

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-4430-I

Appeal MA21-00323

Township of Severn

August 29, 2023

Summary: The Township of Severn (the township) received a multi-part request under the *Act* for access to records relating to the complaint and investigation of a specified property. The township located responsive records and granted full access to the majority of the records. The remaining records were withheld fully or partially on the basis of section 38(a) (discretion to refuse access to requester's own personal information), read with sections 12 (solicitor-client privilege), 8(1)(a) (law enforcement matter) and 8(1)(d) (confidential source of information), and 38(b) (personal privacy). During mediation, the appellant raised the reasonableness of the township's search.

In this order, the adjudicator upholds the township's application of sections 38(a), read with section 12, and 38(b). She finds that some withheld information does not qualify for exemption under section 38(a), read with section 8(1)(d), and ought to be disclosed. She also finds the township's search was not reasonable in part, and orders the township to conduct a further search.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (the definition of "personal information"), 8(1)(a), 8(1)(d) 12, 17, 38(a) and 38(b).

Orders Considered: Orders MO-1262, MO-1578, PO-2085, MO-3030, PO-3409 and PO-3899.

OVERVIEW:

[1] In June 2020, the Township of Severn (the township) received a complaint about

a sauna located at a specified property relating to the township's Zoning and Clean and Clear by-laws.

[2] Subsequently, the appellant made an access request to the township, under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for the complete file relating to the complaint and investigation.

[3] The township issued a decision granting access to the majority of the responsive records. It relied on the exemptions at sections 38(a), read with sections 8(1)(a) (law enforcement matter), 8(1)(d) (confidential source of information), and 12 (solicitor-client privilege), and 38(b) (personal privacy) of the *Act* to withhold the remaining records.

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

[5] During mediation, the township issued a revised decision granting additional disclosure to some of the responsive records.¹

[6] The appellant subsequently raised the issue of reasonable search, which was added to the scope of the appeal. Consequently, the township conducted a secondary search and issued a supplemental decision disclosing some additional responsive records.

[7] As further mediation was not possible, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*.

[8] The adjudicator initially assigned to this appeal invited the township and the appellant to provide representations on the issues in this appeal. She received representations from both parties.² This appeal was subsequently transferred to me to continue the adjudication. I reviewed the parties' representations and decided that I did not require further submissions before making my decision.

[9] For the reasons that follow, I uphold the township's application of sections 38(a), read with section 12, and 38(b). I find that certain withheld information did not qualify for exemption under section 38(a), read with section 8(1)(d), and ought to be disclosed. I also find the township's search was not reasonable, in part, and order it to conduct a further search.

¹ The township granted full access to all the records in Item No. 13, Item No. 17 and almost all the records in Item No. 20 (except for the severances highlighted in pink).

² The parties' representations were shared in accordance with the confidentiality criteria in the IPC's *Practice Direction 7* and section 7.07 of the IPC's *Code of Procedure*.

RECORDS:

[10] The records at issue are identified in the updated Index of Records³ as Items No. 18 and 19, in their entirety, and a portion of Item No. 20:

- Item No. 18 contains email chains of different dates and other attached documents, totalling 34 pages.
- Item No. 19 contains email chains of different dates, totalling 12 pages.
- Item No. 20 contains various email chains of different dates, totalling 18 pages. However, the withheld information at issue is the small withheld portions of an email chain at page 1 (which is highlighted in pink).⁴

ISSUES:

- A. Do the records contain “personal information” as defined in section 2(1) and, if so, whose personal information is it?
- B. Does the discretionary exemption at section 38(a), allowing the township to refuse access to a requester’s own personal information, read with the exemptions at sections 8(1)(a) and 8(1)(d), apply to the records contained in Item No. 19 and the withheld information in Item No. 20?
- C. Does the discretionary personal privacy exemption at section 38(b) apply to the withheld information in Item No. 20?
- D. Does the discretionary exemption at section 38(a), allowing the township to refuse access to a requester’s own personal information, read with the section 12 exemption, apply to the records contained in Item No. 18?
- E. Did the township exercise its discretion under section 38(a), read with sections 8(1)(d) and 12, and section 38(b)? If so, should this office uphold the exercise of discretion?
- F. Did the township conduct a reasonable search for records?

DISCUSSION:

[11] As a preliminary issue, the appellant argues that the *Personal Health Information Protection Act (PHIPA)* applies in this appeal.⁵ In particular, she argues that the

³ Going forward, the township is encouraged to number each individual email chain as a separate record.

⁴ Page 7 is a duplicate of the email, which contains the same portions being withheld.

⁵ At bullet #8 in her sur-reply representations, the appellant argues that there is a *PHIPA* issue.

township inappropriately collected her personal health information when it inspected the interior of her sauna. This issue is not before me in this appeal and I will not be addressing it further in this order.⁶

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

[12] In order to decide whether sections 38(a) and 38(b) apply, I must first decide whether the records contain “personal information,” and if so, to whom this personal information relates.

[13] Section 2(1) of the *Act* defines “personal information” as “recorded information about an identifiable individual.” Recorded information is information recorded in any format, including paper and electronic records.⁷

[14] Information is “about” the individual when it refers to them in their personal capacity, meaning that it reveals something of a personal nature about them. Generally, information about an individual in their professional, official, or business capacity is not considered to be “about” the individual if it does not reveal something of a personal nature about them.⁸

[15] 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.⁹

[16] Section 2(1) of the *Act* gives a list of examples of personal information. All of the examples that are relevant to this appeal are set out below:

“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,

⁶ I note that the Mediator’s Report, which summarizes the facts and issues remaining in the appeal at the conclusion of the mediation, did not identify a *PHIPA* issue. Despite being given the opportunity to identify any errors or omissions in the Mediator’s Report, the appellant did not raise that there exist a *PHIPA* issue.

⁷ The definition of “records” in section 2(1) includes paper records, electronic records, digital photographs, videos and maps. The record before me is a paper record located by searching a police database.

⁸ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁹ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

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

(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.

[17] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."¹⁰

[18] It is important to know whose personal information is in the records. If the records contain the requester's own personal information, their access rights are greater than if it does not.¹¹ Also, if the records contain the personal information of other individuals, one of the personal privacy exemptions might apply.¹²

[19] The township submits that the emails at issue contain information that qualifies as the personal information of the appellant and other identifiable individuals (the affected parties). It submits that the emails contain the names, address and telephone numbers of the appellant and the affected parties.

[20] Although the appellant submitted representations, her representations did not address this issue.

[21] On my review, I find that the records contain information that qualifies as the personal information of affected parties and the appellant, which would fall under paragraphs (a), (d), and (h) of the definition of "personal information" under section 2(1) of the *Act*. The appellant's personal information cannot be severed and disclosed to her as it is inextricably intertwined to the personal information of the affected parties.

[22] As I have found that the withheld information in the records at issue contain the personal information of the appellant along with other identifiable individuals, I will consider the appellant's access to the withheld information under Part II of the *Act*.

Issue B: Does the discretionary exemption at section 38(a), allowing an institution to refuse access to a requester's own personal information, read with the exemptions at sections 8(1)(a) and (d), apply to the withheld information in Item No. 20 and the records in Item No. 19?

[23] The township claims section 38(a), read with section 8(1)(d), applies to the records contained in Item No. 19. It also claims section 38(a), read with section

¹⁰ Order 11.

¹¹ Under sections 47(1) and 49 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

¹² See sections 21(1) and 49(b).

8(1)(a), applies to the withheld information in Item No. 20.

[24] 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. Section 38(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information. [emphasis added]

[25] In this case, the township relies on section 38(a) read with sections 8(1)(a) and (d). These sections read:

(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(a) interfere with a law enforcement matter;

(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] Previous orders have found that the term "law enforcement" can cover a municipality's investigation into a possible violation of a municipal by-law;¹³

[27] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.¹⁴ However, 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.¹⁵ The institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm 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 information at issue and the seriousness of the consequences.¹⁶

Section 8(1)(a): law enforcement matter

[28] The township withheld small portions of an email chain at page 1 of Item No. 20

¹³ Orders M-16 and MO-1245.

¹⁴ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

¹⁵ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

¹⁶ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.

from disclosure under section 38(a), read with section 8(1)(a).

[29] The appellant submits that there is no ongoing matter. She points out that the township confirmed in its representations that the matter has been resolved for quite some time. The appellant also relies on Orders M-420 and MO-4033 for the principle that the institution must provide evidence of an ongoing or existing law enforcement matter for the exemption at section 8(1)(a) to apply.

[30] Past orders of the IPC have made it clear that section 8(1)(a) only applies in the context of ongoing or in existence investigations.¹⁷ The exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters.

[31] In this case, I note the investigation was completed in December 2020. The township acknowledged that the matter has now concluded. As such, I do not find that section 38(a), read with section 8(1)(a), applies to the withheld information in Item No. 20. I will order the township to disclose the withheld information to the appellant unless it is exempt under section 38(b).

Section 8(1)(d): confidential source

[32] The township claims the application of section 38(a), read with section 8(1)(d), applies to all the records in Item No. 19.

[33] Section 8(1)(d) provides an institution with the discretion to withhold a record if the disclosure could reasonably be expected to disclose the identify of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source.

[34] I have reviewed all of the township's representations and the appellant's representations, and below I summarize the portions of their representations relevant to the issue of section 38(a), read with section 8(1)(d).

[35] The township states that its by-law complaint process has always guaranteed the confidentiality of complainants' identities to ensure that members of the public will continue to report by-law infractions.

[36] The township submits that the records in Item No. 19 consist of the written complaint and follow up correspondence from the complainant to the township staff, including responses, as to the status of the matter.

[37] The appellant submits that the requirements of section 8(1)(d) are not met as there was no law enforcement matter as it did not involve an investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or

¹⁷ See Orders MO-1262, MO-1578 and PO-2085.

sanction could be imposed in those proceedings. She explains that she built her sauna in accordance with the township's instructions and the sauna was inspected and approved by the township.

[38] In addition, the appellant submits that the township failed to provide any evidence that the complainant actually held a reasonable expectation of confidentiality. She points out that the township did not file any affidavit. She also points out that there was no evidence in the township's representations that the complaint and follow-up correspondence were marked as "confidential" and no indication that the township's complaints policy or any promise of confidentiality was communicated to the complainant.

[39] The appellant relies on Order M-420 where the adjudicator found that the city did not establish that any confidentiality existed in relation to the identity of any source as it made no representation on the issue. She also relies on MO-3040 where the adjudicator found that once personal identifiers were removed from the letters of complaint no information qualified as personal information of another identifiable person remained. The appellant also relies on MO-3641 where the adjudicator disclosed the entire record except for the complaint's name and contact information.

Findings and analysis

[40] The appellant submits that section 8(1)(d) cannot apply as there was no law enforcement matter. Previous orders of the IPC have found that a municipality's by-law enforcement process qualifies as a "law enforcement" matter for the purposes of section 2(1) of the *Act*.¹⁸ As such, I find that the law enforcement matter was the township's investigation of whether the appellant's sauna complied with the township's Zoning By-law.

[41] In my view, Order M-420 can be distinguished on the basis that the city did not provide any representations on section 8(1)(d) exemption unlike in the current appeal.

[42] I do not accept that the appellant's argument that it is necessary for the township to provide evidence that the complainant held a reasonable expectation of confidentiality. I accept that members of the public would not report by-law complaints if their identities could be disclosed.

[43] On my review of the records in Item No. 19, I find that they contain some information (such as the name of the complainants and other personal identifiers), which would, if disclosed, would reasonably be expected to result in the disclosure of

¹⁸ See Orders M-16, M-582 and MO-1245.

the identity of the source of information.¹⁹

[44] As such, I find that section 8(1)(d) applies to some portions of the records in Item No. 19 and are exempt under section 38(a), subject to my review of the township's exercise of discretion below. As the township only claimed section 38(a), read with section 8(1)(d), for the records in Item No. 19, and the remaining information is not personal information, I will order this information disclosed.

Issue C: Does the discretionary personal privacy exemption at section 38(b) apply to the withheld information in Item No. 20?

[45] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[46] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. If the information fits within any of the exceptions in sections 14(1)(a) to (e), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[47] Sections 14(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy. If any of paragraphs (a) to (d) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[48] In determining whether the disclosure of the personal information in Item No. 20 would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.²⁰

[49] If any of sections 14(3)(a) to (h) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.²¹ The list of factors under section 14(2) is not exhaustive. The institution must also consider any

¹⁹ Although the appellant believes that the name of the complainant has already been disclosed due to the disclosure of the majority of the records in Item No. 20, I have reviewed all the records in Item No. 20 and do not find that the complainant's name has been disclosed.

²⁰ Order MO-2954.

²¹ Order P-239.

circumstances that are relevant, even if they are not listed under section 14(2).²²

Representations, analysis and findings

[50] I note that the withheld information does not fit within the exceptions set out in section 14(1)(a) to (e) nor section 14(4) of the *Act*. As such, I will turn to discuss whether any of the factors or presumptions under sections 14(2) and (3) apply.

[51] The appellant's representations do not address the section 38(b) personal privacy exemption.

[52] The township submits that all of the factors listed in section 14(2) apply to the withheld personal information.²³ I find that the factors listed in section 14(2)(f) and (h) are the only relevant factors in this appeal.

[53] Sections 14(2)(f) and (h) state:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(f) the personal information is highly sensitive;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

[54] With respect to section 14(2)(f), to be considered highly sensitive there must be a reasonable expectation of significant personal distress if the information is disclosed.²⁴

[55] The township submits that if the personal information was disclosed it would be very distressing to the complainant as they considered their complaint and subsequent correspondence to the township to be sensitive in nature. The township submits that it regularly hears from individuals who are hesitant to submit a complaint due to anxiety and sensitivity that the property owner in question would find out who they are.

[56] In Order MO-2980, Adjudicator Bhattacharjee found that whether an individual's name and address is highly sensitive depends on the context, and should be assessed on a case-by-case basis. Specifically, Adjudicator Bhattacharjee wrote:

²² Order P-99.

²³ It appears that the township is confused about the application of section 14(2). Going forward, the township only needs to discuss the factors that are relevant to the appeal at hand. It is not necessary for the township to discuss all the factors listed in section 14(2) if they are not applicable, especially as they are in favour of disclosure.

²⁴ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

An individual's name and address is not always sensitive information. For example, the names and addresses of most individuals appear in publically accessible telephone or online 411 directories and are clearly not highly sensitive in that context.

However, the names and addresses of individuals have greater sensitivity when this information is collected by the state or agencies of the state such as the police ...

[57] I agree with Adjudicator Bhattacharjee and adopt the above reasoning for the purpose of this appeal.

[58] In this case, the complainant's personal information is contained in an email chain in Item No. 20 as they made a by-law complaint against the appellant's property. Due to this context, it suggests that the personal information is highly sensitive. As such, disclosure of their personal information may likely cause the complainant significant personal distress as the factor in section 14(2)(f) requires. As a result, I give this factor some weight.

[59] In order for section 14(2)(h) to apply, both the individual supplying the information and the recipient must have an expectation that the information will be treated confidentially, and that expectation must be reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.²⁵

[60] The township submits that the personal information was submitted, as part of the complaint, in confidence. It points out that its by-law violations complaints policy and its website state that complaints filed will be treated as confidential, which provides individuals with a reasonable expectation that their information would be protected.

[61] In the circumstances, I find that the personal information at issue was supplied by the complainant in confidence and that the factor in section 14(2)(h), which weighs against disclosure, applies.

[62] With respect to presumptions in section 14(3), the township submits that section 14(3)(b) applies, which states:

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

²⁵ Order PO-1670.

[63] Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.²⁶ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.²⁷

[64] Based on my review of the records at issue, I find that the presumption at section 14(3)(b) applies in this circumstance. The withheld personal information relates to a zoning by-law enforcement investigation of the appellant's sauna. Although no charges were laid, section 14(3)(b) still applies. As stated above, the presumption can apply to a variety of investigations, including those relating to by-law enforcement.²⁸ Therefore, I find that section 14(3)(b) applies to the withheld personal information at issue, and that its disclosure is presumed to be an unjustified invasion of the personal privacy of the affected party.

[65] In determining whether the disclosure of the withheld personal information in Item No. 20 would be an unjustified invasion of personal privacy under section 38(b), I will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.²⁹ I note that I find that there are no factors favouring disclosure of the withheld personal information. I concluded above that the personal information is subject to the presumption at section 14(3)(b) and the factors at sections 14(2)(f) and 14(2)(h). Considering and weighing the factors and presumption and balancing the interests of the parties, I find that disclosure of the personal information at issue would be an unjustified invasion of personal privacy under section 38(b). Accordingly, I find that the withheld personal information in Item No. 20 is exempt under section 38(b) subject to my finding on the township's exercise of discretion below.

Absurd result

[66] The appellant argues that the complainant's name should be disclosed as their name has already been disclosed due to the township's disclosure of all the records in Item No. 20 (excluding the withheld information). She argues that the absurd result principle applies as she is able to figure out who the complainant is from the information that is disclosed. I have reviewed all the records in Item No. 20 and do not find that the complainant's name has been disclosed.

[67] The absurd result principle has been applied in appeals where, for example, the requester was seeking access to his or her own witness statement;³⁰ where the requester was present when the information was provided to the institution;³¹ or where

²⁶ Orders P-242 and MO-2235.

²⁷ Orders MO-2213, PO-1849 and PO-2608.

²⁸ Order MO-2147.

²⁹ Order MO-2954.

³⁰ Orders M-444 and M-451.

³¹ Orders M-444 and P-1414.

the information was clearly within the requester's knowledge.³² However, the absurd result principle may not apply even if the information was supplied by the requester or is clearly within the requester's knowledge, if disclosure would be inconsistent with the purpose of the section 14(1) exemption or section 38(b) exemption.³³

[68] While the appellant submits that she can identify the complainant's identity from the information that has already been disclosed to her, I find that the appellant has not established that the absurd result principle should apply to the withheld personal information. I find that disclosure of the withheld personal information would be inconsistent with the purpose of the section 38(b) exemption. I also do not find that this is one of those "clear cases" in which the absurd result principle outweighs the personal privacy protection principles set out in section 14(1) of the *Act*. I, therefore, do not find that the absurd result principle applies.

Issue D: Does the discretionary exemption at section 38(a), allowing the township to refuse access to a requester's own personal information, read with the section 12 exemption, apply to the records contained in Item No. 18?

[69] The township claims section 38(a), read with section 12, applies to all the records in Item No. 18.

[70] 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. Section 38(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, **12**, 13 or 15 would apply to the disclosure of that personal information. [emphasis added]

[71] In this case, the township relies on section 38(a), read with section 12, specifically common law solicitor-client communication privilege.

[72] Section 12 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It states:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

³² Orders MO-1196, PO-1679 and MO- 1755.

³³ Orders M-757, MO-1323, MO-1378.

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

Branch 1: common law privilege

[74] At common law, solicitor-client privilege encompasses two types of privilege:

- solicitor-client communication privilege, and
- litigation privilege.

Common law solicitor-client communication privilege

[75] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.³⁴ This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.³⁵ The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.³⁶

[76] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.³⁷ The privilege does not cover communications between a lawyer and a party on the other side of a transaction.³⁸

Representations

[77] I have reviewed all of the township’s representations and the appellant’s representations, and below I summarize the portions of their representations relevant to the issue of section 38(a), read with section 12.

Township’s representations

[78] The township submits that the records are communications between township staff and the township’s solicitor for the purpose of keeping both sides informed on the

³⁴ Orders PO-2441, MO-2166 and MO-1925.

³⁵ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

³⁶ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

³⁷ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

³⁸ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

zoning by-law matter relating to the appellant's sauna. It submits that it was (and remains) important that its staff be able to communicate freely in confidence with the township's solicitor. The township explains that the records in Item No. 18 reflect communications necessary for the township's solicitor to provide advice to its staff, and for staff to respond and/or provide direction.

[79] In addition, the township explains that during its investigation of the appellant's sauna, its staff had to obtain a warrant under the *Planning Act*³⁹ for the first time in its history. As such, it explains that its staff required guidance from its solicitor as to how to proceed and assistance on next steps. The township submits that these communications are protected by solicitor-client communication privilege.

[80] The township also submits that where its staff communicated with its solicitor on draft correspondence, the final versions of these correspondence and documents (such as the signed warrant) were disclosed to the appellant. However, the disclosure of these final versions of documents do not represent a waiver of privilege on the draft versions of the same documents.

Appellant's representations

[81] The appellant submits that the records do not involve "legal advice" in whole or in part. She points out that the township's representations states that the records are communications between its staff and the township's solicitor and does not speak of "legal advice" being given. The appellant also submits that simply because the township staff chose to ask a solicitor on how to go about obtaining a warrant does not make it legal advice as the township could have asked the Attorney General Office, the OPP, or another local municipality.

[82] The appellant also submits that the communications, in whole or in part, were not intended to be confidential. She submits that, the fact that the subject and the nature of the communications were revealed by the township, suggests that the communications were not intended to be confidential. The appellant also submits that revealing the nature and subject of these communications in its representations meant the township waived privilege over them.

[83] In addition, the appellant cites a number of cases⁴⁰ and submits that the communications should not be protected by solicitor-client privilege as they had the purpose of furthering unlawful or wrongful conduct by the township. She submits that the communications behind any draft correspondence addressed to her from the township (or directly from the township's solicitor) or other draft documents, which contain statements unsupported by the law or otherwise wrongful ought not be

³⁹ R.S.O. 1990, c. P.13.

⁴⁰ *Dublin v. Montessori Jewish Day School of Toronto*, 2007 CanLii 8923 (ONSC), *Zesta Engineering Ltd. v. Cloutier*, [2008] O.J. No. 304, and *Hallstone Products Ltd. v. Canada (Customs and Revenue Agency)*, 2004] O.J. No. 496.

protected by solicitor-client privilege.

[84] Finally, the appellant submits that the township waived solicitor-client privilege on these communications. She submits that the township revealed the subject and nature of the communications and advice. The appellant also refers to Order MO-1925, where the IPC mentions that the courts have held that where is voluntary waiver of part of a record, waiver of the rest of the record may be implied where fairness requires it.

[85] She further argues that there is a global inherent fairness here as residents look to the township as the authority and the township stands in a position of trust. As such, she argues that it is unacceptable for solicitor-client privilege to be used as a shield by the township so that any transgressions do not come to light.

Analysis and findings

[86] After reviewing the representations of the parties and the records in Item No. 18, I find that these records are exempt under the section 12 common law solicitor-client communication privilege.

[87] Before I discuss my findings any further, I will first address the appellant's arguments. The appellant argues that the communications in these records are not legal advice. I have reviewed the records and find that they contain direct communications of a confidential nature between a lawyer and their client made for the purpose of obtaining or giving legal advice. I note that the solicitor-client communication privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given. The appellant also argues that as she is aware of the subject matter and nature of the communications the township did not intend to keep these communications confidential and has waived privilege over them. Although the appellant is aware of the subject matter of these communications, the actual substance of these communications has not been disclosed and remain confidential. Finally, I do not find that the township has waived privilege over these communications. There is no evidence before me to suggest that waiver has occurred.

[88] In addition, the appellant argues that these communications should not be protected by solicitor-client privilege as they had the purpose of furthering unlawful or wrongful conduct by the township. In short, as I understand the appellant's submissions (including the cases that she refers to), she argues that the solicitor-client privilege unlawful act exception applies.

[89] I understand that the appellant strongly believes that it was unnecessary and unlawful for the township to investigate and inspect her sauna. I also understand that the appellant felt she was being harassed by the township by having to provide the township access to the interior of her sauna. The exception to solicitor-client privilege for unlawful acts arise only in rare cases where it is clear that a client has engaged a

solicitor to conspire in the commission of an unlawful, fraudulent or illegal act. There is no basis for me to make such a conclusion in the circumstances of the present appeal. The township's investigation appears to be a routine by-law enforcement investigation. Moreover, the appellant has not provided sufficient evidence to establish that the township's investigation of her sauna was unlawful. I do not find that the appellant has provided evidence that the (a) the township knowingly pursued an unlawful act, and (b) the solicitor-client communication facilitated the unlawful act. As such, I do not find that the solicitor-client privilege exception applies.

[90] The records in Item No. 18 consist of email chains relating to the seeking or providing of instructions on the potential zoning by-law violation and how to obtain a warrant. The recipients of these emails include township staff and the township's solicitor. Based on my review of the township's representations, I am satisfied that these records either contain legal advice from the city solicitor, or they were created to keep both township staff and the township solicitor informed so that legal advice may be sought and provided as required on the issue of the potential zoning by-law violation and the warrant. I note that the bottom of many of these emails contain a "confidential notice" or a "confidentiality warning". While these notations are not determinative, I find that these records contain confidential communications between the township solicitor and his client regarding legal matters, and therefore fall within the ambit of the solicitor-client communication privilege in Branch 1 of section 12 of the *Act*.

[91] I will now turn to the township's exercise of discretion in withholding these records in Item No. 18 that are exempt under section 38(a), read with section 12.

Issue E: Did the township exercised its discretion under section 38(a), read with sections 8(1)(d) and 12, and 38(b)? If so, should this office uphold the exercise of discretion?

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

[93] The IPC may find the institution erred in exercising its discretion where, for example: it does so in bad faith or for an improper purpose; or it takes into account irrelevant considerations or fails to take into account relevant considerations. In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.⁴¹ However, the IPC may not substitute its own discretion for that of the institution.⁴²

[94] The township submits that it properly exercised its discretion under sections 38(a) and 38(b). It submits it considered the following factors in exercising its

⁴¹ Order MO-1573.

⁴² Section 43(2) of the *Act*.

discretion: (1) applicable sections of the *Act*; (2) the privacy rights of involved individuals (including the complainant); (3) individuals should have a right of access to their own personal information; and (4) whether the requester's right to access should take priority over the needs of the municipality to be able to engage/consult with its solicitor.

[95] The appellant submits that the township did not properly exercised its discretion. She submits that the township's refusal to disclose the complaint and the follow-up correspondence was done in bad faith or for an improper purpose. The appellant submits that the township should disclose the withheld information because it must be transparent, accountable and open.

[96] Based on my review of the township's representations and the nature and content of the exempt information, I find that the township properly exercised its discretion to withhold the exempt information pursuant to the discretionary exemption at sections 38(a) and (b) of the *Act*. I note that the township took into account the following relevant considerations: the nature of the information, privacy rights of third parties and individuals should have a right of access to their own personal information, and the wording of the exemption and the interests it seeks to protect. I am satisfied that it did not act in bad faith or for an improper purpose. Accordingly, I uphold the township's exercise of discretion in deciding to withhold the exempt information pursuant to the sections 38(a) and(b) exemptions.

Issue F: Did the township conduct a reasonable search for records?

[97] The appellant claims that further records exist. In particular, she claims that a video and photos (which were taken on December 2, 2020), the by-law enforcement report for December 2020 (including the execution of the warrant), phone call notes for October 1, 2020 between the township CAO and the township clerk, and records of all by-law or other complaints against her property should exist.

[98] Where a requester claims 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 17.⁴³ If I am satisfied the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[99] 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 it has made a reasonable effort to identify and locate responsive records.⁴⁴ 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

⁴³ Orders P-85, P-221 and PO-1954-I.

⁴⁴ Orders P-624 and PO-2559.

reasonably related (responsive) to the request.⁴⁵

[100] 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 such records exist.⁴⁶

Parties' representations

[101] I have reviewed all of the township's and the appellant's representations, and below I summarize the portions of their representations relevant to the issue of section 17.

[102] The township submits that it conducted a reasonable search for responsive records. In support of its position, the township submitted representations describing the individuals involved in the search, where they searched, and the results of their search. It explains that during mediation it conducted another search to ensure that all records were located. This second search resulted in locating additional records, which were disclosed fully to the appellant.

[103] The township acknowledges that the former chief building official (CBO) was identified in some of the investigation related to the sauna. However, it submits that the former CBO kept no records on the matter, such as logs, email, or field notes, beyond what has been located and disclosed to the appellant.

[104] The appellant submits that further records exist. She submits that the description for Item No. 16 in the Index of Records refers to "Officer Notes with Photos and Video from Execution of Warrant on December 2, 2020". She also submits that the officer notes in item No. 16 states that there are "several photos and videos taken" but she has not been provided with the video(s) and photos.

[105] The appellant also submits that she has not been provided with the by-law enforcement report for December 2020.

[106] In addition, the appellant submits that she has not been provided with phone call notes for October 1, 2020 between the township CAO and the township clerk and records of all by-law or other complaints against her property.

[107] Finally, the appellant submits that she finds it very difficult to believe that no records exist relating to the cost of the law enforcement action against her property, discussions with the former CBO and the Director of Planning, discussions between township staff and former CBO, and discussions between the Mayor/Deputy Mayor with the CAO.

⁴⁵ Orders M-909, PO-2469 and PO-2592.

⁴⁶ Order MO-2246.

[108] In response, the township provided the appellant with a copy of the by-law enforcement report for December 2020 (the report).

[109] The township submits that it conducted a full and complete search for responsive records. It submits that it conducted two searches and cannot find a video or photos. The township explains that there are no written records for phone calls between the individuals the appellant listed.

[110] In response, the appellant submits that the township's decision letter of May 2021 purportedly attached a copy of a video. She points out that the township had to place the video on a memory stick (as it was not sent via email) to provide it to her. As such, she submits that the video must have had to be downloaded into the township's computer system. Consequently, she questions why it cannot be retrieved. The appellant also questions whether the township asked the by-law enforcement officer whether he still has a copy of the video.

[111] In addition, the appellant reiterates that the by-law enforcement officer's notes states "videos" were taken during the execution of the warrant on her property.

[112] Finally, the appellant submits that it is unacceptable that there are no written records of phone calls/discussions between township staff.

Analysis and findings

[113] For the following reasons, I find that the township conducted a reasonable search, in part, for responsive records to the appellant's request.

[114] The township has described the individuals involved in the search, where it searched, and the results of its search. In my view, the township's search was logical and comprehensive. As noted above, 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.⁴⁷ I am satisfied that the township has provided sufficient evidence to establish this.

[115] I am also satisfied that no further written records exist with respect to notes of phone calls/discussions between township staff and the mayor/deputy mayor/CAO and between the appellant with township staff (including the former CBO). I accept the township's explanation that its staff (including the mayor/deputy mayor/CAO) may not have taken notes during these phone calls or discussions. I understand that the appellant is upset that the township did not comply with the "Recordkeeping Amendments" to the *Act* but recordkeeping is an issue which is outside of my jurisdiction to adjudicate.

[116] However, I find that the township has not conducted a reasonable search for the

⁴⁷ Orders M-909, PO-2469 and PO-2592.

video(s) and photos purportedly taken on December 2, 2020. I acknowledge that the township has conducted two searches and has not located the video(s) or photos in question but it has not provided any details on these searches. For example, the township has not stated whether it has asked the by-law enforcement officer, who was involved in the execution of the warrant, whether he took video(s) and/or photos of the appellant's sauna. The township also has not provided an explanation for why the by-law enforcement officer's notes refer to videos or why the description for Item No. 16 in the Index of Records refers to a video and photos. The township simply asserts that it has conducted two searches and has not located the video(s) or the photos.

[117] In sum, I find that the township has conducted a reasonable search, in part, for responsive records. I order the township to conduct another search for the video(s) and photos purportedly taken on December 2, 2020.

ORDER:

1. I uphold the township's application of the personal privacy exemption at section 38(b).
2. I also uphold the township's application of section 38(a), read with section 12.
3. I order the township to disclose certain information that did not qualify for exemption under section 38(a), read with section 8(1)(d), to the appellant by **October 4, 2023** but not before **September 27, 2023**. I have identified the portions that the township must disclose by highlighting them in yellow on the copy of the records provided to the township with this order.
4. I also order the township to conduct a further search for video(s) and photos responsive to the appellant's request.
5. I further order the city to provide me with affidavit evidence describing its search efforts, by **September 27, 2023**. At a minimum, the affidavit(s) should include the following:
 - i. The name(s) and position(s) of the individual(s) who conducted the search(es) and their knowledge and understanding of the subject matter and the scope of the request;
 - ii. The date(s) the search(es) took place and the steps taken in conducting the search(es), including information about the type of files searched, the nature and location of the search(es), and the steps taken in conducting the search(es);
 - iii. Whether it is possible that responsive records existed but no longer exist. If so, the city must provide details of when such records were destroyed,

including information about record maintenance policies and practices, such as evidence of retention schedules; and

- iv. If it appears that no video and photos exist after further searches, a reasonable explanation for why the by-law enforcement officer's notes and the description in Item No. 16 states "Officer notes with photos and video from execution of warrant on December 2, 2020.

The township's affidavit will be shared with the appellant, unless there is an overriding confidentiality concern as set out in *Practice Direction Number 7*, which is available on the IPC's website. The township should indicate whether it consents to the sharing of its affidavit with the appellant.

6. If the township finds additional records in its further searches, I order the township to issue an access decision for these records in accordance with the *Act*. For the purposes of section 19, 22 and 23 of the *Act*, the date of this order shall be deemed to be the date of the request.
7. I remain seized of this appeal to deal with issues arising from order provisions 4 and 5.
8. In order to verify compliance with order provision 3, I reserve the right to require the township to provide me with a copy of the information disclosed upon request.

Original signed by: _____

Lan An
Adjudicator

August 29, 2023 _____