Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3174-I

Appeal MA13-438

Corporation of the Town of Arnprior

March 30, 2015

Summary: The appellant sought access to records relating to an assessment of the Town's IT system performed by a named company. The town granted partial access to the responsive records, denying access to portions of them under sections 7(1) (advice and recommendations), 8(1)(e) (endanger life or safety), 8(1)(i) (security), 10(1) (third party information), 11(a)(valuable government information), 11(f) (economic and other interests) and 13 (danger to safety or health) of the *Act*. In this order, the adjudicator finds that the mandatory exemption at section 10(1) does not apply; the discretionary exemption at section 7(1) applies to exempt portions of the records from disclosure; the discretionary exemptions at sections 8(1)(e), 8(1)(i), 11(a), 11(f) and 13 do not apply; and, that the town must re-exercise its discretion with respect to the severances made to portions of the records pursuant to section 7(1). The adjudicator remains seized of this appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 7(1), 8(1)(e), (i), 10(1)(a), (c), 11(a), (f), and 13.

Orders and Investigation Reports Considered: Orders PO-3371 and MO-3058-I.

OVERVIEW:

[1] The Town of Arnprior (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> Copies of all records, studies, analysis, memoranda, communications relating to recent [Information Technology] IT assessment/gap analysis by [named company]:
>
> 1) Network audit and configuration analysis/review completed by [named company] for the CAO of the Town of Arnprior;
>
> 2) The Peer Review of the above review/gap analysis completed by the third party from Queen's University in Kingston, Ontario;
>
> 3) The Request for Proposal, engagement letter or contract, including the statement of work indicating the study methodologies to be utilized in conducted the IT services/review/gap analysis;
>
> 4) Most recent IT operations and capital budget plan for the town.

[2] The town issued a decision letter granting access to two responsive records subject to the payment of a fee which was outlined in a fee estimate. The town advised that access to the remainder of the responsive records was denied under the exemptions at sections 7(1) (advice and recommendations), 8(1)(e) (endanger life or safety), 8(1)(i) (security), 10(1)(a) (third party information), 11(a)(valuable government information), 11(f) (economic and other interests) and 13 (danger to safety of health) of the *Act*.

[3] The requester, now the appellant, appealed the town's decision to deny access to the records and portions of records that were withheld.

[4] During mediation, the town explained how the records relate to the four requested items. It explained that records 1, 2, and 3 consist of the proposal and other documents prepared by the company named in the request and relate to Item 1; record 5 which is a third party's review of the proposals, relates to Item 2; there are no responsive records to Item 3; and, record 7, which is a review of the proposals, relates to Item 4. The town also explained that record 4, a proposal submitted by a company other than the one named in the request, was not specifically sought, but was included as responsive as it is referred to in record 5. The town states that it agreed to include record 4 in the scope of the appeal at the request of the appellant. The town did not identify any record as record 6.

[5] At the conclusion of mediation, the following had been established:

- The appellant wishes to pursue access to records 2, 4, and 5, in their entirety. The town maintains its position that the exemptions at sections 7(1), 8(1)(e), (i), 10(1)(a), 11(a), (f), and 13 of the *Act* apply to exempt the information contained in these records from disclosure.

- The appellant confirmed that he does not wish to pursue access to record 3.

- There are three parties who have might have an interest in the information at issue and who were not notified by the town: (1) the company named in the request that prepared records 1, 2 and 3, (2) the company that prepared record 4, and (3) a third party individual who prepared record 5, which is a review of the proposals submitted by the two companies. These affected parties were notified of the appeal during mediation. At that time, both companies objected to the disclosure of all of the information that relates to them, while the third party individual did not respond to the mediator's attempt to obtain their views on disclosure. The mandatory exemption at section 10(1) was added as an issue on appeal.

- With respect to record 1, which is the proposal submitted by the company named in the request, the town advised that on further review it was prepared to grant partial access to it. The appellant confirmed that he wishes to receive access to this document, but that he is not pursuing access to any of the portions that have been severed by the town.

[6] As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I began my inquiry into this appeal by sending a copy of a Notice of Inquiry, setting out the facts and issues on appeal, to the town as well as to the three parties who might have an interest in this appeal.

[7] The town and the company that prepared record 4 (the affected party) provided representations. The company named in the request that prepared records 1, 2 and 3, contacted this office and advised that it no longer objects to the disclosure of any of its information. The third party individual who prepared portions of record 5 did not respond to the Notice of Inquiry.

[8] As the company named in the request no longer objects to the disclosure of any its information and, for record 1, the appellant does not seek access to the information that the town claims is exempt, record 1 is no longer at issue. Accordingly, I will order it disclosed to the appellant, as previously severed by the town. Additionally, the application of section 10(1) to record 2, a record prepared by the company named in the request, is also no longer at issue. However, the application of the exemptions claimed by the town to record 2 remains at issue, and will be determined by this order.

[9] The town's representations, as well as a summary of those prepared by the affected party, were shared with the appellant in accordance with this office's *Practice*

Direction 7. The appellant provided representations in response. As the appellant's representations raised issues which I believed that the town and the affected party should be given an opportunity to reply to, I provided them with an opportunity to do so. The town provided representations in reply, while the affected party did not.

[10] In this order, I make the following findings:

- The mandatory exemption at section 10(1) does not apply;
- the discretionary exemption at section 7(1) applies to exempt some of the information in the records from disclosure;
- the discretionary exemptions at sections 8(1)(e) and (i) do not apply;
- the discretionary exemptions at sections 11(a) and (f) do not apply;
- the discretionary exemption at section 13 does not apply; and,
- the town must re-exercise its discretion with respect to the severances made to portions of records 2 and 5 pursuant to section 7(1).

RECORDS:

[11] The records and respective issues that remain at issue in this appeal can be summarized as follows:

[12] Record 2: Network Audit and Reconfiguration [prepared by the company named in the request] – access has been denied in its entirety pursuant to the exemptions at sections 7(1), 8(1)(e), (i), 11(a), (f), and 13 of the *Act*.

[13] Record 4: Proposal dated May 24, 2013 [prepared by the affected party who provided representations] – access has been denied in its entirety pursuant to the exemptions at sections 7(1), 8(1)(e), (i), 11(a), (f), and 13 of the *Act*. As the affected party claims that this record might contain its commercial information, the mandatory exemption at section 10(1) of the *Act* is also at issue for this record, in its entirety.

[14] Record 5: Peer Review [review of the proposals in records 1 and 4 by a third party] – access denied in its entirety pursuant to the exemptions at sections 7(1), 8(1)(e), (i), 11(a), (f), and 13 of the *Act*. As the affected party claims that this record might contain its commercial information, the mandatory exemption at section 10(1) of the *Act* is also at issue for this record, in its entirety.

ISSUES:

A. Does the mandatory exemption at section 10(1) apply to the records?

B. Does the discretionary exemption at section 7(1) apply to the records?

C. Do the discretionary exemptions at sections 8(1)(e) and/or (i) apply to the records?

D. Do the discretionary exemptions at sections 11(a) and/or (f) apply to the records?

E. Does the discretionary exemption at section 13 apply to the records?

F. Did the institution exercise its discretion under sections 7(1)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the mandatory exemption at section 10(1) apply to the records?

[15] The affected party claims that all of the information that it provided to the town is its commercial information and is exempt under the mandatory exemption at section 10(1) of the *Act*. Accordingly, it must be determined whether section 10(1) applies to record 4, the affected party's proposal. Additionally, because record 5, the review of the two proposals by a third party individual, contains information taken from record 4, I must also determine whether section 10(1) applies to that record, or portions of it.

[16] The relevant portions of section 10(1) state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[17] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[1] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[2]

[18] For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

> 1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
>
> 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
>
> 3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Representations

[19] As described above, the affected party objects to the disclosure of all of its information. Record 4 consists of its proposal prepared in response to a Request for Proposal (RFP) issued by the town. Record 4 has been withheld in its entirety. Record 5 is an email, portions of which might contain or reveal information taken from the affected party's proposal.

[20] The affected party's representations are brief. It first points to the confidentiality statement found on the first page of its proposal (record 4) which stipulates that the information contained within it is confidential and only intended for use by the town in the evaluation of the company as a potential vendor. It then submits that its information amounts to "intellectual information…used to design a configuration to

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[1] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

respond to [the town's] requirements." It submits that it owns this information and that its disclosure could "pose undue hardship in future competitive situations if the competition understands our approach and methodology." It explains that as all RFP responses require "methodology, approach, delivery and financial aspects," it would not be in its best interests to publicly disclose this information as it could make it difficult for them to respond to other RFP's.

[21] The town's representations on the possible application of section 10(1) to the records are even less detailed than those of the affected party. It states that the record contains a confidentiality statement and submits that it was received and treated "on the basis of confidentiality." It concludes its submissions on the possible application of this exemption by stating that "all the various tests as to the type of information, supply in confidence and harms are fully met." The town does not provide specific representations on how the information that it has severed from the records meets each part of the section 10(1) test.

[22] The appellant submits that he is not a competitor in the marketplace to the company or companies supplying the information. He also submits that the most relevant market competitive information, such as product list pricing, was removed during the mediation stage of the inquiry. He further submits:

> The affected party, a supplier like others known as "resellers" in the marketplace has no particular competitive, exclusivity or proprietary intellectual property in conducting a gap analysis to develop a marketing proposal for which they were paid by the buyer to prepare. The town paid for the proposal in order to buy product from the reseller. The gap analysis diagnostic employed by the reseller is widely, easily and freely available to any other market player. Furthermore, product pricing sheets from large manufacturers and the standard network designs are fluid and changes occur rapidly in this market (like tract housing designs) so any perceived competitive advantage the affected party has is ephemeral and fleeting. Often these proposals are not much more than hyping of the resellers line of products/hardware. Thus no reasonable expectation of demonstrable harm can be expected.

[23] The appellant submits that the fact that another supplier agreed to disclose similar information and did not claim it to be confidential is a relevant consideration. He also submits that since the design and framework/process to conduct a gap analysis to build the marketing proposal are widely available in generic form in the marketplace, revealing this information cannot be said to meet the test of substantial or undue gain or loss.

[24] In reply, the town submits that it does not agree that the information contained in the records is not generic in nature as suggested by the appellant.

Part 1: type of information

[25] Based on my review of the information contained in records 4 and 5, I accept that it contains information that is appropriately categorized as "commercial," "financial" or "technical" in nature. These types of information have been discussed in prior orders:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[3]
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[4] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[5]
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[6]

[26] Based on my review of record 4, the proposal submitted by the affected party, I am satisfied that the information that it contains constitutes commercial information for the purposes of section 10(1) of the *Act*. Specifically, it describes the services that the affected party would provide to support and manage the town's IT system in exchange for a fee. In my view, this information clearly falls within the definition of "commercial information." I also find that record 4 contains "financial information," within the definition of that term; namely, information about the affected party's fee structure for the services offered. Finally, I accept that the proposal contains "technical information" as contemplated by part 1 of the section 10(1) test. The proposal clearly describes the manner in which the affected party proposes to operate and maintain the town's IT system, which in my view meets the definition of "technical information."

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[3] Order PO-2010.
[4] Order PO-2010.
[5] Order P-1621.
[6] Order PO-2010.

[27] Record 5 is a review of two proposals submitted to the town in response to its RFP for IT management and maintenance services. As the company named in the request does not object to the disclosure of its information, the only information in record 5 to which section 10(1) might apply is the portion that provides brief comments on the proposal submitted by the affected party (record 4). The portion that relates to the affected party's proposal contains commercial, financial, and technical information taken directly from the proposal. Therefore, I accept that the portion of record 5 that relates to the affected party's proposal contains the type of information described in section 10(1) of the *Act*.

[28] In summary, I find that both records 4 and 5 contain information that can be described as commercial, financial, and technical information. Accordingly, part 1 of the test for exemption under section 10(1) of the *Act* has been met for those records.

Part 2: supplied in confidence

[29] In order to meet part 2 of the test under section 10(1), the town or the affected party must provide sufficient evidence to establish that the information at issue was "supplied" to the town by the affected party "in confidence," either implicitly or explicitly. I will address each of these components separately.

Supplied

[30] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[7] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[8]

[31] I accept that the information at issue meets the "supplied" component of part 2 of the section 10(1) test.

[32] Recently, in Order PO-3371, Adjudicator Cathy Hamilton reviewed this office's approach with respect to proposals submitted in response to RFPs issued by institutions. Specifically, she cites with approval Senior Adjudicator Sherry Liang's finding in Order MO-3058-F in which the Senior Adjudicator stated:

> Record 1, the winning RFP submission, was also "supplied" to the town within the meaning of section 10(1). My conclusion with respect to this record is consistent with many previous orders of this office that have considered the application of section 10(1) or its provincial equivalent to

[7] Order MO-1706.
[8] Orders PO-2020 and PO-2043.

RFP proposals.[9] As this office stated, in Order MO-1706, in discussing a winning proposal:

> ... it is clear that the information contained in the Proposal was supplied by the affected party to the Board in response to the Board's solicitation of proposals from the affected party and a competitor for the delivery of vending services. This information was not the product of any negotiation and remains in the form originally provided by the affected party to the Board. This finding is consistent with previous decision of this office involving information delivered in a proposal by a third party to an institution...[page 9]

[33] I adopt the reasoning expressed in those prior orders for the purpose of this appeal.

[34] In the circumstances before me, the proposal submitted by the affected party was not the winning proposal. Therefore, the information contained in record 4 is precisely what was supplied by the affected party to the town in response to the town's RFP for IT management services. It was not the product of negotiation and did not form the basis of any agreement or contract. In keeping with the reasoning traditionally taken by this office, I accept that the information contained in record 4 was "supplied" to the town by the affected party.

[35] Additionally, I also accept that the information relating to the affected party that is contained in record 5 was "supplied" to the town by the affected party. As stated above, information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inference with respect to information supplied by a third party. The relevant portion of record 5 clearly reveals information that was taken directly from record 4, the proposal submitted by the affected party, and therefore, I find that it was also "supplied" as contemplated by this component of part 2 of the section 10(1) test.

In confidence

[36] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[10]

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[9] See, for example, Orders MO-2151, MO-2176, MO-2435, MO-2856 and PO-3202.
[10] Order PO-2020.

[37] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;
- not otherwise disclosed or available from sources to which the public has access; and,
- prepared for a purpose that would not entail disclosure.[11]

[38] I accept that the information at issue was supplied "in confidence" by the affected party to the town, thereby meeting that component of part 2 of the test for the application of section 10(1).

[39] Both the affected party and the town submit that the information provided in the proposal was supplied "in confidence." I have reviewed the confidentiality statement at the beginning of the proposal and accept that the affected party had a reasonably held expectation that the information that it supplied in its proposal would be treated in a confidential manner by the town. In the circumstances, I accept that the information in record 4 and the portion of record 5 that specifically addresses the affected party's proposal was supplied "in confidence."

[40] In summary, I find that record 4 and the portion of record 5 that specifically addresses the affected party's proposal were "supplied in confidence" for the purpose of part 2 of the section 10(1) test for exemption.

Part 3: harms

[41] To meet this part of the test, the party resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of 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.[12]

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[11] Orders PO-2043, PO-2371, and PO-2497.
[12] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31 (CanLII) at paras 52-54.

[42] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, parties should not assume that harms under section 10(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[13]

[43] Neither the town nor the affected party provides representations on which specific harms listed in section 10(1) could reasonably expected to occur as a result of disclosure. However, because section 10(1) is a mandatory exemption, I will address all those that, in my view, might be applicable. In the circumstances of this appeal, I will examine the possible application of sections 10(1)(a) and (c) to the information that remains at issue.

Section 10(1)(a): prejudice to competitive position

[44] Although it did not specifically identify which of the harms listed in section 10(1) might be applicable, the affected party's representations suggest that it is of the view that disclosure of its information contained in records 4 and 5 could reasonably be expected to result in prejudice to its competitive position. It suggests that the disclosure of the configuration that it designed to respond to the town's IT requirements could be used by its competitors in future competitive situations as it would reveal its methodology, approach, delivery, and financial position with respect to responding to other IT related RFPs.

[45] I am not satisfied that I have been provided with the requisite clear and convincing evidence to establish that the disclosure of the information of the affected party that is found in record 4 and portions of record 5 could result in prejudice to its competitive position. From my review of the information, the affected party's proposal is very general in nature in terms of its description of how it would meet the needs of the town. In my view, it is not evident how its disclosure could reasonably be expected to reveal information that could be used by its competitors in any future situation. Both the affected party and the town's representations on the harm that could result from the disclosure of this information are also very general. They do not point to specific information or even the types of information contained in the records that they believe could be of assistance to the affected party's competitors; nor do they provide evidence to demonstrate or explain how the disclosure of any specific information could reasonably be expected to prejudice its competitive position.

[46] Moreover, the proposal was submitted by the affected party in response to an RFP prepared by the town which described in detail its precise needs. Records 4 and 5, therefore, provide information as to how the affected party would respond to those precise needs. In the absence of detailed evidence to demonstrate that the information

[13] Order PO-2435.

contained in these records would be of use to a competitor in future situations where the needs of the party issuing an RFP for IT services would be sufficiently similar to those sought by the town, I am not convinced that disclosure of this specific information would prejudice its position with respect to such future competition.

[47] Accordingly, I am not satisfied that either the town or the affected party have provided the requisite evidence to establish that disclosure of the information at issue in records 4 and 5 could reasonably be expected to give rise to the harm contemplated by section 10(1)(a).

Section 10(1)(c): undue loss or gain

[48] Again, although it did not specifically identify the possible application of the harm contemplated by section 10(1)(c), the affected party's representations also suggest that the disclosure of the information contained in records 4 and 5 could reasonably be expected to result in an undue gain to its competitors resulting in a correlative undue loss to itself.

[49] For the reasons described above in my discussion of the possible application of section 10(1)(a), I do not accept that the disclosure of the information contained in those records could reasonably be expected to give rise to an undue loss or gain. Additionally, based on the wording of this exemption, not only is the party objecting to disclosure (in this case, the affected party) required to demonstrate that disclosure would afford a competitor an advantage or that would result in a loss to itself, any such loss or gain must be characterized as "undue." In the circumstances of this appeal, I have not been provided with clear and convincing evidence that disclosure of the specific information at issue would give rise to either a loss or a gain, let alone that such loss or gain could be described as "undue."

[50] Accordingly, I do not accept that I have been provided with clear and convincing evidence to establish that disclosure of the information at issue in records 4 and 5 could reasonably be expected to give rise to the harm contemplated by section 10(1)(c).

[51] As none of the other harms identified in section 10(1) appear to be relevant in the circumstances of this appeal, the third component of the test for the application of that exemption has not been established.

Summary conclusion

[52] I find that the harm component in part 3 of the section 10(1) test has not been established with respect to the disclosure of record 4 and the relevant portions of record 5. As all three parts of the test must be established for the exemption to apply, I find that section 10(1) does not apply to exempt this information from disclosure.

B. Does the discretionary exemption at section 7(1) apply to the records?

[53] Section 7(1) states:

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

[54] The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[14]

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

[56] "Advice" has a broader meaning than "recommendations." It includes "policy options," which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "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.[15]

[57] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or recommendations" extends to "objective information" or factual material.

[58] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the nature of the advice or recommendations given.[16]

[59] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the institution to prove that the advice or recommendation was subsequently

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[14] *John Doe v. Ontario (Finance),* 2014 SCC 36, at para. 43.
[15] *Ibid* at paras. 26 and 47.
[16] Orders PO-2028 and PO-2084, 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.

communicated. Evidence of an intention to communicate is also not required for section 7(1) to apply as that intention is inherent to the job of policy development, whether by a public servant to consultant.[17]

[60] Examples of the types of information that have been found *not* to qualify as advice or recommendations include factual or background information;[18] a supervisor's direction to staff on how to conduct an investigation;[19] and information prepared for public dissemination.[20]

[61] Sections 7(2) and (3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7. Section 7(2)(a) states:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> > factual material.

Representations

[62] The town submits that the information in all of the records at issue (records 2, 4, and 5) is exempt from disclosure as they amount to advice or recommendations within the meaning of section 7(1) of the *Act*. Specifically, the town submits:

> [I]t is self-evident on the face of the documents that the record [sic] reveals advice by consultants retained by the institution on which the Municipal Council is entitled to act. The exceptions to the exemptions are not applicable.

[63] In his representations, the appellant states

> In no case is the information being requested any advice or recommendation of a town official or employee. In all instances, it is generic and descriptive information originating with hopeful peddlers or a willing citizen volunteer engaged by the Chief Administrative Officer for the Town to offer up gratuitous advice at no charge. It is difficult to ascertain how release of this information could inhibit the free flow of information to the town in the future.

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[17] *Supra* note 10, at para. 51.
[18] Order PO-3315
[19] 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.).
[20] Order PO-2677.

[64] In reply, the town submits that the exemption at section 7(1) extends the general principle to "consultants" and "the consultant's audit contains comprehensive information and is of a technical nature and includes a series of recommendations..." It further submits that the "information is not merely factual information, it goes much farther."

Analysis and findings

[65] Based on my review of the records and the parties' representations, I find that some of the information that remains at issue consists of advice or recommendations within the meaning of the exemption at section 7(1), while some of it does not.

[66] Record 2 is described by the town as a Network Audit and Reconfiguration prepared for the town by the company named in the request, the successful proponent in the bid for the management and maintenance of the town's IT network services. From my review of this record, I accept that the information contained on pages 10 to 12 (numbering at bottom of page) under the heading 5, entitled "Recommendations" as well as that contained on page 13, under heading 6, entitled "Next Steps," qualifies as "advice" and "recommendations" within the meaning of section 7(1) of the *Act*. Some portions of this information reveal suggested courses of action that will ultimately be accepted or rejected by the town while others identify alternative courses of action to be accepted or rejected by the town in relation to decisions that are to be made regarding the management and maintenance of its IT network. Additionally, the very last page of record 2 provides a schematic of the network layout proposed by the successful proponent. I also accept that this information qualifies as "advice" or "recommendations" within the meaning of section 7(1) of the *Act*. The remaining information contained in record 2 however, does not contain information that qualifies as either "advice" or "recommendations" as it amounts to factual information, including information about the company itself and how it conducts business. Accordingly, section 7(1) does not apply to it as factual information fits within the exception to the section 7(1) exemption, set out in section 7(2)(a) of the *Act*.

[67] Record 4 is a proposal submitted in response to the RFP issued by the town, prepared by the unsuccessful party. I do not accept that information outlined in a proposal describing how a company, not yet retained by the town for the particular services outlined in an RFP, would potentially go about performing those services amounts to the advice or recommendations of a consultant retained by the town within the meaning of section 7(1) of the *Act*.

[68] Finally, record 5 is an email chain between a town employee and a third party individual who was asked by the town to review the two proposals received by the town in response to its RFP for IT network services. On the face of the record, it is clear that the individual was retained by the town and financially compensated for his review of the proposals. As a result, I accept that the individual, while not an employee of the

town, is a consultant for the purposes of section 7(1). Record 5 contains the advice of that individual regarding the two proposals. It provides an evaluative analysis of the proposal information and his opinions on each proponent's ability to meet the town's needs. This advice sets out the individual's identification and consideration of alternative decisions regarding the management of the town's IT network system to be considered by the decision maker. The record also provides the individual's own recommendation to the town describing how he himself would manage their IT network.

[69] I find that the portion of record 5 that provides the review of the proposals qualifies for exemption under section 7(1) of the *Act* as it amounts to the individual's advice and recommendation to the town regarding the management of its IT network services. However, record 5 is an email chain and I do not accept that the other email exchanges in the record contain or reveal the advice and recommendations of the individual or any other public servant. Accordingly, I find that the portion of record 5 which consists of the email dated May 29, 2013 is exempt pursuant to section 7(1), but that the remaining email exchanges are not.

[70] As the town has claimed a number of other exemptions apply to all of the information at issue, I will go on to determine whether any of those exemptions might apply to the portions of the records for which I have found section 7(1) does not apply.

C. Do the discretionary exemptions at sections 8(1)(e) and/or (i) apply to the records?

[71] The town submits that the exemptions at sections 8(1)(e) and/or (i) apply to all of the records at issue. As a result of my findings above, in this discussion I will determine whether these exemptions apply to record 4, in its entirety, and/or the portions of records 2 and 5 that I have found do not qualify as advice or recommendations for the purposes of section 7(1).

[72] Sections 8(1)(e) and (i) state:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

[73] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[21]

[74] 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.[22] The institution must provide detailed and convincing 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.[23]

Representations

[75] The town submits that with respect to the "topic of law enforcement generally, there is little more [it] can say." It notes the comment in the Notice of Inquiry (and indicated above) that states that it is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record but states:

> However, the record, in the context of the world in which we seem to live, makes it obvious that a continuing law enforcement matter involving the protection of confidential information is crucial. Likewise, physical safety and the safety of property depend on the maintenance of confidentiality with respect to some of this information.

[76] The appellant submits that the town has failed to "convincingly demonstrate that the request would hamper an existing real law enforcement action," but rather "suggests that there may be a possible violation sometime in the future." The appellant submits that this is a "tactic of fear mongering over the issue of cyber security." He submits that "if the town is following basic cyber security hygiene, such records do not make up the network design and infrastructure that the town is seeking to refurbish."

[77] In reply, the town submits:

> Given the constant reports of security breaches on government computer systems, an environment of constant cyber-attacks is not fear mongering by a reality for government organizations, including municipalities…As stated earlier, the service contracts for the town include detailed descriptions of the hardware and software infrastructure and release of

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[21] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[22] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[23] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

> this information, although downplayed by the appellant, will leave the town vulnerable and exposed to both cyber-attack and/or physical attacks. There is simply no need for a member of the public to have this type of security information.

Analysis and findings

8(1)(e): life or physical safety

[78] For section 8(1)(e) to apply, it is normally the institution that must provide evidence to establish a reasonable basis for believing that endangerment to life of physical safety could result from disclosure. In the particular circumstances of this appeal, this onus falls on the town who is asserting that the disclosure of the information at issue would endanger individuals. The reasons for resisting disclosure must not be frivolous or exaggerated.[24] A person's subjective fear, while relevant, may not be enough to justify the exemption.[25] Also relevant to the circumstances of this appeal, is that the term "person" is not necessarily limited to a particular identified individual, and may include the members of an identifiable group or organization.[26]

[79] I am not persuaded that the town has established that the disclosure of any of the information contained in records 2, 4 or 5 could reasonably be expected to lead to the harm contemplated in section 8(1)(e). The particular records at issue in this appeal include a proposal submitted by an unsuccessful proponent regarding the provision of IT services to the town, a review of the two proposals received by the town in response to its RFP regarding IT services, and an audit/assessment of the town's IT network prepared by the successful proponent. In my view, in the absence of detailed and convincing evidence, it is difficult to see how disclosing the type of information that appears in these particular records could reasonably be expected to endanger the lives or physical safety of any individuals, let alone that such expectation of harm is well beyond the merely possible or speculative.

[80] In short, I find that the records do not qualify for exemption under section 8(1)(e).

Section 8(1)(i): security of a building, vehicle, system or procedure

[81] As with section 8(1)(e), for section 8(1)(i) to apply, the onus falls on the town to provide evidence to establish a reasonable basis for believing that endangerment could result from disclosure, specifically, the endangerment of a building, vehicle, system, or procedure. Although this provision is found in a section of the *Act* dealing specifically with law enforcement matters, it has been found not to be restricted to law

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[24] Order PO-2085.
[25] Order PO-2003.
[26] Order PO-1817-R.

enforcement situations and can cover any building, vehicle or system which requires protection.[27]

[82] As with section 8(1)(e), given the brevity of the town's representations on the application of this exemption, I am not persuaded that the town has established that the disclosure of any of the information contained in records 2, 4, or 5 could reasonably be expected to lead to the harm contemplated by section 8(1)(i). Although I am aware of the difficulty of predicting future events, in my view, I have not been provided with sufficiently detailed and convincing evidence to demonstrate how the specific information at issue in the records could reasonably be expected to result in that type of harm, let alone that such expectation of harm is well beyond the merely possible or speculative. I find that the town has not established that its disclosure could reasonably be expected to endanger the security of a building or the security of a vehicle carrying items or of a system or procedure established for the protection of items, for which protection is reasonably required.

[83] Accordingly, I find that the records do not qualify for exemption under section 8(1)(i).

D. Do the discretionary exemptions at sections 11(a) and/or (f) apply to the records?

[84] In its decision letter and on its index, the town submits that sections 11(a) and (f) apply to records 2, 4, and 5 in their entirety. As I have found that section 7(1) applies to portions of records 2 and 5, it is not necessary for me to consider whether section 11(a) or (f) applies to those portions.

[85] Sections 11(a) and (f) state:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
>
> (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

[86] The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams

[27] Orders P-900 and PO-2461.

Commission Report)[28] explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[87] Parties should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of the *Act.*[29]

[88] The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests.[30]

Representations

[89] Again, the town's representations on the possible application of these exemptions to the records are very brief. With the respect to the application of section 11 to the records it states:

> [T]he IT platform is an economic interest of the institution. Its structure constitutes commercially valuable information which should be exempt from disclosure.

[90] The appellant submits that "[a]t face value, it is difficult to comprehend how an IT network design for the town would constitute economic value" within the meaning of the section 11 exemption. He submits that IT platforms are generic and would only have marginal value to the town, none of which would be in the competitive marketplace. He also submits that the requested information is not about future plans to be implemented, but about what proponents would provide by way of IT services and products to the town.

[91] In reply, the town submits that the information contained in the audit "is information that was yet to have been put into operation or made public" and it "opposes making public these plans for the stated reason." The town also states that "releasing the costing information will remove any competitiveness in the acquisition of services and goods."

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[28] Toronto: Queen's Printer, 1980.
[29] Order MO-2363.
[30] Orders MO-2363 and PO-2758.

Analysis and findings

[92] *Section 11(a): information that belongs to government*

[93] For section 11(a) to apply, the town must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information;

2. belongs to an institution; and

3. has monetary value or potential monetary value.

Part 1: type of information

[94] The types of information listed in section 11(a) are the same as those listed in section 10(1), defined above. I have already found in my discussion of the application of section 10(1) to record 4 that it contains information that qualifies as "commercial," "financial," and "technical" information. That finding is equally applicable for the purposes of my analysis of whether section 11(a) applies to record 4 and I adopt it here.

[95] With respect to record 2, portions of which remain at issue, I find that it contains technical information. Record 2 is a network audit and reconfiguration prepared by the company named in the request. I accept that this record contains information belonging to the organized field of knowledge of IT. It has been prepared by professionals in the field and clearly describes the structure, operation and maintenance of the town's IT network.

[96] In my view the portions of record 5 that remain at issue can be broadly categorized as commercial information. The email exchanges relate to the town's purchase of the individual's services, specifically, his review the proposals.

[97] Accordingly, I accept that the part 1 of the section 11(a) test has been met with respect to the information that remains at issue.

Part 2: belongs to

[98] The term "belongs to" refers to "ownership" by an institution. It is more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense – such as copyright, trade mark, patent or industrial design –

or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

[99] Examples of the latter type of information may include trade secrets, business-to-business mailing lists,[31] customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others.[32]

[100] The town indicates in its representations that information regarding the structure of its IT platform is "commercially valuable information." It does not elaborate on this statement. Although record 2 appears to describe the town's IT system in what, in my view, appears to be a general sense, in the absence of specific evidence describing how the town might have a proprietary interest (in the intellectual property sense) in this information or a substantial interest in protecting this specific information resulting from its inherent monetary value, I do not accept that this information can be said "belong to" the town within the meaning of part 2 of the section 11(a) test.

[101] Record 4 is the affected party's proposal that was supplied in response to an RFP. It is very general in nature and it describes how the affected party would provide support to the town regarding the administration and maintenance of the town's IT services. It does not describe the town's IT system in any detail. As this information was prepared by an affected party, it is difficult to see how it could be described as belonging to the town within the meaning of this part of the test. Moreover, I have been provided with no evidence to establish that the town has a proprietary interest in this information or that it has a substantial interest in protecting it because it has inherent monetary value. Accordingly, I find that the town has not established that information that remains at issue in record 4 meets part 2 of the section 11(a) test.

[102] Finally, from my review of the portions of record 5 that remain at issue, the emails between staff employees and the individual retained to review the two proposals, I do not accept that it can be said that the town has a proprietary interest in this information or that it has a substantial interest in protecting this information from misappropriation by another party. This information amounts to brief exchanges between the parties for the purposes of clarifying the town's needs with respect to the review of the proposals. In the absence of evidence demonstrating how this

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[31] Order P-636.

[32] Order PO-1736, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.); see also Orders PO-1805, PO-2226 and PO-2632.

information can be said to "belong to" the town as that term has been defined for the purposes of this section, I do not accept that it meets the requirement of part 2 of the section 11(a) as belonging to the town.

[103] As all three parts of the test must be established for this discretionary exemption to apply, I find that section 11(a) does not apply to the remaining information.

Section 11(f): plans relating to the management of personnel

[104] In order for section 11(f) to apply, the institution must show that:

1. the record contains a plan or plans, and
2. the plan or plans relate to:
   (i) the management of personnel, or
   (ii) the administration of an institution, and
3. the plan or plans have not yet been put into operation or made public.[33]

[105] This office has adopted the dictionary definition of "plan" as a "formulated and especially detailed method by which a thing is to be done; a design or scheme".[34]

[106] In its initial representations, the town does not describe how the records for which section 11(f) has been claimed amount to a plan relating to the management or personnel or the administration of the institution. In its reply representations however, the town refers specifically to the information in the "audit" (record 2) as "information that was yet to have been put into operation or made public."

[107] I disagree with the town any of the information remaining at issue in records 2 and 5 and the information in record 4, in its entirety, can be described as a plan relating to the administration of an institution for the purposes of section 11(f).

[108] Record 2 is an audit of the town's IT network conducted by the company named in the request. Portions of this record contain advice and recommendations that I have already found to be exempt under section 7(1) of the *Act*. From my review of the remaining information, I do not accept that any of it details a "formulated and especially detailed method by which a thing is to be done; a design or scheme" which the town was to implement without further discussion. I also do not accept that it relates to the management of personnel or the administration of an institution. In my

[33] Orders PO-2071 and PO-2536.
[34] Orders P-348 and PO-2536.

view, the information remaining at issue in this record describes the summation and analysis of information acquired during the course of a third party's audit of the town's IT network and includes information about that company and how it conducts business.

[109] I also do not accept that record 4, a proposal submitted by the affected party describing how it would manage and maintain the town's IT network, amounts to a plan within the meaning of section 11(f) of the *Act*. Previous decisions from this office have found that reports which contain information which form the basis of the development of a plan is not itself a "plan" for the purposes of section 11(f).[35] As record 4 is an unsuccessful proposal, I do not accept that the information contained within it can accurately be described as a plan within the meaning of section 11(f) of the *Act*, since it will not be put into operation or made public.

[110] Finally, the portions of record 5 that remain at issue are emails between a town employee and another individual detailing that individual's review of the two proposals reviewed by the town. From the face of the record it is clear that none of this information can be described as a plan that relates to the management of personnel or the administration of an institution.

[111] In conclusion, I find that the town has not provided sufficiently detailed evidence to support a conclusion that any of information remaining at issue amounts to a plan relating to the administration of the institution. As this is a discretionary exemption and the town bears the burden of demonstrating that it applies, in the absence of evidence explaining how this exemption might apply, the town has not discharged its burden and I find that section 11(f) does not apply to the information remaining at issue.

E. Does the discretionary exemption at section 13 apply to the records?

[112] The town takes the position that section 13 applies to records 2, 4, and 5 in their entirety. As a result of my findings above, in this discussion I must only determine whether section 13 applies to the information that I have found *not* to be exempt from disclosure under section 7(1).

[113] Section 13 states:

> A head may refuse to disclose a records whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[114] For this exemption to apply, the town must provide detailed and convincing 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

[35] Orders P-348, P-603, P-989, and PO-2780.

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.[36]

Representations

[115] With respect to the possible application of section 13 to records 2, 4, and 5, the town submits:

> [T]he disclosure [of the information at issue] could reasonably be expected to seriously threaten the safety of the institution and individuals. In light of the world in which we live, it is difficult to see how the reasons for this could be frivolous or exaggerated.

[116] The appellant submits that the town's claim that section 13 applies is "frivolous and exaggerated." He submits that he is not seeking the town's IT security policy, strategy, IT disaster recovery plan or its IT threat and risk mitigation strategy and there is no evidence provided to support a conclusion that knowledge of any component of the town's previous outdated generic IT platform would lead to any harm.

[117] In reply, the town submits:

> The fact is that leaving the town's "mission critical" data vulnerable to security breaches would leave a great deal of information about identifiable individuals at peril. It is common for town staff and its agents to be subjected to threats in [the] course of its enforcement duties. There have in recent months been police investigations in response to such threats. Leaving employee (or agent) information vulnerable could reasonably be expected to result in a threat to the safety of an employee, agent or resident or business of the town.

Analysis and findings

[118] In its reply representations the town submits generally that "it is common" for its staff to be subjected to threats and refers vaguely to police investigations arising from such threats. However, it does not provide any description of the nature of these threats or provide any evidence to suggest that they resulted from the disclosure of information that is similar to the type of information that is before me in this appeal. In my view, the town's representations do not elucidate, sufficiently, how the disclosure of any of the specific information that is before me could reasonably be expected to seriously threaten the safety or health of an individual, let alone demonstrate that any risk of such harm is well beyond the merely possible or speculative.

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[36] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCCC 31 (CanLII) at paras. 52-4.

[119] In the absence of the requisite detailed and convincing evidence to establish that the disclosure of any of the information that remains at issue in records 2, 4, or 5 could reasonably be expected result in the harm contemplated by section 13, I find that it does not apply in the circumstances of this appeal.

F. Did the institution exercise its discretion under sections 7(1)? If so, should this office uphold the exercise of discretion?

[120] I have found that some of the information at issue is exempt under section 7(1) of the *Act.* The exemption at section 7(1) 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, the Commissioner may determine whether the institution failed to do so.

[121] In addition, the Commissioner 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
- it fails to take into account relevant considerations.

[122] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[37] This office may not, however, substitute its own discretion for that of the institution.[38]

Relevant considerations

[123] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[39]

- 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

[37] Order MO-1573.
[38] Section 43(2).
[39] Orders P-344 and MO-1573.

  - exemptions from the right of access should be limited and specific
  - 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
- 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
- the historic practice of the institution with respect to similar information.

Representations, analysis and findings

[124] With respect to its exercise of discretion the town submits that it:

> ...notes that the requester is not seeking his own personal information, he has no sympathetic or compelling need to receive the information, disclosure will decrease, rather than increase public confidence in the operations of the institutions and the nature of the information is as already set out.

[125] In my view, the factors identified by the town as having been considered in its exercise of discretion not to disclose the requested information to the appellant are irrelevant considerations in the circumstances of this appeal.

[126] The town is reminded that one of the purposes of the *Act*, as set out in section 1, is to provide a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and

necessary exemptions from that right should be limited and specific. The town is also reminded of section 4 of the *Act* which establishes that every person has a right of access to a record or part of a record in the custody or under the control of an institution unless the record or part of the records falls within one of the exemptions set out in the *Act*.

[127] In this appeal, the fact that the information sought by the appellant does not constitute his personal information, the fact that he has no sympathetic of compelling need to receive this information and the fact that disclosure will decrease, rather than increase, public confidence in the operation of the institution do not, in my view, diminish his general right of access, with limited and specific exemptions where applicable.

[128] In exercising its discretion in this instance, the town was required to weigh the appellant's general right of access to information under the control of the town against the purpose of the exemption in section 7(1) of the *Act*. In the absence of evidence to demonstrate that it has done so, I have not been provided any basis upon which to uphold the town's decision to deny access to the information at issue under that exemption.

[129] Accordingly, I will require that the town exercise its discretion with respect to its application of section 7(1) to the portions of records 2 and 4 that I have upheld and provide me with representations as to the reasons for that decision. I will remain seized of this matter to complete my inquiry.

ORDER:

1. I order the town to disclose to the appellant, record 1, as previously severed by the town, record 4, in its entirety, and the portions of records 2 and 5 that I have found do not qualify for exemption under section 7(1) of the *Act*. This information should be disclosed to the appellant by providing him with a copy by no later than **May 6, 2015** but not before **May 1, 2015**. For the sake of clarity, I will provide the town with copies of records 2 and 5 that have been highlighted to identify the portions of those records that are not to be disclosed.

2. I order the town to exercise its discretion to deny access to the portions of records 2 and 5 to which I have found section 7(1) of the *Act* applies. The town is to provide me with written representations detailing the result of its exercise of discretion by **May 1, 2015**. If the town continues to withhold all or part of the information to which I have found section 7(1) applies, I order it to provide in its representations an explanation of the basis for exercising its discretion to do so.

3. If the town decides, after exercising its discretion, to disclose additional information in records 2 and 5 to the appellant, it must issue a new access decision in accordance with sections 19, 20, 21, and 22 of the *Act,* treating the date of its decision to disclose the information as the date of the request.

4. I may share the town's representations on its exercise of discretion with the appellant unless they meet the confidentiality criteria identified in *Practice Direction Number 7.* If the town believes that portions of its representations should remain confidential, it must identify these portions and explain why the confidentiality criteria apply to the portions it seeks to withhold.

5. I remain seized of this appeal pending the final determination of the town's exercise of discretion or any related issues that may arise.

Original Signed By: March 30, 2015
Catherine Corban
Adjudicator