Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-3138-I

Appeal MA13-510

Corporation of the City of Clarence-Rockland

December 17, 2014

Summary: The city received a three-part request for access to information relating to its termination of the appellant's employment. The city denied access to records responsive to parts 1 and 2 of the request pursuant to section 12 (solicitor-client privilege) of the *Act* and advised that it did not have any records responsive to part 3 of the request. The appellant appealed the city's decision to deny access to the records and took the position that records related to part 3 of his request should exist. As the records appear to contain the personal information of the appellant, section 38(a) (discretion to disclose a requester's own information), read in conjunction with section 12, was deemed to be the applicable exemption. In this order, the adjudicator upholds the city's decision to apply the exemption to the responsive records, in part. However, she does not uphold its exercise of discretion not to disclose this information as the city failed provide representations on that issue. The adjudicator orders the city to exercise its discretion under section 38(a) and to provide her with representations on that issue. Additionally, the adjudicator does not uphold the city's search for records responsive to part 3 of the request and orders it to conduct another search. The adjudicator remains seized of this appeal in order to deal with any outstanding issues arising from this interim order.

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), 12, and 38(a).

OVERVIEW:

[1] The Corporation of the City of Clarence-Rockland (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

1. Copies of any legal opinions/advice obtained by city officials regarding the termination of [named individual], including but not limited to the opinion provided by [a named law firm] to the City of Clarence-Rockland dated February 22, 2011, as well as the names of any individuals who have received, viewed or had access to such opinions/advice.

2. Copies of any legal opinions/advice obtained by city officials regarding the decision to disclose and/or publish on the City of Clarence-Rockland website the records referred to in the letter by [named mayor] to the citizens of the City of Clarence-Rockland, dated July 12, 2013, as well as the names of any person who has received, viewed or had access to such opinions.

3. All communications between city officials and the Office of the Information and Privacy Commissioner of Ontario regarding the decision to disclose and/or publish on the City of Clarence-Rockland website the records referred to in the letter by [named mayor] to the citizens of the City of Clarence-Rockland, dated July 12, 2013.

[2] The request was submitted by a lawyer who did not stipulate whether he was acting on his own behalf or on behalf of either the individual named in the request or another individual.

[3] The city denied access to the responsive records pursuant to section 12 (solicitor-client privilege) of the *Act*. In its decision, the city indicated that it did not have any records responsive to part 3 of the request.

[4] The lawyer who requested the information appealed the city's decision.

[5] During the mediation stage of this appeal, the mediator contacted the lawyer who advised that he no longer represented the client (the individual named in the request) on whose behalf he submitted the access request and appealed the decision. However, he further advised that his former client intended to pursue the appeal on his own behalf and requested that the mediator communicate directly with him. As a result, the mediator contacted the lawyer's former client directly regarding the issues on appeal and, going forward, that individual was identified as the appellant.

[6] The appellant advised that he seeks access to all of the records that were withheld. Therefore, he is appealing the city's application of the exemption at section 12. He also advised that he is of the view that records responsive to part 3 of his request ought to exist. As a result, whether the city conducted a reasonable search for records responsive to part 3 of the request is an issue in this appeal.

[7] The records at issue appear to contain the appellant's own personal information. Accordingly, the mediator included the possible application of section 38(a) (discretion to refuse a requester's own information), read in conjunction with the section 12 exemption, as an issue in this appeal.

[8] As a mediated resolution could not be reached, the file was transferred to me to conduct an inquiry. I sought representations from both the city and the appellant. The city's representations were shared with the appellant in accordance with *Practice Direction 7*. I did not find it necessary to share the appellant's representations with the city.

[9] In this order, I find that the city properly applied section 38(a), read with the section 12 solicitor-client privilege exemption, to some the responsive records. However, in the absence of representations on its exercise of discretion not to disclose this information, I order the city to provide me with representations on its exercise of discretion. Additionally, I find that the city did not conduct a reasonable search for records responsive to part 3 of the appellant's request and order it to conduct a new search for them.

RECORDS:

[10] There are 16 records at issue in this appeal that have been withheld in their entirety. The records consist of emails and correspondence.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the information at issue?

C. Did the city exercise its discretion under section 38(a)? If so, should this office uphold the exercise of discretion?

D. Did the city conduct a reasonable search for records responsive to part 3 of the request?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[11] Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester.[1] Where the records contain the requester's own information, access to the records is addressed under Part II of the *Act* and the discretionary exemptions at section 38 may apply. Where the records contain the personal information of individuals other than the appellant but do not contain the personal information of the appellant, access to the records is addressed under Part I of the *Act* and the mandatory exemption at section 14(1) may apply.

[12] Accordingly, in order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. 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,

[1] Order M-352.

> (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;

[13] 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.[2]

[14] 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.[3]

[15] 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.[4]

[16] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[5]

[17] The city states generally that the records "may contain personal and professional information relating to" the appellant.

[18] The appellant states generally that the records contain his personal information.

[19] Having reviewed the responsive records, which consist of emails and other correspondence relating the termination of the appellant's employment by the city, all of the records clearly contain the personal information of the appellant. Specifically, the personal information relates to the appellant's employment history (paragraph (b)), the

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[2] Order 11.
[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[4] Orders P-1409, R-980015, PO-2225 and MO-2344.
[5] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe,* [2002] O.J. No. 4300 (C.A.).

views or opinions of other individuals about the appellant (paragraph (g), and the appellant's name where it appears with other personal information relating to him (paragraph (h)).

[20] Accordingly, I find that all of the records at issue contain the "personal information" of the appellant within the meaning of the definition of that term at section 2(1) of the *Act*.

B. Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the information at issue?

[21] 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.

[22] Section 38(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, **12**, 13 or 15 would apply to the disclosure of that personal information.
>
> [emphasis added]

[23] 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.[6]

[24] 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.

[25] In this case, the applicable exemption claim is section 38(a), read in conjunction with the exemption for solicitor-client privileged records at 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.

[6] Order M-352.

[26] 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.

Branch 1: common law privilege

[27] 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.[7]

Solicitor-client communication privilege

[28] 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.[8]

[29] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[9]

[30] 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.[10]

[31] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[11]

[32] 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.[12]

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[7] 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).
[8] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[9] Orders PO-2441, MO-2166 and MO-1925.
[10] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[11] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[12] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

Litigation privilege

[33] Litigation privilege protects records created for the dominant purpose of litigation, actual or contemplated.[13]

[34] 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.

Branch 2: statutory privileges

[35] Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory solicitor-client communication privilege

[36] Branch 2 applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice."

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[13] Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (cited above).

Statutory litigation privilege

[37] Branch 2 applies to a record that was prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation."

[38] Records that form part of the Crown brief, including copies of materials provided to prosecutors by police, and other materials created by or for counsel, are exempt under the statutory litigation privilege aspect of branch 2.[14] However, "branch 2 of section does not exempt records in the possession of the police, created in the course of an investigation, just because copies later become part of the Crown brief." [15]

[39] Documents not originally created in contemplation of or for use in litigation, which are copied for the Crown brief as the result of counsel's skill and knowledge, are exempt under branch 2 statutory litigation privilege.[16]

[40] Termination of litigation does not affect the application of statutory litigation privilege under branch 2.[17]

[41] Branch 2 includes records prepared for use in the mediation or settlement of actual or contemplated litigation.[18]

Representations

[42] The city submits that the records responsive to parts 1 and 2 of the appellant's request are subject to solicitor-client privilege as they were prepared by or for counsel employed or retained by the city for use in giving legal advice or in contemplation of or for use in litigation. It submits:

> It is obvious that the legal opinions/advice given to the [city] by its legal counsel regarding a lawsuit involving the termination of [the appellant] are privileged based upon common law privilege and that it was obtained in giving legal advice or in contemplation of or for use in litigation.

[43] The city also submits that the wording of part 2 of the request indicates that the appellant seeks access to legal opinions or advice provided regarding a decision to publish certain documentation on the city's website.

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[14] Order PO-2733.
[15] Orders PO-2494, PO-2532-R and PO-2498, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952.
[16] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 290 D.L.R. (4th) 102, [2008] O.J. No. 289; and Order PO-2733.
[17] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer),* (cited above).
[18] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

[44] It submits that all of the records that have been withheld met the requirements of both branches of section 12 of the *Act* for the following reasons:

- there is written or oral communication.
- the communication was of a confidential nature,
- the communication was between a client (or his agent) and a legal advisor,
- the communication was directly related to seeking, formulating or giving legal advice,
- the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation,
- the record was prepared by or for counsel employed or retained by an institution; and
- the record was prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[45] The city further submits that there was no waiver of privilege with respect to the records at issue.

[46] The appellant submits that he "has reservations" with respect to the city's position that the records at issue are subject to solicitor-client privilege at common law and, more specifically, litigation privilege and statutory litigation privilege. He points to a public notice published in the local newspaper by the municipality on March 10, 2011 in which the municipal council set out its reasons for abandoning an agreement where the city was to pay his legal costs for a lawsuit against a third party. The appellant submits:

> In the notice (third paragraph) it states that a legal opinion was obtained from [a named law firm] (one of the documents requested under [part 1 of the request]) on the possible outcome of my litigation with a third party. Nowhere does it speak to the fact that this legal opinion is as of the result of the municipality or is contemplated with litigation with myself, the third party or anyone else. According to the public notice, the legal opinion does not refer to any litigation between me and the city but more with regards to a litigation between myself and a third party. I have not received any proof or arguments that the letter from [named law firm] (which is part of my request under [part 1]) to the city was produced or obtained in the purpose to aid the municipality in a particular litigation.

[47] The appellant discloses in his representations that there was a "common law litigation matter" between him and the city that concluded in August of 2011. He submits that there is no other litigation, existing or contemplated, relating to his termination by the city in August of 2011. He submits that privilege has been lost by the city given that any existing litigation has not been completed.

[48] The appellant also submits that on July 12, 2013, the mayor posted a letter on the municipal web page together with 46 documents. The appellant enclosed these documents with his representations. He submits that of these 46 documents, 19 of them relate to communications between "municipal solicitors and the city or representatives of the city." He submits that of these documents that were posted publically, he would refer to "at least six of them" as legal opinions. He submits one of them is responsive to part 1 of his request for a legal opinion of a named law firm dated February 22, 2011, but acknowledges that the letter is completely blacked out. He submits that an argument can be made that the city waived its privilege with respect to these documents. He submits that in the March 10, 2011 public notice reference is made to a legal opinion and outlined the content and conclusion and states: "In my opinion there is a voluntary action of disclosure of the document to the public by not only making reference to it but actually posting it publically on the web page but blacked out. Clearly this is an implied waiver on the part of the city."

[49] With respect to the records responsive to part 2 of his request, the appellant submits that they were referred to in a news report by Radio Canada Téléjournal which also showed parts of these documents on television. Therefore, the appellant submit, that the documents must have been disclosed to a Radio Canada reporter and the city waived its privilege with respect to these documents having disclosed them to an outside party.

Analysis and finding

[50] Having reviewed the records at issue and the representations of the parties, I accept that some of the records are subject to the solicitor-client privilege exemption as contemplated by section 12 of the *Act*. However, some of the records, or parts of the records, do not.

[51] Records 2, 3, 7, 11, 12, 13, 16 and portions of records 4 and 8 are email exchanges between counsel retained by the city and city employees discussing legal matters relating to the termination of the appellant's employment. Records 5 and 15 are letters to the city from its counsel. The former communication provides the city with advice and the latter outlines a legal opinion, both with respect to the appellant's dismissal. All of the information contained in these records, with the exception of portions of records 4 and 8, which I will discuss below, qualifies as direct communications of a confidential nature between a solicitor and a client made for the purpose of giving or obtaining legal advice. Accordingly, I find that this information

appropriately falls under both the common law solicitor-client communication privilege at branch 1 and the statutory solicitor-client communication privilege at branch 2 as in all circumstances the legal advice is being provided or sought by counsel retained by the city.

[52] I will now turn to the records that I find are not subject to solicitor-client communication privilege. Record 1 and portions of records 4 and 8 are email exchanges between counsel retained by the city and the appellant's counsel. In some of these exchanges, city employees are also copied. Records 6 and 10 are letters from the city's counsel to the appellant's counsel. Record 9 is a letter and accompanying fax cover sheet from the appellant's counsel to the city's counsel. Given that these are all communications between counsel retained by the city and opposing counsel, the appellant's lawyer, this information cannot be said to be subject to solicitor-client privilege as they are not communications of a confidential nature between a lawyer and his client. Additionally, I do not accept that any of this information qualifies for litigation privilege or falls under either of the statutory privileges. Accordingly, this information does not qualify for exemption under section 38(a), read in conjunction with section 12 of the *Act.*

[53] Despite my findings above, record 8 should be specifically addressed. I have found that the portions of the email that consist of communication between the city's counsel and city's employees amount to solicitor-client privileged information while the portions that represent communications between the city's counsel and the appellant's counsel do not. However, it should be noted that the portions of record 8 that consist of communications between the city's counsel and the appellant's counsel also contain handwritten notes. From my review of the substance of these notes, I am prepared to accept that the disclosure of these handwritten notes would reveal legal advice either obtained or sought by the city from its counsel. Additionally, there is no evidence before me to suggest that this information falls under litigation privilege or either of the statutory privileges. As a result, I find that the handwritten notes in record 8 qualify for exemption under section 38(a), read in conjunction with section 12 of the *Act*.

[54] Finally, record 14 is a document that appears to have been prepared by the mayor and addresses matters related to the termination of the appellant's employment. The city identified this as a stand-alone document, but did not make any specific representations on how the solicitor-client privilege exemption might apply to it. There is no indication that this record was sent to the city's counsel or created for the purpose of any litigation that may exist or may have existed between the appellant and the city. In the absence of any substantive representations on how this record can be said to amount to either common-law or statutory solicitor-client privileged information, I have insufficient evidence before me to conclude that it does. Accordingly, I find that the discretionary exemption at section 38(a), read in conjunction with section 12 of the *Act*, does not apply to it.

Waiver

[55] With respect to the information that I have found to be subject to solicitor-client communication privilege, I find that there has not been a waiver of privilege on the part of the city. In his representations the appellant points to 46 documents that have been posted on the city's website and describes "at least six of them" as legal opinions. The appellant submits that the posting of these documents, even if they have been severed in whole or in part, amounts to a voluntary waiver of privilege by the city. I disagree.

[56] Under the common law, solicitor-client privilege may be waived by the holder of the privilege. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.[19]

[57] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[20] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[21]

[58] From my review, the majority of the records that the appellant submits the city posted on its website are statements of account charged to the city by a law firm, city documents such as minutes of council meetings and resolutions and documents that were filed publicly with the court, such as statements of claim and statements of defence. Some of the posted documents however, are communications between the city and counsel retained by the city and could be said to amount to or contain legal advice. The only record that is responsive to the appellant's request and is replicated in the records at issue in this appeal is a legal opinion dated February 22, 2011. This legal opinion is identified as record 15 in the current appeal. The copy that the appellant has retrieved from the website has been severed in its entirety, with the exception of the firm letterhead, the date and counsel's signature.

[59] Solicitor-client privilege is a privilege that rests with the client. It is the client who may decide whether or not to waive its privilege and disclose certain information obtained from counsel. Although the city may have decided to waive its solicitor-client privilege with respect to the specific information that it has posted on its website, none of that information is at issue in this appeal. With respect to the legal opinion dated February 22, 2011, which is a duplicate of record 15, in my view, posting a record with some or all of the substantive information severed cannot be characterized as a waiver

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[19] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[20] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[21] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.

of privilege with respect to the severed information as, for all intents and purposes, the information has not been disclosed.

[60] Additionally, with respect to the information that the appellant submits was disclosed in a televised news report, as I have no specific evidence as to what information was disclosed in the news report and whether it amounts to the same information contained in the records at issue, I find that waiver has not been established on that basis.

[61] Accordingly, I find that there has been no waiver of privilege with respect to any of the information at issue in this appeal.

C. Did the city exercise its discretion under section 38(a)? If so, should this office uphold the exercise of discretion?

[62] 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.

[63] 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.

[64] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[22] This office may not, however, substitute its own discretion for that of the institution.[23]

Relevant considerations

[65] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[24]

[22] Order MO-1573.
[23] section 43(2).
[24] Orders P-344 and MO-1573.

- 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
- 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.

Analysis and findings

[66] In Issue D of the Notice of Inquiry sent to the city at the outset of the adjudication stage, I requested that the city provide me with representations on its exercise of discretion with respect to the information that it withheld pursuant to the application of the discretionary exemption at section 38(a) of the *Act*, read in conjunction with section 12. The city did not address this issue in its representations.

[67] As the city did not provide me with any evidence respecting its exercise of discretion, I am unable to determine whether it exercised its discretion properly in

choosing not to disclose the information which I have found to be exempt under the discretionary exemption at section 38(a), read in conjunction with section 12.

[68] With discretionary exemptions, the city must turn its mind to whether or not it will disclose information and must articulate this to the appellant and this office, explaining the factors applied in exercising its discretion so that this office is assured that it considered relevant factors and did not consider unfair or irrelevant factors.

[69] As the city has provided insufficient evidence to support its discretionary application of the section 38(a) exemption, I will order it to exercise its discretion and provide the appellant and this office with written representations on how it did so. I remain seized of this matter pending the resolution of the issue which I have outlined in order provision 3.

D. Did the city conduct a reasonable search for records?

[70] Where an appellant claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[25] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[71] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[26] To be responsive, a record must be "reasonably related" to the request.[27]

[72] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[28]

[73] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[29]

[74] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[30]

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[25] Orders P-85, P-221 and PO-1954-I.
[26] Orders P-624 and PO-2559.
[27] Order PO-2554.
[28] Orders M-909, PO-2469 and PO-2592.
[29] Order MO-2185.
[30] Order MO-2246.

Representations

[75] The city submits that it conducted a reasonable search for records responsive to all three parts of the request. The appellant takes the position that records relating to part 3 of his request must exist. In part 3 of his request, the appellant sought access to:

> All communications between city officials and the Office of the Information and Privacy Commissioner of Ontario regarding the decision to disclose and/or publish on the City of Clarence-Rockland website the records referred to in the letter by [named mayor] to the citizens of the City of Clarence-Rockland, dated July 12, 2013.

[76] With its representations, the city enclosed an affidavit sworn by the clerk and Freedom of Information and Protection of Privacy Coordinator detailing the search conducted for responsive records. With respect to part 3 of the request she stated:

> … I spoke to the Mayor and conducted the following searches with the following results:
>
> a. I looked on the Mayor's cell phone for a record of calls from July 1, 2013 to July 14, 2013 and found nothing related to this matter;
>
> b. I looked for a corporate file and did not find one;
>
> c. I conducted a search of the Mayor's black briefcase and found three (3) documents relating to communication he has had with the IPC.

[77] The clerk further states that she is not aware that any records were destroyed.

[78] The appellant submits that he does not dispute that the clerk did all that she stated in her affidavit however, he submits that the search as conducted was not sufficiently exhaustive and documents could have been searched for in a number of other locations. He also submits that phone records were searched for only a two-week period and questions whether calls were made before or after that period. The appellant submits that the reason that he believes that records responsive to part 3 of his request exist is because "the Mayor himself confirmed in the posted letter on the municipal web page that there has been consultation with *MFIPPA*…. Therefore, I can only conclude that the statement in the Mayor's press release is false in regards to his consultation with *MFIPPA.*"

Analysis and finding

[79] The appellant's concern regarding the reasonableness of the city's search is specifically with respect to its search for records responsive to part 3 of his request. Having reviewed the request, the records, and the representations of the parties, I find that city has not provided me with sufficient evidence to support the position that it has conducted a reasonable search for records responsive to part 3 of his request.

[80] The city's representations and the supporting affidavit that describe its search efforts are very brief. In my view, I have not been provided with sufficient explanation from the city as to why the scope of the search was not more expansive. Specifically, I have not been provided with a sufficiently detailed explanation as to why the searches for communications responsive to part 3 of the request were restricted to records held by the mayor when the request specifically seeks access to "all communications between city officials." Additionally with respect to any responsive records that might be held by the mayor, I have not been provided with a sufficiently detailed explanation as to why that search was restricted to two-weeks worth of phone calls, to whether a corporate file might exist, and to documents in the mayor's briefcase. In my view, the search conducted by the city is not sufficiently comprehensive to conclude that no records responsive to part 3 of the appellant's request might exist.

[81] Accordingly, I am not satisfied that the city's search for responsive records was reasonable. I order the city to conduct a further search for records relating to part 3 of the request in accordance with the terms of this order, outlined below.

[82] Additionally, the city indicates in the affidavit sworn by the clerk that three records responsive to part 3 of the request were located in the search of the mayor's briefcase. These documents were attached to the affidavit as "Exhibit A." It is not clear to me whether the city has disclosed these records to the appellant. As a result, I will order the city to provide the appellant with a decision respecting access to these records in its access decision with respect to any records responsive to part 3 of the request that are located in the course of the additional search that I have ordered it to conduct.

ORDER:

1. I uphold the city's application of the discretionary exemption at section 38(a), read in conjunction with section 12, to records 2, 3, 5, 7, 11, 12, 13, 15 and 16 and portions of records 4 and 8 to the appellant.

2. I order the city to disclose records 1, 6, 9, 10 and 14 and the portions of records 4 and 8 for which I have not upheld the city's application of the discretionary exemption at section 38(a), read in conjunction with section 12. For the sake of clarity I have enclosed a copy of records 4 and 8 that have been highlighted to identify in green the portions that should **not** be disclosed.

3. I order the city to exercise its discretion to apply section 38(a), read in conjunction with section 12, to the records outlined in order provision 1, in accordance with the guidelines set out above. The city is to advise the appellant and this office of the results of this exercise of discretion, in writing. If the city continues to withhold all or part of the records for which I have upheld its application of section 38(a), I also order it to provide the appellant with an explanation as to the basis for exercising its discretion to do so and to provide a copy of that explanation to me. The city is required to send representations on the results of its exercise, and its explanation to the appellant, with a copy to this office no later than **January 11, 2015**. If the appellant wishes to respond to the city's exercise of discretion and/or its explanation for exercising its discretion to withhold the information that I have found to be subject to section 38(a), he must do so within **January 13, 2015** of the date of the city's correspondence by providing me with written representations.

4. I order the city to conduct a new search for records responsive to part 3 of the appellant's request. The city is to send representations on the results of its new search that it carries out to locate new records and to provide me, by **January 13, 2015**, an affidavit outlining the following:

    (a) the names and positions of the individuals who conducted the searches;

    (b) information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search; and

    (c) the results of the search.

5. I order the city to issue an access decision to the appellant regarding access to any additional records located as a result of the search ordered in provision 4, in accordance with the *Act*, treating the date of this order as the date of the request. In this access decision the city is also ordered to address access to the three records responsive to part 3 of the appellant's request that were referred to in the affidavit sworn by its clerk and attached to that affidavit as "Exhibit A".

6. The city's representations prepared in compliance with order provisions 3 and 4 may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in this office's *Practice Direction Number 7*, which is available on the IPC's website. The city should indicate whether it consents to the sharing of its representations with the appellant.

7. I remain seized of this appeal in order to deal with any other outstanding issues arising from this interim order.

Original Signed by: December 17, 2014
Catherine Corban
Adjudicator