

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2789

Appeal MA11-125

City of Toronto

September 13, 2012

Summary: The appellant seeks access to records relating to his request to the City of Toronto for a conveyance. The city claims that the majority of records contain solicitor-client privileged information and are exempt under section 38(a) in conjunction with section 12. The city also claims that two records contain advice and recommendations and are exempt under section 7(1). The city's decision to withhold records it claims contain solicitor-client privileged information is upheld. The city is ordered to disclose the two records it claims contain advice and recommendations. Appeal upheld in part.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss.2(1) definition of "personal information", 7(1), 12 and 38(a).

OVERVIEW:

[1] The appellant filed a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Toronto (the city), for access to information relating to his property.

[2] The city initially issued a fee estimate in the amount of \$413.00, and an interim access decision advising that portions of the responsive records qualify for exemption under the *Act*. The city further advised that a \$206.50 deposit was required to complete its processing of the request.

[3] Upon receipt of the requested deposit, the city issued a decision granting access

to some of the records in full, partial access to others and withholding access entirely to others. The city claimed that the withheld portions qualify for exemption under sections 38(a) (requester's personal information) in conjunction with sections 7(1) (advice and recommendations) and 12 (solicitor-client privilege). The city also claimed that disclosure of some withheld portions would constitute an unjustified invasion of personal privacy under section 38(b) in conjunction with section 14(1) (personal privacy). In addition, the city withheld access to some records relating to the appellant's complaint to the city's Integrity Commissioner pursuant to section 53(1) (confidentiality provision in other Act prevails). The city attached an Index of Records to its decision letter.

[4] The appellant appealed the city's decision to this office.

[5] At the end of mediation, the appellant confirmed that he no longer wishes to pursue access to the records the city withheld under section 14(1) and 53(1). However, the appellant confirmed that he continues to seek access to the records withheld pursuant to section 38(a) in conjunction with sections 7(1) and 12. The appellant also questioned whether the portions of the records identified in the city's revised index of the records as not responsive are in fact responsive to his request.

[6] The issues remaining in dispute at the end of mediation were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. The parties' representations were shared in accordance with the *IPC's Code of Procedure and Practice Direction 7*.

[7] In this order, I find that the majority of the records contain the appellant's personal information but also find that these records contain solicitor-client privileged information and thus are exempt from disclosure. However, I order the city to disclose the two records it claims are exempt under section 7(1).

RECORDS:

[8] The city provided a revised Index of Records with its reply representations. The revised index identifies portions of records which the city now claims are not responsive to the request. I have reviewed these portions and find they are not responsive as they refer to administrative matters such as the availability of city staff. Accordingly, I have removed these portions from the scope of this appeal.

[9] The records at issue are described in the index of records below:

Group A: Correspondence exchanged between Legal Services staff and other city staff			
Record #	Page Nos.	Record Description	Disclosed?
2	19-22	Emails and attachment from Acting Supervisor to Solicitor, Sep 27	s.12 - Denied in Full

9	209-213	Email and attachments from Acting Supervisor to Solicitor, Oct 20	s.12 - Denied in Full
10	214-216	Email from Solicitor to Acting Supervisor, Oct 20	s.12 - Denied in Full
11	250-259	Emails and attachments from Acting Supervisor to Solicitor, Oct 14	s.12 - Denied in Full
12	263-264	Email from Surveyor to Solicitor and Manager, Oct 4	s.12 - Denied in Full
13	265-268	Emails and attachments from Solicitor to Acting Supervisor, Oct 4	s.12 - Denied in Full
17	289-304	Emails and attachment between Solicitor, Manager, Surveyor and Acting Supervisor, Sep 23-27	s.12 - Denied in Full
19	307-308	Email from Solicitor to Solicitor and Acting Supervisor, Sep 23	s.12 - Denied in Full
21	354-359	Emails from Solicitor to Solicitor and Acting Supervisor, Sep 21	s.12 - Denied in Full
22	360-362	Email from Acting Supervisor to Solicitor and Solicitor, Sep 21	s.12 - Denied in Full
23	379	Email from Acting Supervisor to Solicitor, Sep 20	s.12 - Denied in Full
24	383-384	Email from Solicitor to Acting Supervisor and Solicitor, Sep 20	s.12 - Denied in Full
26	387-388	Email from Acting Supervisor to Solicitor, Sep 15	s.12 - Denied in Full
27	389	Email from Solicitor to Acting Supervisor, Sep 14	s.12 - Denied in Full
28	390-395	Email and attachments from Acting Supervisor to Solicitor, Sep 14	s.12 - Denied in Full
29	396-397	Email from Acting Supervisor to Solicitor, Solicitor, and Manager, Sep 14	s.12 - Denied in Full
30	398-399	Email from Solicitor to Acting Supervisor, Solicitor, and Manager, Sep 14	s.12 - Denied in Full
36	426	Email from Acting Supervisor to Solicitor, Aug 11	s.12 - Denied in Full
38	428-432	Email from Acting Supervisor to Solicitor, Solicitor, and Manager, Aug 6	s.12 - Denied in Full
39	445-449	Email from Manager to Solicitor, Solicitor, and Acting Supervisor, Aug 6	s.12 - Denied in Full
40	450-453	Email from Solicitor to Solicitor, Acting Supervisor and Manager, Aug 6	s.12 - Denied in Full
42	456-458	Email from Manager to Solicitor, Solicitor, and Acting Supervisor, Aug 6	s.12 - Denied in Full
44	468	Email from Solicitor to Acting Supervisor, Aug 6	s.12 - Denied in Full
45	475-478	Email from Solicitor to Solicitor, Acting Supervisor and Manager, Aug 6	s.12 - Denied in Full
46	479-482	Email from Acting Supervisor to Solicitor, Aug 6	s.12 - Denied in Full
47	554-555	Email and attachment from Acting Supervisor to Solicitor and Solicitor, Aug 5	s.12 - Denied in Full
48	556-558	Email from Acting Supervisor to Solicitor, Aug 4	s.12 - Denied in Full
49	567-568	Email from Deputy City Manager to Solicitor, Solicitor and Director, Aug 1	s.12 - Denied in Full
50	581-584	Email from Acting Supervisor to Solicitor and Solicitor, July 29	s.12 - Denied in Full
55	600-603	Email from Acting Supervisor to Solicitor and Solicitor, July 9	s.12 - Denied in Full
57	608-610	Email from Solicitor to Acting Supervisor and Solicitor, July 29	s.12 - Denied in Full
58	611-613	Email from Acting Supervisor to Solicitor and Solicitor, July 29	s.12 - Denied in Full
59	614-616	Email from Acting Supervisor to Solicitor and Solicitor, July 29	s.12 - Denied in Full
60	617-618	Email from Acting Supervisor to Solicitor, July 29	s.12 - Denied in Full
61	619-621	Email from Solicitor to Solicitor and Acting Supervisor, July 29	s.12 - Denied in Full
62	622-623	Email from Solicitor to Acting Supervisor, July 29	s.12 - Denied in Full
63	624-625	Email from Acting Supervisor to Solicitor, July 29	s.12 - Denied in Full
64	626	Email from Solicitor to Acting Supervisor, July 29	s.12 - Denied in Full
65	627	Email from Solicitor to Director and Solicitor, July 29	s.12 - Denied in Full
73	655-658	Email from Acting Supervisor to Solicitor, July 13	s.12 - Denied in Full
74	659-660	Email from Acting Supervisor to Solicitor, July 9	s.12 - Denied in Full
76	666-674	Emails between Acting Supervisor and Solicitor, July 6-Jun 21	s.12 - Denied in Full
78	679-684	Solicitor to Solicitor, Oct 4	s.12 - Denied in Full
80	686	Email from Solicitor to Director, Oct 4	s.12 - Denied in Full

81	687	Email from Director to Solicitor, Acting Supervisor and Manager, Oct 1	s.12 - Denied in Full
86	703-704	Email from Deputy City Manager to Solicitor, Solicitor and Director, Aug 1	s.12 - Denied in Full
87	710-714	Email and attachments from Acting Supervisor to Solicitor, Oct 20	s.12 - Denied in Full
88	719-720	Email from Surveyor to Solicitor and Manager, Oct 4	s.12 - Denied in Full
91	729	Email from Director to Solicitor, Manager and Acting Supervisor, Oct 1	s.12 - Denied in Full
92	730-735	Emails between Solicitor, Manager and Surveyor, Sep 14-27	s.12 - Denied in Full
98	758	Email from Surveyor to Solicitor, Solicitor, Manager, and Co-ordinator, Sep 17, p. 1	s.12 - Denied in Part
99	760-762	Email and attachment from Acting Supervisor to Solicitor, Sep 15	s.12 - Denied in Full
100	763	Email from Solicitor to Solicitor and Acting Supervisor, Sep 14	s.12 - Denied in Full
101	764-770	Email and attachments from Acting Supervisor to Solicitor, Sep 14	s.12 - Denied in Full
107	780	Email from Solicitor to Solicitor, Manager and Co-ordinator, Sep 14, p. 1	s.12 - Denied in Part
110	902-903	Email from Deputy City Manager to Solicitor, Solicitor and Director, Aug 1	s.12 - Denied in Full

Group B: Correspondence exchanged between non-legal city staff members

Record #	Page Nos.	Record Description	Disclosed?
1	16-18	Emails between Acting Supervisor, Archivist and Records Analyst, Sep 27-Aug 11, p. 1 & 2	s.12 - Denied in Full
3	23-26	Emails and attachment between Acting Supervisor, Archivist and Records Analyst, Sep 27-Aug 11	s.12 - Denied in Full
4	27-30	Emails between Acting Supervisor, Archivist and Records Analyst, Sep 27-Aug 11	s.12 - Denied in Full
5	33-36	Emails between Acting Supervisor, Archivist and Records Analyst, Sep 23-Aug 11	s.12 - Denied in Full
6	52	Email from Records Analyst to Acting Supervisor and Archivist, Aug 11	s.12 - Denied in Full
14	269-271	Email and attachments from Acting Supervisor to Director and Manager, Oct 4	s.12 - Denied in Full
15	272	Email from Director to Manager & Acting Supervisor, Oct 4	s.12 - Denied in Full
16	285-288	Emails between Superintendent and Acting Supervisor, Sep 28	s.12 - Denied in Full
18	305-306	Email from Acting Supervisor to Manager, Sep 23	s.12 - Denied in Full
20	339-341	Email from Acting Supervisor to By-Law Officer, Sep 21	s.12 - Denied in Full
25	385	Email from Manager to Acting Supervisor, Sep 17, p. 1	s.12 - Denied in Part
31	400	Email from Supervisor to Acting Supervisor, Sep 14, p. 1	s.12 - Denied in Part
32	402	Email from Supervisor to Acting Supervisor, Sep 14, p. 1	s.12 - Denied in Part
33	404	Email from Manager to Acting Supervisor, Sep 14, p. 1	s.12 - Denied in Part
37	427	Email from Acting Supervisor to Records Analyst, Aug 11	s.12 - Denied in Full
41	454-455	Email from Acting Supervisor to Manager, Aug 6	s.12 - Denied in Full
43	463	Email from Acting Supervisor to Manager, Aug 6	s.12 - Denied in Full
51	585-588	Email from Manager to Manager, Manager and Manager, July 29	s.12 - Denied in Full
52	589-592	Email from Manager to Acting Supervisor, July 29	s.12 - Denied in Full
53	593-595	Email from Acting Supervisor to Superintendent, July 29	s.12 - Denied in Full
54	596-599	Email from Manager to Manager, Manager, and Manager, July 29	s.12 - Denied in Full
56	604-607	Email from Acting Supervisor to Manager, July 29	s.12 - Denied in Full
75	661-665	Email and attachment from Acting Supervisor to Director and	s.12 - Denied in Full

		Manager, July 7	
77	678	Email from Acting Supervisor to Director and Manager, Oct 4	s.12 - Denied in Full
79	685	Email from Director to Manager and Acting Supervisor, Oct 4	s.12 - Denied in Full
82	688-689	Email from Manager to Director, Sep 23	s.12 - Denied in Full
83	690	Email from Acting Supervisor to Manager and Supervisor, Sep 14, p. 1	s.12 - Denied in Part
84	692	Email from Records Analyst to Acting Supervisor and Archivist, Aug 11	s.12 - Denied in Full
85	693	Email from Supervisor to Acting Supervisor and Manager, Sep 14, p. 1	s.12 - Denied in Part
89	721-727	Email and attachments from Acting Supervisor to Director and Manager, Oct 4	s.12 - Denied in Full
90	728	Email from Director to Manager and Acting Supervisor, Oct 4	s.12 - Denied in Full
93	736-749	Email and attachments from Surveyor to Manager, Sep 27	s.12 - Denied in Full
94	750-751	Email from Manager to Surveyor, Sep 23	s.12 - Denied in Full
95	752-753	Email from Manager to Director Sep 23	s.12 - Denied in Full
96	754-755	Email from Acting Supervisor to Manager, Sep 23	s.12 - Denied in Full
97	756	Email from Manager to Acting Supervisor, Sep 17, p. 1	s.12 - Denied in Part
102	771	Email from Supervisor to Manager, Sep 14, p. 1	s.12 - Denied in Part
103	773	Email from Acting Supervisor to Manager and Supervisor, Sep 14, p. 1	s.12 - Denied in Part
104	775	Attachment of email from Acting Supervisor to Manager and Supervisor, Sep 14	s.12 - Denied in Full
105	776	Email from Supervisor to Acting Supervisor and Manager, Sep 14, p. 1	s.12 - Denied in Part
106	778	Email from Manager to Acting Supervisor, Sep 14, p. 1	s.12 - Denied in Part
108	804-811	Email and attachments from Acting Supervisor to Manager, Aug 6	s.12 - Denied in Full
109	816	Email from Acting Supervisor to Manager, Aug 6	s.12 - Denied in Full
Group D: Correspondence between Staff in Transportation Services for which s.7 is applied in part			
Record #	Page Nos.	Record Description	Disclosed?
34	407	Email from Manager to Acting Supervisor, Sep 3, p. 1	s. 7(1) – Disclose in Part
35	409	Email from Acting Supervisor to Manager, Sep 3	s. 7(1) – Disclose in Part

ISSUES:

- A. Do the records contain “personal information” as defined in section 2(1)?
- B. Do the records contain solicitor-client privileged information under section 38(a) in conjunction with section 12(1)?
- C. Do the records contain advice and recommendations under section 7(1)
- D. Did the city properly exercise its discretion in applying the discretionary exemptions at section 38(a)?

DISCUSSION:

A. Do the records contain “personal information” as defined in section 2(1)?

[10] In order to determine whether section 38(a) of the *Act* applies in the circumstance of this appeal, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates.

[11] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225].

[12] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225 and MO-2344].

[13] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

[14] The city submits that the Group A and B records address questions about the potential legal issues about the use of two properties. The city submits that appellant owns one of the properties in question and as a result, the records “peripherally” contain his personal information. However, the city submits that the withheld portions of the emails in Group D do not contain the appellant’s personal information. The city states that the withheld portions of these records “address issues relating to the property” and not the appellant.

[15] The appellant’s representations did not address the issue as to whether the records contain his personal information.

[16] I have reviewed the records and agree with the city that the Group A and B records contain the appellant’s personal information. In particular, the records contain information about the appellant’s address [paragraph (d) of the definition of personal information in section 2(1)], his personal opinions or views [paragraph (e)] along with his name where it appears with other personal information relating to him [paragraph h)]. Accordingly, I will go on to determine whether the Group A and B records are exempt under section 38(a). Section 38(a) recognizes the special nature of requests for one’s own information.

[17] With respect to the remaining records, I find that the withheld portions of the Group D records do not contain the personal information of any identifiable individual. As a result, I will go on to determine whether these records qualify for exemption under section 7(1) of the *Act*.

B. Do the records contain solicitor-client privileged information under section 38(a)?

[18] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right. Section 38(a) reads:

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

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

[19] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information [Order M-352].

[20] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[21] In this case, the institution relies on section 38(a) in conjunction with section 12, which states:

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

[22] Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply. The city claims that both branches 1 and 2 apply to the Group A and B records.

[23] For the reasons stated below, I find that the solicitor-client communication privilege under branch 1 applies to the Group A and B records and that the city has not waived its privilege. As a result of my finding, it is not necessary for me to determine whether the litigation privilege under branch 1 or the privileges under branch 2 also apply.

Branch 1: common law privilege

[24] The city submits that the Group A and B records contain solicitor-client privileged information. The city advises that the Group A records contain correspondence between its legal services staff and other city staff, or solely between legal services staff. The city advises that the Group B records comprise of correspondence exchanged between non-legal city staff members.

[25] Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Solicitor-client communication privilege

[26] 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 or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

[27] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Orders PO-2441, MO-2166 and MO-1925].

[28] The privilege applies to “a continuum of communications” between a 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 [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

[29] The privilege may also 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].

[30] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Group A Records – Correspondence exchanged between Legal Service staff and other city staff

[31] The city submits that these records comprise of correspondence “prepared by or for the City’s solicitors, in relation to issues involving the Current Dispute and potential litigation”. In support of its position, the city goes on to state:

Some of the Group A records in question are the “working drafts” of various documents prepared in relation to the Current Dispute. Some of the Group A records are communications between the City Legal Services and their internal clients, advising them of recent developments in the Current Dispute, and providing copies of documents prepared by City Legal Services to their internal clients. Providing these “working drafts” would provide the substance of the solicitor-client advice provided to the City in relation to the Current Dispute to be publicly available.

...

Other records are prepared by or for Legal Services such as memorandums, setting out legal and factual issues for the purpose of formulating legal opinions, or are documents provided to Legal Services, setting out facts, issues, or instructions to the Legal Services department.

[32] The appellant’s representations question the validity of the city’s claim that the records contain solicitor-client privileged information. In this regard, the appellant’s representations state:

... the sheer volume of legal records suggest that the City Solicitor’s office has engaged itself in the day-to-day activities of the Transportation Department while moving away from its capacity as a legal advisor. The claim of privilege must be strictly applied so that public agency operating departments cannot hide by merely involving legal counsel in their normal activities and using lawyer’s files as a dumping ground for information in the hopes of keeping such information confidential. This would represent a grotesque misapplication of the concept of such privilege.

[33] I have carefully reviewed the Group A records and find that these records comprise of emails and attached documents exchanged between city solicitors and city solicitors and non-legal staff. I note that many of the e-mails duplicate information contained in other e-mails as a result of individuals responding to an e-mail, thus creating an email chain. As a result, some of the e-mail chains are very lengthy, which contributes to the voluminous nature of the records.

[34] With respect to the content of these emails, I am satisfied that the creation of these records were aimed at keeping both the city and its solicitors informed so that legal advice may be sought and given as required.

[35] Having regard to the nature of information contained in the Group A records, I find that these records contain confidential communications between the city solicitors and the city about legal matters. Accordingly, I find that the Group A records fall within the ambit of the solicitor-client privilege under Branch 1, subject to my finding, below, as to whether the privilege has been waived.

Group B Records – Correspondence exchanged between non-legal city staff members

[36] The city submits that these records “contain content which would directly or indirectly reveal the content of documents collected or received by the city’s solicitors for the purpose of formulating legal advice or preparing for potential litigation”. The city states the following in its representations:

All of the Group B Records are, as has been previously identified, documents which are internal circulation within members of the City program areas, which from the City’s Legal Departments’ internal clients, of communications which contain or would otherwise reveal communications between City’s Legal Department and other specific City Staff.

[37] The city also states that the Group B records are “re-transmissions” of the Group A records.

[38] I have carefully reviewed the Group B records and find that they contain solicitor-client communication privileged information. Though most of these records were not prepared by or for the city solicitors, I am satisfied that they contain information which would reveal the content of discussions between city solicitors and staff. In addition, I find that disclosure of these records would indirectly reveal information exchanged between the city solicitors and city staff for the purpose of keeping both the city and its solicitors informed so that legal advice may be sought and given as required. For instance, some of the emails seek to solicit information the solicitors asked staff to collect on their behalf. In other emails, staff disseminate, paraphrase or reveal discussions they had with solicitors. In others, staff forward emails received from city solicitors to one another. Previous decisions from this office have found that communications between non-legal staff that refer directly to legal advice originally provided by legal counsel to other staff would reveal solicitor-client privileged communications.¹

¹ Orders PO-2087-I, PO-2223, PO-2370 and PO-2624.

[39] Having regard to the content of the records, I find that the records form part of the "continuum of communications" recognized in *Balabel* as falling within the solicitor-client privilege in branch 1. Accordingly, I find that the Group B records fall within the ambit of the solicitor-client privilege under branch 1, subject to my finding, below, as to whether the privilege has been waived.

Loss of privilege

Waiver

[40] The city submits that it has not waived any privilege attached to the Group A or B records. The city submits that the records "were at all times treated as confidential communications and not shared with any party, which was not part of the solicitor-client relationship". The appellant submits that any privilege that may attach to records has been waived. In support of his position, the appellant argues:

- The City Solicitor identified specific provisions of the *Municipal Code* to the appellant in an effort to assist him prepare his conveyance request to the city. The appellant states that "this action by the City Solicitor has removed the City Solicitor from the capacity of professional legal advisor to some other capacity and therefore solicitor-client privilege does not apply".
- The city waived privilege by communicating its legal position and strategy to a Councillor, who is a third party. The appellant states "[s]uch action entirely negates any claim that the City might have to privilege of such records". In support of this position, the appellant refers to a portion of an email (page 825), which was disclosed to him.

[41] Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

[42] Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege

[*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

[43] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman*

v. General Crane Industries Ltd. (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.).

[44] Waiver has been found to apply where, for example

- the record is disclosed to another outside party [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)]
- the communication is made to an opposing party in litigation [Orders MO-1514 and MO-2396-F]
- the document records a communication made in open court [Orders P-1551 and MO-2006-F]

[45] I have carefully considered the appellant's representations and am not satisfied that he has adduced sufficient evidence to establish that the city waived the privilege attached to the Group A and B records. In making my decision, I considered the city's evidence and am satisfied that the city treated the Group A and B records confidentially and did not waive its privilege to these records by disclosing the content of the records to outside parties. In my view, the city's identification of relevant legislation to the appellant does not constitute a waiver of privilege. I also considered the appellant's evidence that the city revealed its "legal position and strategy" to a councillor and carefully reviewed page 825 of the records, which is an email from a councillor disclosed in part to the appellant. I have carefully reviewed the email and it appears that the email merely confirms the councillor's understanding that the matter is being supervised by the city's legal department. The councillor also states that it is his understanding that the city does not want to escalate its discussions with the appellant's lawyer. In my view, the fact that the councillor indicated that the city's legal department was supervising the matter and it was interested in de-intensifying the dispute does not amount to a disclosure of the city's "legal position and strategy".

[46] Having regard to the above, I find that the city has not waived its privilege to the records I found falling within the ambit of the solicitor-client communication privilege under branch 1. As a result, I find that the Group A and B records qualify for exemption under section 38(a). I will go on to determine whether the city properly exercised its discretion in applying section 38(a) to these records. However, first I will consider whether the Group D records qualify for exemption under section 7(1).

C. Do the records contain advice and recommendations under section 7(1)?

[47] The city submits that the Group D records comprise of two e-mails that are part of an e-mail chain between two individuals from its Transportation Department. The

emails were disclosed, in part, to the appellant and the city submits that the emails relate to the transfer of the appellant's written conveyance request.

[48] As stated above, the city indicates that the withheld portions of these records solely relate to issues relating to the subject property. The withheld portion comprises of three sentences which originally appear on the email chain on page 409 and is duplicated on page 407.

[49] The city's representations state:

... The redacted portions of the Group D records address three sentences, which could reveal a suggested course of conduct with respect to the City's actions in response to the [appellant's] letter seeking the transfer to him of City owned property.

The Group D records, for which access was withheld on the basis of the exemption under s. 7, set out more than a mere description of facts in that they contain a suggested course of conduct with respect to the City's determination of whether the disposition of the On-Foot Reserve, would be appropriate from the position of Transportation Services.

...

It is the City's submission that, these three redacted sentences constitute a recommendation, and that any portions which would not be so characterized are information which while not a recommendation, would indirectly reveal the substance of the recommendation, would permit the accurate inferences as to the nature of the recommendation.

[50] The appellant's representations did not address the issue of whether the Group D records qualify for exemption under section 7(1).

[51] 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.

[52] 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. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in

Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner) (1999), 118 O.A.C. 108 (C.A.)].

[53] Previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information [see Order PO-2681].

[54] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised.²

[55] Advice or recommendations may be revealed in two ways:³

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

[56] I have carefully reviewed the information at issue and find that it does not qualify for exemption under section 7(1). Though the information was exchanged between city employees and it appears that the purpose of the communication is for one employee to inform the other about a specific matter. I am not satisfied that the communication qualifies as "advice or recommendations" for the purposes of section 7(1). As stated above, in order for this information to qualify as "advice or recommendations", it must suggest a course of action that will ultimately be accepted or rejected by the person being advised. That is not the case here. Instead, a city employee provides another with information about a course of action already decided. In addition, there is insufficient evidence before me to suggest that the city employee receiving the information is in a position to ultimately accept or reject the information. Accordingly, it cannot be said that the communication contains a suggested course of action that will be ultimately be accepted or rejected by the person being advised.

[57] Having regard to the above, I find that disclosure of the information at issue would not reveal the advice of the city employee in question and find that the exemption at section 7(1) does not apply. As the city has not claimed that any other exemption applies, and it appears that no mandatory exemption could apply, I will order the city to disclose the portions of the Group D records it withheld under section 7(1). For the sake of clarity, I will highlight the portions of the Group D records the city

² [Orders PO-2028, 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].

³ [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above)].

claims are exempt under section 38(b). These portions of the records are not at issue in this appeal and this will continue to be withheld from the appellant.

E. Did the city properly exercise its discretion in applying the discretionary exemptions at sections 38 (a)?

[58] The section 38(a) exemption 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.

[59] 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.

[60] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

[61] The city submits that it exercised its discretion in good faith and took into account the following relevant considerations:

- the purposes of the *Act*, including the principle that individuals should have a right of access to their own personal information;
- the wording of the exemption and the interests it seeks to protect;
- the nature of the information and the extent to which it is significant and/or sensitive to the city;
- whether disclosure will increase public confidence in the operation of the institution;
- whether the requester has a sympathetic or compelling need to receive the information; and
- the age of the information.

[62] The city advises that in making its decision to withhold the Group A and B records, it determined that the records contained highly sensitive information and that the appellant did not have a sympathetic or compelling need to obtain this information. In addition, the city submits that disclosure would decrease public confidence. Finally, the city argues that the information at issue only marginally relates to the appellant.

[63] The appellant's representations did not address this issue.

[64] Having regard to the city's representations, I am satisfied that it properly exercised its discretion and in doing so took into account relevant considerations such as the confidential nature of the information I found fell within the ambit of the solicitor client communication privilege. In doing so, the city took into account the significance and sensitivity of this information. I am also satisfied that the city took into consideration that one of the purposes of the *Act* includes the principle that requesters should have a right of access to their own information. However, in my view, this factor does not outweigh the purpose of the solicitor-client privilege exemption which seeks to protect confidential communications between solicitors and their clients. Finally, I find that the city did not exercise its discretion in bad faith or for an improper purpose, nor is there any evidence that it took into consideration irrelevant considerations.

[65] Having regard to the above, I find that the city properly exercised its discretion in applying section 38(a) in conjunction with section 12.

ORDER:

1. I order the city to disclose the portions of the Group D records it withheld under section 7(1) of the *Act* **by October 15, 2012**. For the sake of clarity, in the copies of the records enclosed with the city's order, I have highlighted the portions of pages 407 and 409 (Group D records) which **should not** be disclosed to the appellant.
2. I uphold the city's decision to withhold the Group A and B records.
3. In order to verify compliance with order provisions 1 and 2, I reserve the right to require a copy of the records disclosed by the city to be provided to me.

Original Signed by: _____
Jennifer James
Adjudicator

September 13, 2012 _____