Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1531

Appeal MA-010280-1

City of Toronto

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NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> Any and all documentation pertinent to or containing reference to [the requester]. This includes but should not be limited to reports, memos, letters, minutes of meetings, E-mails, correspondence, opinions, notes, notes to file, correspondence or notes resulting from phone conversations and any/all other related records from the past 2 years.

The requester also indicated the locations where responsive records may be found. The City identified 11 separate files containing responsive records held by the Toronto Housing Corporation (the THC), which was then an agency of the City. The new Toronto Community Housing Corporation (the TCHC), which replaced the THC, is now a separate institution under the *Act*. The City granted access to a portion of the responsive records and denied access to the remaining undisclosed records, or parts of records, pursuant to the following exemptions contained in the *Act*:

- advice or recommendations – section 7(1);
- solicitor-client privilege – section 12;
- invasion of privacy – sections 14(1) and 38(b) with reference to the considerations listed in section 14(2)(f) (highly sensitive information) and (h) (supplied in confidence) and the presumption in section 14(3)(c) (information relating to eligibility for social service or welfare benefits); and
- discretion to refuse access to a requester's own information – section 38(a).

The requester, now the appellant, appealed the City's decision to deny access.

During the mediation of the appeal, the City provided the appellant with access to several additional records and a copy of an index of the records at issue. The appellant also confirmed that she is seeking access only to records created during the two years immediately preceding the date of the request, April 30, 2001. As no other mediation was possible, the matter was moved to the adjudication stage of the appeal process.

I decided to seek the representations of the City, initially, as it bears the burden of demonstrating that the exemptions claimed apply to the records. In the course of making its representations, the City conducted a further review of the records at issue and agreed to disclose a number of additional documents to the appellant. As it is unclear if the City has already done so, I will order it to disclose Records 5-10, 23-24 and 35-36 from File #1, Record 1 from File #2, Records 1 and 3 from File #5, Record 1 from File #6, Record 2 and portions of Record 44 from File #7 and Records 32 and 55-56 from file #8. In its representations, the City also withdrew its reliance on the discretionary exemption in section 7(1) of the *Act*.

The City's submissions were shared, in part, with the appellant. Portions of these representations were withheld due to concerns which I had about the confidentiality of the contents of some of

the representations. The appellant also made submissions in response to the Notice of Inquiry. In her representations, the appellant reiterated that she is seeking access only to personal information relating to herself, and not other individuals.

DISCUSSION:

PERSONAL INFORMATION

Personal information is defined in section 2(1) of the *Act* to include "recorded information about an identifiable individual". The City submits that the records relate not only to the appellant but also THC staff and tenants, other identifiable individuals who conducted various investigations on behalf of the THC or provided it with information by way of correspondence.

The appellant has been a tenant of the THC and its predecessors since 1993 and has been very active in various tenant associations and tenant organizations. She has served in many high-profile positions in these organizations, advocating on behalf of herself and other tenants who live in City-owned properties. In addition to her work as a "tenant activist", the appellant has been involved in a number of disputes with the THC and its predecessors over matters relating to her own tenancy and others relating to the management of the building in which she resides. The records at issue in this appeal describe in bewildering detail a series of disagreements, accusations and disputes passing between the appellant and THC, as well as its predecessors, over the two year period covered by the request.

The appellant is clearly a forceful, opinionated, outspoken and often controversial figure in the building. Her own views and those of other identifiable individuals about her are contained in the majority of the records at issue in the appeal. As such, I find that they contain the personal information of the appellant, as that term is defined in section 2(1)(e) and (g).

The records also contain information about other TCHC tenants including information about their sexual orientation, race, sex, marital or family status and age. This information qualifies as the personal information of these individuals under the definition of that term contained in section 2(1)(a).

The records also contain information pertaining to TCHC (or its predecessors) staff members. Because many of the records describe complaints about the manner in which these individuals perform their work or raise questions about their integrity or honesty, I find that the information qualifies as their personal information under section 2(1)(h). As the information involves an examination or allegation into the character of the staff persons, I find that it represents their personal information, as opposed to relating to them only in their professional or employment capacities. Many of the records relate directly to allegations by the appellant against these individuals in their personal, rather than their professional, capacities and qualifies, accordingly, as their personal information.

The appellant has made it clear that she is not seeking access to the personal information of other identifiable individuals. However, because of the nature of the records, much of the information relating to other people is inextricably intertwined with that of the appellant. In addition,

because of the appellant's intimate knowledge of the circumstances surrounding the creation of the records and the identities of those involved in the various disputes documented therein, she is in a unique position to "read between the lines" and discern the identities of individuals even if their personal identifiers, such as their names, are removed.

The appellant indicates in her representations that she is not seeking the personal information of any individuals other than herself. Several of the records contain only personal information about other identifiable individuals and do not relate to the appellant or those matters which are of concern to her. Accordingly, I find that those records identified as File #1 – Records 18 and 103-118; File #7 – Records 17-18; File #8 – Records 41, 42, 57 and 63; and File #11 – Records 17, 106, 107-125 and 135 contain information which falls outside the scope of the appellant's request. I need not, therefore, address the application of the exemptions claimed for these records.

Several of the records do not contain any personal information as that term is defined in section 2(1). I find that those records designated as File #1 - Records 1, 3, 33 and 100; File #4 – Records 1 and 14; File #7 – Records 31-32, 46 and 49-50; File #8 – Record 58-62; File #11 – Records 17, 35-37 and 134 do not contain personal information.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/SOLICITOR-CLIENT PRIVILEGE

Introduction

One of the exceptions to the general right of access to one's own personal information is found in section 38(a) of the *Act*. Under this section, an institution has the right to deny a requester access to his or her own personal information in instances where the exemptions found in sections 6, 7, 8, 9, 10, 11, 12, 13 or 15 would otherwise apply to the information. In this case, the City relies on section 12 of the *Act* in conjunction with section 38(a) to deny access to the information contained in the records. I will, accordingly, consider whether section 38(a), taken together with section 12, applies to exempt the records from disclosure.

Solicitor-Client Privilege - Section 12

Section 12 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-Client Communication Privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> . . . the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

Solicitor-client communication privilege has also been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729].

Litigation Privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
> >
> > It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .
>
> > [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

In Order MO-1337-I, Assistant Commissioner Tom Mitchinson found that even where records were not created for the dominant purpose of litigation, copies of those records may become privileged if they have "found their way" into the lawyer's brief [see *General Accident*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.); *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (B.C. C.A.)]. The court in *Nickmar* stated the following with respect to this aspect of litigation privilege:

> . . . the result in any such case depends on the manner in which the copy or extract is made or obtained. If it involves a selective copying or results from research or the exercise of skill and knowledge on the part of the solicitor, then I consider privilege should apply.

In Order MO-1337-I, the Assistant Commissioner elaborated on the potential application of the *Nickmar* test:

> The types of records to which the *Nickmar* test can be applied have been described in various ways. Justice Carthy referred to them in *General Accident* as "public" documents. *Nickmar* characterizes them as "documents which can be obtained elsewhere", and [*Hodgkinson*] calls them "documents collected by the ... solicitor from third parties and now included in his brief". Applying the reasoning from these various sources, I have concluded that the types of records that may qualify for litigation privilege under this test are those that are publicly available (such as newspaper clippings and case reports), and others which were not created with the litigation in mind. On the other hand, records that were created with real or reasonably contemplated litigation in mind cannot qualify for litigation under the *Nickmar* test and should be tested under "dominant purpose".

The City's Position on the Application of Section 12 to the Records

The City's submissions on solicitor-client communication privilege state:

> . . . the records at issue include communications of a confidential nature made specifically for the purpose of obtaining legal advice with respect to the THC and their dealings with the appellant or they constitute information passed by the solicitor or THC staff to the other party aimed at keeping both informed so that advice may be sought and given as required; or constitute the solicitor's working papers for the purpose directly related to seeking formulating or giving of the legal advice.
>
> . . .
>
> The City solicitor's comments contain[ed] in Record 128, File #1 makes it quite clear that all of the records were necessary to her ability to provide advice to THC.

In addition, the City submits that the information contained in the records "is required by the solicitor who acts for the THC at proceedings before the [Ontario Rental Housing] Tribunal, which will include the pending hearing in January." I note that although this proceeding was adjourned in January of this year and a date for a hearing before the ORHT has not yet been agreed to, it remains ongoing.

With respect to those records which it argues are subject to litigation privilege, the City submits:

> …… submits that the records at issue include documents that were specifically produced or brought into existence with the dominant purpose of using them or their contents to conduct or aid in the conduct of the litigation, for example, File #1: Records 11-14, 19-22, 52-63, 65-99, etc.
>
> The City further submits that other records at issue were specifically compiled for inclusion in the solicitor's brief as supporting evidence to assist in the preparation of documents for litigation. Examples of such records include those noted under solicitor client communication privilege above as well as the following: File #2, Records 23-36; File #3, Records 1 to 17; File #4, Records 7, 9-10, 12; File #5, Records 2, 5-6, 15, 21, 28-29, 38; File #6, 1-19; File #7, Records 3-6, 8, 9, 15, 20-21, 26-27; File #8, Records 1-63, 69-80; File #9, Records 1-35; File #11, Records 1-14, 15, 24-27, etc.
>
> The City submits that the litigation has not been terminated but is current (as previously stated, the THC's harassment complaint against the appellant will likely be heard by the Tribunal in January). The City submits that all of the records at issue are relevant to this litigation and therefore litigation privilege applies.

Finally, the City submits that:

> . . . in applying the section 12 exemption, the City considered all relevant factors including the fact that the THC has had protracted issues relating to the appellant's tenancy including her non-payment of rent and alleged harassment and intimidation of staff and tenants, issues that are relevant to the continuing litigation between the parties.
>
> Moreover, with respect to those records that originated from or were sent to the appellant, the City has provided copies to the appellant. Only copies of such correspondence that have THC staff notations or were drafts that were not signed and sent to the appellant have been withheld from the appellant under section 12.
>
> In summary, it is the City's view that section 12 applies to all the records at issue and further that the City has properly exercised its discretion in denying access to exempt these records.

The Appellant's Representations on the Application of Section 12 to the Records

In her submissions, the appellant confirms that currently there remains outstanding one matter before the Ontario Rental Housing Tribunal originally set to be heard in January 2002 which has now been adjourned. She states that no new date for the hearing of this matter has yet been agreed upon. The appellant also takes issue with a number of what she sees as factual inaccuracies in the City's representations.

The appellant indicates that should I find that any of the information at issue in this appeal is exempt from disclosure under the litigation privilege component of the section 12 exemption, she asks that the City provide her with access to them once the litigation is concluded.

Findings:

Are the Records Exempt under the Solicitor-Client Communication Privilege Component of Section 12?

I have thoroughly reviewed each of the records at issue in this appeal. A small portion of these documents represent confidential communications between a solicitor and his/her client relating to the seeking, formulating or giving of legal advice. This information concerns seeking, giving and formulation of advice from counsel to the TCHC and its predecessors relating to legal issues involving the appellant. These include proceedings before the ORHT involving the appellant, attempts by the TCHC to address the multitude of complaints and accusations brought by or against the appellant and TCHC staff and the investigation and mediation of a dispute between the appellant and an employee of the TCHC. I find that the following records represent confidential communications between counsel for the TCHC and its employees relating to obtaining or providing legal advice:

File #1 - Records 18, 33, 51, 100, 101-102, 146; File #8 – Records 1-31, 34-40, 43-48, 49-54, 58-62 and 73-80; File #11 – Records 16 and 99.

As such, these records qualify for exemption from disclosure under the solicitor-client communication privilege component of section 12. Because File #1 – Records 51, 101-102 and 146; File #8 – Records 1-31, 34-40, 43-48, 49-54 and 73-80; and File #11 – Records 16 and 99 contain the personal information of the appellant, they are exempt from disclosure under section 38(a) of the *Act*.

In addition, I have concluded that four other records are sufficiently linked to the seeking or providing of legal advice to represent part of the "continuum of communications" between officials with the TCHC and its counsel. I therefore find that the records described in File #1 as Records 1, 3, 119 and 126 also qualify for exemption under the solicitor-client communications privilege component of section 12 following the reasoning expressed in *Balabel*. As Records 119 and 126 contain the personal information of the appellant, they are exempt from disclosure under section 38(a) of the *Act*.

Litigation Privilege

I find that those responsive records consisting of draft pleadings and letters to the ORHT were created for the dominant purpose of existing litigation involving the THC and the appellant before that tribunal. Accordingly, the records described as File #1 – Records 11-14, 19-22, 34, 52-78, 80-81, 82-93, 94, 96-99, 120-121, 122-123, 124-125 and 127-131 qualify for exemption under the litigation privilege component of section 12. I am satisfied that the litigation for which they were created, in the form of proceedings before the ORHT, remains on-going. The privilege in these records has not, therefore, been lost due to the termination of the litigation. Because all of these records contain the personal information of the appellant, they are properly exempt under section 38(a).

As noted above, the City relies on the test described by Assistant Commissioner Mitchinson in Order MO-1337-I from the *Nickmar* decision to exempt a large number of records from disclosure. The City takes the position that because its counsel required that TCHC staff provide her with a large number of documents in order to assist her in preparing for the litigation, all of these records fall within the ambit of litigation privilege as contemplated by *Nickmar*. In support of this position, the City indicates that all of the compiled records and the information they contain was relevant to the litigation and was brought together by the solicitor in order to properly prepare her case.

Many of the records remaining at issue in this appeal consist of communications between the appellant, other tenants and various TCHC staff on a wide variety of issues ranging from the appellant's own tenancy to matters relating to the management of the building where she lives. In my view, counsel for the TCHC asked staff to provide her with these records in order to ensure that counsel was well-briefed and informed of all of the circumstances extant in the relationship between the THC, its other tenants and the appellant. As a result of the exercise of skill and knowledge on the part of counsel, a great many records originating with or sent to the appellant "found their way" into the litigation brief which she compiled. While these records

were not prepared for the dominant purpose of litigation, they were compiled for inclusion in counsel's litigation brief "as supporting evidence to assist in the preparation of documents for litigation".

Based on my review of the contents of these records, counsel did, in fact, incorporate much of the information contained in them into the pleadings and other written materials filed with the ORHT. The subject matter of the records bears directly on the issues before the ORHT and a great deal of the information in the records was required by counsel to adequately and thoroughly prepare the TCHC's written materials for the ORHT proceedings.

Accordingly, I find that the following documents are exempt under the principles established in Order MO-1337-I and *Nickmar* with respect to the litigation privilege component of section 12:

> File #1 – Records 2, 4, 15-17, 79, 132-136, 137-141, 142-145 and 146; File #2 – Records 2-23, 24-36 and 37-38; File #3 – Records 1-17; File #4 – Records 7, 9, 12, 15, 38 and 41; File #5 – Records 5, 6, 15, 21, 23, 24, 27, 28, 29 and 38; File #6 in its entirety; File #7 – Records 2, 3-6, 8, 9, 10, 11-12, 13-16, 20, 21, 23-25, 26-29, 30, 39, 41, 42-43, 45 and 47; File #8 – Records 33, 56, 65-68 (which is the same as File #11 – Records 85-88) and 69-72; File #9 – Records 1-35; File #10 – Records 1-13; File #11 – Records 1-3, 4, 15, 24-27, 48, 49, 51, 54, 55, 56, 57, 59, 65-67, 68, 70-74, 75, 106, 107-125, 129, 133 and 135.

As all of these records, with the exception of File #4 – Record 1 and 14; File #5, Record 41; File #7 – Records 31-32, 46 and 49-50, contain the personal information of the appellant, and are exempt from disclosure under section 38(a), in conjunction with section 12.

Absurd Result

In Order M-444, former Adjudicator John Higgins stated:

> . . . it is an established principle of statutory interpretation that an absurd result, or one which contradicts the purposes of the statute in which it is found, is not a proper implementation of the legislature's intention. In this case, applying the presumption to deny access to information which the appellant provided to the Police in the first place is, in my view, a manifestly absurd result. Moreover, one of the primary purposes of the *Act* is to allow individuals to have access to records containing their own personal information, unless there is a compelling reason for non-disclosure. In my view, in the circumstances of this appeal, non-disclosure of this information would contradict this primary purpose.
>
> It is possible that, in some cases, the circumstances would dictate that this presumption should apply to information which was supplied by the requester to a government organization. However, in my view, this is not such a case. Accordingly, for the reasons enumerated above, I find that the presumption in section 14(3)(b) does not apply. In the absence of any factors favouring non-disclosure, I find that the exemption in section 38(b) does not apply to the information at issue in the records.

Several subsequent orders have supported this position and include similar findings (M-613, M-847, M-1077 and P-1263, for example). All of these orders have found that non-disclosure of personal information which was originally provided to the institution by an appellant, or personal information of other individuals which would clearly have been known to an appellant, would contradict one of the primary purposes of the *Act*, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. They determined that applying the presumption to deny access to the information which the appellant provided to the institution would, according to the rules of statutory interpretation, lead to an "absurd" result.

In Order MO-1524-I, Adjudicator Laurel Cropley made the following observations with respect to the application of the "absurd result" principle in the context of a request for records containing one's own personal information:

> The privacy rights of individuals other than the appellant are without question of fundamental importance. One of the primary purposes of the *Act* (as set out in section 1(b)) is to protect the privacy of individuals. Indeed, there are circumstances where, because of the sensitivity of the information, a decision is made not to apply the absurd result principle (see, for example, Order PO-1759). In other cases, after careful consideration of all of the circumstances, a decision is made that there is an insufficient basis for the application of the principle (see, for example, Orders MO-1323 and MO-1449). In these situations, the privacy rights of individuals other than the requester weighed against the application of the absurd result principle.
>
> However, the withholding of personal information of others in certain circumstances, particularly where it is intertwined with that of the requesting party, would also be contrary to another of the fundamental principles of the *Act*: the right of access to information about oneself. Each case must be considered on its own facts and all of the circumstances carefully weighed in order to arrive at a conclusion that, in these circumstances, withholding the personal information would result in an absurdity.

In the present case, I find that a large number of the records at issue either originated with the appellant or were sent to her by the TCHC or other individuals. In my view, an absurd result would obtain if the appellant was not granted access to those records. In some cases, the copies of the records include various markings and notations made by TCHC's counsel. I find that these notations ought not to be disclosed to the appellant as they form part of the "working papers" of the TCHC's solicitor and are properly exempt from disclosure under the solicitor-client communications component of section 12. As a result, I will order the City to disclose the following records to the appellant, with the notations removed. These records are:

> File #1 – Records 2 and 79; File #4 – Records 7, 9, 12, 15, 38 and 41; File #5 – Records 6, 15, 21, 27 and 41; File #7 – Records 2, 8, 10, 11-12, 21, 23-25, 39, 46, 47 and 49-50; File #8 – Records 33 and 56; File #11 – Records 15, 48, 49, 54-57, 68, 70-74, 99 and 129.

I further find that my analysis of the records originating with or sent to the appellant which are described above under the heading "absurd result" would apply equally to a discussion of the application of the invasion of privacy exemptions in sections 14(1) and 38(b). Accordingly, I find that these exemptions also do not apply to exempt these particular records from disclosure.

ORDER:

1. I uphold the City's decision to deny access to all of the records, with the exception of File #1 – Records 2, 5-10, 23-24, 35-36 and 79; File # 2 – Record 1; File #4 – Records 7, 9, 12, 15, 38 and 41; File #5 – Records 1, 3, 6, 15, 21, 27 and 41; File #6 – Record 1; File #7 – Records 2, 8, 10, 11-12, 21, 23-25, 39, 44, 46, 47 and 49-50; File #8 – Records 32, 33 and 55-56; File #11 – Records 15, 48, 49, 54-57, 68, 70-74, 99 and 129.

2. I order the City to disclose File #1 – Records 2, 5-10, 23-24, 35-36 and 79; File # 2 – Record 1; File #4 – Records 7, 9, 12, 15, 38 and 41; File #5 – Records 1, 3, 6, 15, 21, 27 and 41; File #6 – Record 1; File #7 – Records 2, 8, 10, 11-12, 21, 23-25, 39, 44, 46, 47 and 49-50; File #8 – Records 32, 33 and 55-56; File #11 – Records 15, 48, 49, 54-57, 68, 70-74, 99 and 129 by providing the appellant with copies in which any notations made by counsel have been severed by **May 31, 2002 but not before May 27, 2002**.

3. In order to verify compliance with Order Provision 2, I reserve the right to require the City to provide me with copies of the records disclosed to the appellant.

Original signed by
Donald Hale
Adjudicator

April 26, 2002