the public interest override at section 16 does not apply to these records.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, sections 2(1) (definition of personal information), 7(1), 14(1), and 16.

### OVERVIEW:

[1] This order concerns an access request about residents' emails to and from the municipality about the disbanding of a homeless encampment in the Regional Municipality of Waterloo (the municipality).

[2] The municipality received a request from a media requester under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)* for:

All emails, texts and other written communication between Nov. 19, 2021 and Nov. 30, 2021 written to or from employees of the [municipality] and members of regional council, related to the forced eviction on Friday November 26, [2021] of an informal encampment [of homeless people (the encampment)] on regional property near [named] streets in Kitchener.

[3] The appellant subsequently clarified that:

...my request for communications to or from members of regional council includes Regional Chair [name], and that my request for communications to or from regional officials includes [named Chief Administrative Officer, Chief Communication and Strategy Officer, and Manager, Licensing and Enforcement Services].

[4] After notifying affected persons, the municipality issued an access decision granting partial access to the records, which consisted of emails. Some information was withheld based on various exemptions, including sections 7(1) (advice or recommendations), 11 (economic and other interests), and 14(1) (personal privacy).

[5] The appellant appealed the municipality's decision to the Information and Privacy Commissioner of Ontario (the IPC), where a mediator was appointed to explore resolution of the appeal.

[6] With respect to information withheld by the municipality based on section 14(1), the personal privacy exemption, the appellant advised the mediator that she is not seeking any individuals' names, contact information, or job titles. However, she is seeking the content of their communications to or from the municipality. The appellant requested that the mediator notify affected persons and attempt to gain their consent to disclose the information in the records relating to those individuals. The mediator notified several individuals (affected persons) and, after receiving the written consent of one affected person, disclosed to the appellant additional information.<sup>1</sup>

[7] During mediation, the appellant also contended that there is a compelling public interest in the disclosure of the withheld information.

[8] The parties were unable to resolve the remaining issues under appeal through the process of mediation and the file was referred to adjudication where an adjudicator

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<sup>1</sup> On pages 35 (duplicated at page 64), 53, 54, and 55. In addition, following discussions with the mediator about the nature of the information, the appellant advised the mediator that she did not wish to pursue access to information withheld based on section 12, the solicitor-client privilege exemption. As a result, page 15 and the section 12 exemption were no longer at issue in this appeal.

may conduct an inquiry. I decided to conduct an inquiry and I sought the representations of the municipality and the Waterloo Regional Police Service (the WRPS) (an affected party that may have an interest in disclosure of record 23), as well as the affected persons who did not consent to the disclosure of their information.

[9] During the inquiry, the municipality issued two supplementary access decisions (on January 4 and March 1, 2023) and disclosed additional information. The municipality also stated that it no longer claimed the application of section 8(1)(a), which it had initially relied on.

[10] As a result of the municipality's two supplementary access decisions and because the appellant does not seek access to names, titles, and contact information of affected persons, only certain information withheld in records 11 to 13 and 23 remains at issue in this appeal and is dealt with in this order.

[11] Under section 42 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution. Neither the municipality nor the WRPS provided representations on the application of the discretionary exemption claims in respect of record 23: sections 7(1) (advice or recommendations), 8 (law enforcement), or 11 (economic or other interests).

[12] In the absence of any representations about the possible application of these discretionary exemptions to record 23, I find that the municipality has not met its burden of proof under the *Act* to withhold any information in it on the basis of any of these discretionary exemptions and I will not consider these claims further in this order. I will however consider whether the mandatory personal privacy exemption at section 14(1) applies to record 23.

[13] In this order, I find that the information at issue in records 13 and 23 is not personal information and therefore not exempt under the personal privacy exemption at section 14(1) and I order the municipality to disclose the information at issue to the appellant. However, I uphold the municipality's decision to withhold access to the information at issue in records 11 and 12 on the basis that it is exempt as advice or recommendations under section 7(1) and I find that the public interest override at section 16 does not apply.

## **RECORDS:**

[14] The records are emails received or sent by the municipality about the encampment. As noted above, the appellant does not seek access to individuals' names, titles and contact information when they are acting in their personal capacity.

[15] The remaining information at issue in the records is set out in the following index of records of the municipality:

<b>Record No.</b>	<b>Page #</b>	<b>Release</b>	<b>Pages# withheld</b>	<b>Exemption(s) claimed by municipality</b>
11	16	partial	email chain page16	section 7(1) advice or recommendations
12	17	partial	email chain page 17	section 7(1) advice or recommendations
13	19-20	partial	affected resident's email pages 19-20	section 14(1) personal privacy
23	41-42	withheld entirely	WRPS email pages 41-42	section 7(1) advice or recommendations section 8 law enforcement section 11 economic interests section 14(1) personal privacy

## **ISSUES:**

- A. Do records 13 and 23 contain "personal information" as defined in section 2(1)?
- B. Should the municipality's decision to withhold certain information on the basis of the section 7(1) discretionary exemption for advice and recommendations be upheld?
- C. If the discretionary exemption under section 7(1) is upheld, does the public interest override in section 16 of the *Act* apply to the information at issue?

## **DISCUSSION:**

### **Issue A: Do records 13 and 23 contain "personal information" as defined in section 2(1)?**

[16] The municipality has claimed that records 13 and 23 contain personal information that is exempt under the section 14(1) personal privacy exemption. As a first step, therefore, it is necessary for me to consider whether records 13 and 23 contains personal information.

[17] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual."<sup>2</sup>

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<sup>2</sup> "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps. See the definition of "record" in section 2(1).

[18] Information is “about” the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be “about” the individual.<sup>3</sup> 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.<sup>4</sup>

[19] Moreover, for information to be “personal information”, it must be about an identifiable individual. Information is about an “identifiable individual” if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.<sup>5</sup>

### ***Representations***

[20] The municipality claims that records 13 and 23 contain personal information. It states that these records contain information relating to the residents/complainants’ names, contact email addresses, their personal views and opinions, and email correspondence sent to the municipality by the individuals that is implicitly of a private and confidential nature.

[21] The appellant confirms in her representations that she is not interested in obtaining any information that identifies the individuals listed in the records – that is, their names, titles, and contact information.

### ***Findings***

[22] For the following reasons, I find that the information at issue in these records is not personal information. In the case of record 13, the information does not relate to any identifiable individual(s). In the case of record 23, the information relates to individual(s) in their professional capability.

[23] Record 13 consists of two emails exchanged between the municipality and residents about the encampment. As noted above, any information consisting of the residents’ names, titles and contact information is not at issue and will not be disclosed.

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<sup>3</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225. See also sections 2(2.1) and (2.2), which 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 dwelling and the contact information for the individual relates to that dwelling.

<sup>4</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>5</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

I have considered, therefore, whether the remaining information in this record contains any personal information.

[24] In my view, the content of the emails alone without any contact details does not contain any information about an *identifiable* individual. In other words, it is not reasonable to expect that an individual will be identified through this information alone, because there is nothing specific or distinctive about the content that could reasonably be expected to identify an individual. I, therefore, find that the information at issue in record 13 is not personal information.

[25] Record 23 is an email from the WRPS Police Chief to the WRPS' board and the municipality's Chief Administrative Officer. The WRPS takes no position on this record. Having reviewed the email, I find that the individuals mentioned in this record are acting in their professional capacity and there is nothing of a personal nature that would be revealed by disclosing this information. I find that this email does not contain personal information of identifiable individuals.

[26] Because I have found that in the information at issue in records 13 and 23 is not personal information, the personal privacy exemption in section 14(1) cannot apply to it. As section 14(1) is the only exemption claimed for records 13 and 23, I will order these records disclosed. For clarity, in relation to record 13, the municipality shall not disclose the name of the sender, their email address, their title, and where they work.

**Issue B: Should the municipality's decision to withhold certain information on the basis of the section 7(1) discretionary exemption for advice and recommendations be upheld?**

[27] Section 7(1) of the *Act* exempts certain records containing advice or recommendations given to an institution. This exemption aims to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.<sup>6</sup>

[28] Section 7(1) states:

A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[29] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to a suggested course of action that will ultimately be accepted or rejected by the person being advised. Recommendations can be express or inferred.

[30] "Advice" has a broader meaning than "recommendations." "Advice" involves an

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<sup>6</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

evaluative analysis of information. It includes “policy options,” which are the public servant or consultant’s identification of alternative possible courses of action. “Advice” includes the views or opinions of a public servant or consultant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.<sup>7</sup>

[31] Neither “advice” nor “recommendations” include “objective information” or factual material.

[32] Section 7(1) applies if disclosure would “reveal” advice or recommendations, either because the information itself consists of advice or recommendations or the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.<sup>8</sup>

[33] The relevant time for assessing the application of section 7(1) is the point when the public servant or consultant prepared the advice or recommendations. The institution does not have to prove that the public servant or consultant actually communicated the advice or recommendations. Section 7(1) can also apply if there is no evidence of an intention to communicate, since that intention is inherent to the job of policy development, whether by a public servant or consultant.<sup>9</sup>

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

- factual or background information,<sup>10</sup>
- a supervisor’s direction to staff on how to conduct an investigation,<sup>11</sup> and
- information prepared for public dissemination.<sup>12</sup>

### ***Representations***

[35] Record 11 is an email chain dated November 30, 2021 that includes both an email from a media requester and internal emails. At issue is an internal email from the Chair’s Chief of Staff to the Manager of Corporate Communications and the Chair, with a carbon copy to the Director of Communications and Engagement.

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<sup>7</sup> See above at paras. 26 and 47.

<sup>8</sup> Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff’d [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

<sup>9</sup> *John Doe v. Ontario (Finance)*, cited above, at para. 51.

<sup>10</sup> Order PO-3315.

<sup>11</sup> Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

<sup>12</sup> Order PO-2677.

[36] Record 12 is an email chain dated November 29, 2021 exchanged between the Manager, Corporate Communications, the Chief Communication and Strategy Officer, the Chief of Staff to the Chair, the Chair, and the Director, Communications and Engagement. At issue are portions of each email in this email chain.

[37] The municipality states that leading up to both records, the Chair was receiving numerous media enquiries directly to her email address in response to the removal of the encampment, and was unable to respond in a timely manner due to her schedule. It states that both records contain recommendations to the Chair and the municipality's staff about a suggested course of action or change in procedure to enable the Chair to process media requests in a timelier manner.

[38] The appellant submits the emails at issue are simply procedural deliberations about how to deal with media requests, and not policy questions, nor would these emails contain "an evaluative analysis of information." She states that how the region handles its media requests is certainly not "sensitive" and that releasing emails about this matter is certainly not going to prevent the municipality's staff from freely advising regional officials on policy matters or government decisions.

### ***Findings***

[39] Both records 11 and 12 are email chains made in response to the media contacting the municipality's Chair about the encampment.

[40] The withheld portions of both records are internal emails regarding the municipality's response to the media contact. I agree with the municipality that the withheld portions of both records contain recommendations, that is they contain suggested courses of action in how to deal with media requests that will ultimately be accepted or rejected by the person being advised. I have considered the appellant's arguments, which focus on whether the withheld information is advice. For section 7(1) to apply, it is only necessary for me to find that the information consists of either recommendations or advice, and I have found that it consists of recommendations. In any event, I also find that the recommendations in question are a form of advice.

[41] Therefore, I find that the information at issue in records 11 and 12 is exempt under section 7(1).

[42] Section 7(1) is a discretionary exemption, meaning that the municipality could decide to disclose information even if it qualifies as exempt. I have, therefore, also reviewed the municipality's exercise of discretion regarding the information I have found subject to section 7(1) in records 11 and 12. The municipality argues that it properly exercised its discretion to deny access to this information as it is sensitive information related to processing of media requests to the Chair and is independent of and unrelated to the subject matter of the clearing of the homeless encampment issue that is the subject of the appeal. The appellant did not provide representations on the



municipality's exercise of discretion regarding records 11 and 12.

[43] Considering the parties' representations and the information at issue in records 11 and 12, I find that the municipality properly exercised its discretion in denying access to the information at issue in records 11 and 12. I agree with the municipality that the information at issue in these two records is largely unrelated to the specific issue of the homeless encampment, which is the subject matter of the request, but instead deals with the municipality's procedures in responding to media requests to the Chair generally.

**Issue C: If the discretionary exemption under section 7(1) is upheld, does the public interest override in section 16 of the *Act* apply to the information at issue?**

[44] Section 16 of the *Act*, the "public interest override," provides for the disclosure of records that would otherwise be exempt under another section of the *Act*. It states:

An exemption from disclosure of a record under sections 7, 9, 9.1, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[45] For section 16 to apply, two requirements must be met:

- there must be a compelling public interest in disclosure of the records; and
- this interest must clearly outweigh the purpose of the exemption.

[46] Although the appellant raised the public interest override (section 16) in mediation and she was invited to make representations in support of her contention at adjudication, she did not provide any argument on the application of section 16 to the information at issue in records 11 and 12.

[47] The *Act* does not place the onus on the appellant to establish that a compelling public interest is at stake. Accordingly, I have reviewed the records and considered the surrounding circumstances to determine whether any compelling public interest would be served by disclosure and it is my view that there is none.

[48] As noted above, the information at issue does not pertain to or shed light on the municipality's substantive actions with respect the encampment. I am also mindful that through the course of this inquiry several records that were initially withheld have been disclosed and more will be as the result of this order. In my view, these disclosures are sufficient to satisfy public interest considerations. I find, therefore, that the public interest override at section 16 does not apply to override the application of section 7(1) to the information at issue in records 11 and 12.

[49] Accordingly, I uphold the municipality's decision to withhold the information at

issue in records 11 and 12 on the basis that it is exempt by reason of section 7(1).

**ORDER:**

1. I order the municipality to disclose records 13 and 23 to the appellant (less the name of the sender, their email address, their title and where they work in record 13) by **April 30, 2023** but not before **April 25, 2023**.
2. I uphold the municipality's decision to deny access to the information at issue in records 11 and 12.

Original Signed by: \_\_\_\_\_  
Diane Smith  
Adjudicator

\_\_\_\_\_ March 23, 2023