

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3071

Appeal MA13-68

City of Guelph

July 15, 2014

Summary: The City of Guelph received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for by-law, zoning and fire inspection records, complaints, responses and related records for two addresses. The city granted partial access to the responsive records, citing the mandatory personal privacy exemption in section 14(1), the discretionary solicitor-client privilege exemption in section 12, and the discretionary advice or recommendations exemption in section 7(1) of the *Act*. The appellant appealed the application of the exemptions to the records, as well as the fee charged by the city. This order upholds the city's decisions under sections 7(1) and 12 and partially upholds the city's decision under section 14(1). This order also reduces the city's search fee.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of personal information), 7(1), 12 and 45(1).

OVERVIEW:

[1] The City of Guelph (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for the following:

[named address] – All files, emails, letters & communications from 2007 to present.

[named address] – All files, emails, letters & communications including from city councillors from 2001 to present. Any information with regard to [requester's name and date of birth].

As per s. 17(3) of the Act ongoing access & update to the above information for a period of two years.

[2] As a result of discussions with the city, the requester amended his request to the following:

I am requesting by-law, zoning inspection & fire inspection records, complaints & responses & related record for [named address 1 & named address 2] from 2007 to present for [named address 1] & 2001 to present for [named address 2].

As per s. 17(3) of the Act ongoing access & updates to the above information for a period of two years on a quarterly basis.

[3] The city issued an interim access decision with a fee estimate of \$923.00. The city requested a 50% deposit of \$461.50 in order to continue processing the request.

[4] The city also advised that the mandatory personal privacy exemption in section 14(1) of the *Act* may apply to some of the records.

[5] The city issued its final decision granting partial access to the records. Access was denied to the withheld portions of the records pursuant to the discretionary solicitor-client privilege exemption in section 12, as well as section 14(1).

[6] The requester, now the appellant, appealed the decision of the city to deny access to the withheld portions of the records and the amount of the fee.

[7] During mediation, the appellant advised that he was concerned that he had not received all the responsive records. The appellant indicated that he had received 218 pages of records, while the city's decision letter stated that there were 280 pages of responsive records, thereby raising the reasonableness of the city's search as an issue.

[8] The appellant believed that the fee of \$923.00 was excessive for the 218 pages of records he received. The appellant was concerned that the city had charged him for seeking legal advice in the processing of the request. In addition, the appellant was concerned that the section 12 exemption relating to solicitor-client privilege was inappropriately applied to the records.

[9] The appellant indicated that he was not interested in pursuing access to the personal information of other individuals, including tenants, but he believed that he

should have access to the withheld names and contact information of the individuals who complained to the city about his property.

[10] The mediator advised the appellant that under the *Act*, information related to other individuals (affected parties) could not be disclosed to him without their consent. At the request of the appellant, the mediator notified three affected parties of the appellant's request. One of the affected parties did not provide consent to disclose her personal information and the mediator was unable to contact the other two.

[11] During mediation, the appellant confirmed that he was no longer interested in pursuing access to the names, dates of birth, contact information or licence plate numbers of the affected parties found in the records. As such, Records 17, 23, 24, 28, 29, 30, 32, 34, 35, 37, 118-123, 141, 142, 149, 163, 197, 204, 205, 209 and 212-215 were no longer at issue.

[12] The appellant remained interested however in pursuing access to the names and addresses of the lawyers withheld pursuant to section 14(1) of the *Act* from records 125-127 and 144-146. It was the view of the appellant that this information did not qualify as personal information, but was business information.

[13] The mediator explained to the appellant that the information withheld from several records did not appear to relate to his request. She explained that the withheld information generally related to by-law enforcement officers notebook entries, where an officer may have made entries for more than one property on a page, or computer codes relating to other property files. The appellant consequently confirmed that he was not interested in the records or parts of the records that do not relate to his request. Accordingly, Records 11, 21, 128, 129, 154, 155, 156, 157, 158, 174, 175, 186, 187, 188, 189, 190, 192, 193, 194, 202, 206, 208, 210, 211, 217 and 218 were no longer at issue.

[14] During mediation, the city claimed that the discretionary advice or recommendations exemption in section 7(1) applied to Record 140. The city also clarified that there was an error in its decision letter. The city confirmed that there were 222 pages of responsive records, not 280 as indicated in its decision. Seventy-five of the pages had exemptions applied to them. Four of the pages were withheld in full, resulting in the appellant receiving 218 of the 222 responsive pages. The appellant accepted that there was an error in the decision letter; therefore, the reasonableness of the city's search was no longer at issue.

[15] The mediator raised the possible application of section 38(a) (right of access to one's own personal information) to those records withheld pursuant to section 12, and the discretionary personal privacy exemption in section 38(b) for those records withheld under section 14(1) of the *Act* with the city, as those records appear to contain

information related to the appellant. The city did not respond to the mediator concerning the application of sections 38(a) and 38(b) to the records.

[16] The city confirmed with the mediator that it would be providing the appellant with on-going access to the requested records for a period of two years on a quarterly basis.

[17] As no further mediation was possible, this file was transferred to adjudication where an adjudicator conducts an inquiry. I sought and received representations from the city and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*. In its representations, the city agreed to disclose Records 97, 98, 125 to 127. Accordingly, these records are no longer at issue. The city also recalculated its fee and reduced it to \$681.60.

[18] The city provided both confidential and non-confidential representations. Although I have considered both the confidential and non-confidential representations, I will only be referring to the non-confidential representations in this order.

[19] In this order, I uphold the city's search fee in a reduced amount of \$60.00, its preparation fee of \$1.00 per page that requires severing, and its photocopy fee of \$0.20 per photocopy. I also order the city to disclose the names and the contact information of the law firms listed in Records 144 to 146 and I uphold the decision of the city to withhold the remaining information at issue in the records.

RECORDS:

[20] The records remaining at issue are the withheld portions of: Records 25, 26, 27, 47, 80, 81, 82, 91, 140, 144, 145 and 146. I have removed duplicate records, Records 83, and 88 to 90 from consideration in this order. Records 25 to 27 are identical to Records 88 to 90 and Record 47 is identical to Record 83.

ISSUES:

- A. Do Records 144 to 146 contain "personal information" of other individuals as defined in section 2(1)?
- B. Does the discretionary section 12 solicitor-client exemption apply to Records 25, 26, 27, 47, 80, 81, 82, and 91?
- C. Does the discretionary section 7(1) advice or recommendations exemption apply to Record 140?
- D. Did the institution exercise its discretion under sections 7(1) and 12? If so, should this office uphold the exercise of discretion?

E. Should the fee of \$681.60 be upheld?

DISCUSSION:

A. Do Records 144 to 146 contain "personal information" of other individuals as defined in section 2(1)?

[21] In order to determine which sections of the *Act* may apply, it is necessary to decide whether they contain "personal information". That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if it appears with other personal information relating to the individual or where the

disclosure of the name would reveal other personal information about the individual;

[22] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.¹

[23] Sections 2(2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[24] 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.²

[25] 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.³

[26] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

[27] The city states that the following records contain personal information of third parties:

[Records] 144, 145, 146 - The documents were disclosed with information being redacted. The redacted information is personal information (names) regarding third parties (the relocating parties) and the name and address of their representative (which could be used to identify the relocating parties).

¹ Order 11.

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[28] The appellant did not address this issue in his representations.

Analysis/Findings

[29] Records 144 to 146 are standard real estate transaction letters exchanged between the city and the lawyers for the individuals being relocated from a property (the property owners). Severed from these records are the names of the property owners and the name and contact information for the lawyers acting for the property owners.

[30] I agree with the city that the names of the property owners in Records 144 to 146 are the personal information of these individuals, as disclosure would reveal the details of financial transactions they have been involved in, in accordance with paragraph (b) of the definition of personal information in section 2(1).

[31] Records 144 to 146 do not contain the personal information of the appellant. Nor do they contain the personal information of individuals who complained about the appellant's property. As the appellant has indicated that he is not interested in pursuing access to personal information of other individuals, including tenants, except those complaining about the property, the names of the property owners in Records 144 to 146 is not at issue in this appeal and I will order them withheld.

[32] The city did not provide any evidence how disclosure of the name and contact information of the law firm acting for the property owners in Records 144 to 146 would reveal the identity of the property owners. I find that disclosure of the law firm information would not reveal the identity of the property owners. I also find that the lawyers acting for the property owners were acting in their business capacity. As I have found that the information related to the law firm acting for the property owners is not personal information, but information about them in a business capacity, and as no other exemptions apply, I will order this information about the law firm in Records 144 to 146 disclosed.

B. Does the discretionary section 12 solicitor-client exemption apply to Records 25, 26, 27, 47, 80, 81, 82, and 91?

[33] 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.

[34] 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.

[35] 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.⁵

[36] 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.

[37] In this case, the city relies on section 38(a) in conjunction with section 12. Section 12 states as follows:

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.

[38] Section 12 contains two branches. 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. From its representations, it appears that the city relies on branch 1 solicitor-client communication privilege.

[39] Record 25 is an email from legal counsel for the city to city staff. Attached to Record 25 are Records 26 and 27, which are pages one and two of the two page draft letter from legal counsel circulated to staff for comment. The city states that these records are part of the communication required between staff and legal counsel to allow for legal advice.

[40] Record 47 is a transmittal memo from legal services. The city states that this record relates to the chain of correspondence between the city's solicitor and staff necessary for obtaining information and instructions and providing legal advice.

[41] Record 80 is an email from city staff to legal counsel and other city staff. The city states that this record falls directly within the intent of protecting communication seeking legal advice.

[42] Record 81 is an email from city staff. The city states that in this record staff seek legal advice.

⁵ Order M-352.

[43] Record 82 is an email from city staff. The city states that this email forms part of the chain of communication seeking legal advice.

[44] Record 91 is a series of internal emails from staff to legal counsel. The city states that this is part of the continuum of communications between the legal counsel and client, allowing advice to be sought and given.

[45] The city states that the only personal information of the appellant is his name and the address of the property owned by the appellant.

[46] The appellant states that he requires access to the records at issue to:

...obtain informed legal advice, to determine the extent of the city's alleged culpability and to determine whether legal action is warranted with regard to the city's practices and policies for identifying properties to be inspected, the level of proof of an offence (if any) that the city requires to commence an inspection process, the practice of leaving a file open when no evidence of an offence exists, whether the involvement of the fire department and the increased search provisions of the Fire Code was exercised in bad faith for the purposes of by-law and zoning matters, whether legal advice has been given to facilitate discriminatory practices and the extent of the influence and interference of city councillors in daily zoning and by-law enforcement processes.

Solicitor Client privilege may be lost where the legal advice encourages or facilitates an illegal act, or where the lawyer is aware of the individual's intention to commit an illegal act.

[47] In reply, the city states that the appellant contends that privilege can be lost if the legal advice is intended to further an illegal or improper motive. It states that:

...the appellant has provided no case law to support the proposition. More importantly, there is no evidence to suggest that the city has engaged in illegal or improper activity, or that if this were the case, such activity has been counselled in any way by the legal advice. There is no evidence to suggest that the privilege has been lost in this case.

Analysis/Findings

[48] 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.⁶

[49] As stated above, the city relies on branch 1 solicitor-client communication privilege, which 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.⁷

[50] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.⁸

[51] 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.⁹

[52] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.¹⁰

[53] 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.¹¹

[54] Based on my review of the records at issue, the appellant’s representations, and both the confidential and non-confidential representations of the city, I agree with the city that these records all contain direct solicitor-client communications or form part of a continuum of communication for the purpose of obtaining or giving legal advice. I find that the appellant’s desire to determine whether legal action is warranted with regard to the city’s practices and policies does not change the fact that the records are privileged.

[55] The appellant has raised the issue of waiver of privilege. Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

⁶ Order PO-2538-R and *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).

⁷ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁸ Orders PO-2441, MO-2166 and MO-1925.

⁹ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

¹⁰ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

¹¹ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

[56] 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.¹²

[57] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.¹³

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

- the record is disclosed to another outside party,¹⁴
- the communication is made to an opposing party in litigation,¹⁵
- the document records a communication made in open court.¹⁶

[59] The legal advice sought by city staff in the records was for a legitimate issue of concern to the city. Based on my review of the records at issue, I do not agree with the appellant that the city by seeking legal advice attempted to encourage or facilitate an illegal act and that the city waived privilege. Even if solicitor-client privilege could be lost in such circumstances, there is no evidence in the records at issue to support the appellant's contention about illegal activity.

[60] All of the records at issue contain legal advice or contain information about the seeking of legal advice. There is no evidence in the records that city staff by copying other city staff had in any way waived privilege. The records at issue contain the legal advice provided by the city solicitors and were exchanged between city staff in order to allow city staff to take steps to implement the legal advice provided by the city's solicitors. The attachments to the emails all refer to information that city staff sought legal advice about. I find that I have no evidence in this appeal that privilege has been waived for the records at issue.

[61] Although the city claims that section 38(a) may apply to the records at issue as they contain the appellant's name and address, I do not agree. The appellant is

¹² *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

¹³ 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.) and *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S.C.).

¹⁴ Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

¹⁵ Orders MO-1514 and MO-2396-F.

¹⁶ Orders P-1551 and MO-2006-F.

referred to in the records in his business capacity and the information therein is, therefore, not personal information.

[62] The records at issue are all subject to branch 1 solicitor-client communication privilege. As such, section 12 applies to the records at issue.

[63] Accordingly, subject to my review of the city's exercise of discretion, I find that the information at issue in the records at issue is exempt under section 12 of the *Act*.

C. Does the section 7(1) advice or recommendations exemption apply to Record 140?

[64] 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.

[65] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.¹⁷

[66] "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.

[67] "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 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.¹⁸

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

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

- the information itself consists of advice or recommendations

¹⁷ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

¹⁸ See above at paras. 26 and 47.

- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.¹⁹

[70] 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 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 or consultant.²⁰

[71] Section 7(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 7(1).²¹

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

- factual or background information,²²
- a supervisor's direction to staff on how to conduct an investigation,²³
- information prepared for public dissemination.²⁴

[73] The city states that Record 140 is a submission by city staff providing advice that is directly within the exemption under section 7(1) and the advice does not fall under any of the exemptions in section 7(2).

[74] The appellant did not directly address this issue in his representations.

Analysis/Findings

[75] Based on my review of Record 140 and the city's confidential and non-confidential representations, I agree with the city that this record contains advice. This record contains the evaluative analysis of the information in the record by a public servant.

[76] None of the exceptions in section 7(2) to section 7(1) apply to Record 140.

¹⁹ Order P-1054.

²⁰ See footnote 1 above at para. 51.

²¹ See footnote 1 above at paras. 50-51.

²² Order PO-3315.

²³ 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.).

²⁴ Order PO-2677

[77] Accordingly, subject to my review of the city's exercise of discretion, this record is exempt under section 7(1).

D. Did the institution exercise its discretion under sections 7(1) or 12? If so, should this office uphold the exercise of discretion?

[78] The sections 7(1) and 12 exemptions are discretionary and permit 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.

[79] 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.

[80] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁵ This office may not, however, substitute its own discretion for that of the institution.²⁶

[81] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²⁷

- 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
 - 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

²⁵ Order MO-1573.

²⁶ Section 43(2).

²⁷ Orders P-344 and MO-1573.

- 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.

[82] The city states that it has exercised its discretion under section 7(1) to withhold Record 140, as it is necessary to maintain the confidentiality of the record in order to preserve the ability for staff to provide advice in a proper manner.

[83] The city states that it has exercised its discretion under the discretionary solicitor-client privilege exemption in section 12, as it is necessary for the confidentiality of the records subject to that section to be maintained.

[84] The appellant states that because the content of his request is focused on alleged discriminatory conduct of city staff, conflict of interest of city councillors and privacy breaches under the *Act*, he is concerned that the city has exercised its discretion under sections 7(1) and 12 in bad faith and for an improper purpose in order to hide discriminatory policy development and shield the individuals who encourage and implement those policies from public scrutiny and accountability.

[85] The appellant states that he is concerned that the repeated unconscionable conduct of city staff shows a blatant disregard for various laws enacted to protect against discrimination and a pattern of abuse by the city of its authority.

[86] The appellant is also concerned that in a record not at issue in this appeal that two city councillors were included in the email chain of various city staff communications and given access to the private information of the appellant.

[87] In reply, the city states that there is no evidence of bad faith or improper purpose on the part of the city in its exercise of discretion. The city states that the

appellant's contentions as to the appropriateness of its enforcement with respect to his properties, or his opinion as to the merits of the city's position or actions with respect to enforcement, do not provide evidence that the city has acted in bad faith or for improper purposes with respect to the request.

[88] The city also states that the question of enforcement and/or compliance with city by-laws is a separate matter to be determined in the appropriate forum and is not a matter before the IPC for adjudication. It is the city's position that the enforcement activities are not relevant to the request that is before the IPC for determination, and in no way provide circumstantial evidence of bad faith.

[89] The city states that in exercising its discretion under sections 7 and 12, it has considered the appropriate and relevant factors, including:

Section 7

- a) Record 140 relates to advice regarding the freedom of information request, which forms advice directly within the scope of section 7. This section is intended to be applied in cases where the opinion and advice given is that of a personal nature, and not that of the institution. The opinion provided did not affect the records that were released or not released to the appellant.
- b) Information should generally be available to citizens, but this should be balanced with fact that the privacy of individuals should be protected.
- c) Disclosure of the information is not necessary for the appellant to determine his rights. The advice relates to the request and not to the merits of the issues that the appellant has identified.

Section 12

- a) The city's refusal to disclose under section 12 is an exercise of the city's right to protect common law and statutory privilege.
- b) The purpose for protecting this privilege is for the city to continue to receive and rely upon legal advice in the relationship of solicitor and client.
- c) The information is sensitive to the institution as it includes communication with legal counsel and legal advice received.

d) It is the historic practice of the city not to disclose information subject to solicitor client privilege unless the privilege has been waived by City Council (which occurs in rare circumstances only).

e) Disclosure of the information is not necessary for the appellant to determine his rights. The information previously provided to the appellant is sufficient for him to identify city activities with respect to the properties, and consider his legal rights. Access to the privileged documents is not required in order for the appellant to determine whether he can/should proceed with action against the city.

[90] In surreply, the appellant did not directly address this issue.

Analysis/Findings

[91] In this appeal, I must decide whether the city exercised its discretion in a proper manner in deciding to withhold access to the one record that I have found subject to section 7(1) and the eight records that I have found subject to section 12. Although the appellant has issues with the city's interaction with him about the properties he owns, these issues are not within my jurisdiction.

[92] Under section 7(1), the city withheld one record, Record 140. This record is an internal memo containing advice.

[93] Under section 12, the city withheld Records 25, 26, 27, 47, 80, 81, 82, and 91.

[94] Record 25 is an email containing legal advice. Attached to this are Records 26 and 27, which is a draft letter incorporating this legal advice.

[95] Record 47 is a transmittal memo and Records 80 to 82 and 91 are emails. All of these records form part of the continuum of communication between the city's solicitor and city staff.

[96] Based on my review of the records at issue and the parties' representations, I find that the city exercised its discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations.

[97] I find that there is no evidence in the city's decision in exercising its discretion to withhold the records at issue that it acted in bad faith. In addition, I find that the records at issue do not address the appellant's allegations of discriminatory policy development, discrimination, or alleged privacy breaches by the city.

[98] Accordingly, I am upholding the city's exercise of discretion under sections 7(1) and 12 and find that Records 25, 26, 27, 47, 80, 81, 82, 91 and 140 are exempt.

E. Should the fee of \$681.60 be upheld?

[99] The city states that the total hours spent by its staff to search for responsive records were 17.45 and that it has reduced this to 13.54 hours. The city calculates the search fee at \$7.50 per 15 minutes for 13.54 hours of search time as \$417.00

[100] The city also recalculated the preparation and photocopy fees to reflect the correction in the number of pages disclosed to the appellant from 280 to 218. The city reduced the preparation time to reflect the standard of 2 minutes per page at \$7.50 per 15 minutes. The revised preparation time equals 436 minutes or 7.37 hours. At \$7.50 per 15 minutes or \$30 per hour, the preparation fee sought by the city is \$218.00.

[101] The city applied a rate of \$.20 per page to calculate the cost of photocopies. At this rate, the photocopy fee at \$.20 x 218 pages is \$46.60.

[102] Based on these adjustments, the recalculated total fee sought by the city is \$681.60.

[103] The city states that it did not seek outside legal advice with respect to processing of the request, and has not charged the appellant any costs with respect to either internal or external legal advice.

[104] The appellant is concerned that the city charged him for seeking legal advice in processing the request. He states that while the city reduced the amount charged for preparation time from \$450.00 to \$218.00, no similar re-evaluation has been undertaken to reassess the \$417.00 charged for records searches. The appellant requests a proportional reduction in the charges for search time or a reduction in the search fee to whatever amount I deem appropriate.

[105] In reply, the city states that the search fee is based on actual search time, as provided by the seven city staff in the city's Building department and the one staff member in the city's Fire Department who searched for records. The city provided a breakdown of search times per staff member as follows:

Building Services	Time Spent
Individual A	1.5 hours
Individual B	7.5 hours
Individual C	.25 hours
Individual D	.25 hours
Individual E	.25 hours
Individual F	2.0 hours
Individual G	2.0 hours
Fire Department	3.0 hours
Total	16.75 hours

[106] In surreply, the appellant states that it was likely the city's freedom of information co-ordinator was overly cautious in handling his file due to past interactions with him which resulted in the time and fees being inflated well beyond a reasonable amount.

Analysis/Findings

[107] Where the fee exceeds \$25, an institution must provide the requester with a fee estimate.²⁸

[108] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.²⁹

[109] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823, as set out below.

[110] Section 45(1) requires an institution to charge fees for requests under the *Act*. That section reads:

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

- (a) the costs of every hour of manual search required to locate a record;
- (b) the costs of preparing the record for disclosure;

²⁸ Section 45(3).

²⁹ Orders P-81 and MO-1614.

- (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
- (d) shipping costs; and
- (e) any other costs incurred in responding to a request for access to a record.

[111] More specific provisions regarding fees are found in section 6 of Regulation 823, which reads:

6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:

- 1. For photocopies and computer printouts, 20 cents per page.
- 2. For records provided on CD-ROMs, \$10 for each CD-ROM.
- 3. For manually searching a record, \$7.50 for each 15 minutes spent by any person.
- 4. For preparing a record for disclosure, including severing a part of the record, \$7.50 for each 15 minutes spent by any person.
- 5. For developing a computer program or other method of producing a record from machine readable record, \$15 for each 15 minutes spent by any person.
- 6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

[112] As stated above, the city states that the total hours to search were 17.45 and that it reduced this to 13.54 hours. The city calculates the search fee at \$7.50 per 15 minutes for 13.54 hours of search time as \$417.00. However, I note that in its breakdown of search hours, the total search hours are 16.75 hours not 17.45 hours.

[113] The city was asked in the Notice of Inquiry to provide representations on how the requested records were kept and maintained and what actions were necessary to locate the requested records.

[114] The city did not provide the requested information in its representations. In addition to not providing details of on how the requested records were kept and maintained and what actions were necessary to locate the requested records, the city did not explain the differing search times in the same department. For example, it took three people in the Building Services Department 15 minutes to search for responsive records, whereas it took another individual 7.5 hours to perform the same search.

[115] The city also provided no details as to why it took an individual at the Fire Department three hours to conduct a search for responsive records. Nor did the city provide an explanation as to how it arrived at a search time of 17.45 hours when the information it provided in its representations adds up to 16.75 hours. In addition, the memorandum in the city's representations includes a handwritten note that some unnamed individual spent 1.5 to 2 hours searching. The city did not explain what amount the appellant was actually charged for this range of search time.

[116] I find that I do not have sufficient information to find that the \$417.00 search fee charged by the city is reasonable. I do agree with the city that searches were required to be performed to locate the responsive records. As three individuals out of eight³⁰ were able to conduct searches for responsive records in 15 minutes, I will allow this amount per each of the eight individuals that conducted searches. Accordingly the time allowed is two hours. At \$7.50 for each 15 minutes spent per individual,³¹ this totals a search fee of \$60.00.

[117] The city has charged the preparation fee of two minutes per page of record that requires severing, totalling \$1.00 per page at the allowable rate of \$7.50 for each 15 minutes,³² and \$0.20 per photocopy,³³ and I will uphold these amounts.

ORDER:

1. I uphold the city's search fee in the reduced amount of \$60.00, its preparation fee of \$1.00 per page that requires severing, and its photocopy fee of \$0.20 per photocopy, and order it to refund to the appellant within 21 days of the date of this order any amount already paid by him that is not in accordance with this order provision.
2. I order the city to disclose to the appellant the names and the contact information of the law firms listed in Records 144 to 146 by **August 6, 2014.**

³⁰ Seven at the Building Department and one at the Fire Department.

³¹ Section 6 of Regulation 823.

³² Section 45(1)(b) includes time for severing a record. Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.

³³ Section 45(1)(c) includes the cost of photocopies.

3. I uphold the decision of the city to withhold the remaining information at issue in the records.

Original signed by: _____
Diane Smith
Adjudicator

_____ July 15, 2014