

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3415

Appeal MA15-476

Toronto Community Housing Corporation

February 21, 2017

Summary: The Toronto Community Housing Corporation (the TCHC) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to records relating to the requester. The TCHC granted the appellant partial access to responsive records, relying on section 38(a) (discretion to refuse requester's own information), in conjunction with section 12 (solicitor-client privilege), as well as section 38(b) (personal privacy) to deny access to the portion it withheld. At mediation, the appellant took issue with the reasonableness of the TCHC's search for responsive records. In this order the adjudicator upholds the reasonableness of the TCHC's search for responsive records, and the application of section 38(a), in conjunction with section 12 for the records for which it is claimed, but orders the TCHC to disclose to the appellant certain withheld information, which the adjudicator finds to be about a property and not about an identifiable individual.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1), 12, 17 and 38(b).

Orders and Investigation Reports Considered: Investigation Report 194-079M and Orders M-1013, MO-3261, MO-3288, MO-3616, P-538, PO-3078, PO-3088 and PO-3616.

Case Considered: *Edmonton (City) v Alberta (Information and Privacy Commissioner)*, 2016 ABCA 110.

BACKGROUND:

[1] The Toronto Community Housing Corporation (the TCHC) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to all records relating to the requester for the time period from January 1, 2007 to June 30, 2015. Accompanying the request was a consent form signed by the requester's wife consenting to the release to the requester of any information pertaining to her that is found in the records. The requester's wife also submitted a request to the TCHC for information relating to her for the same time period, which was accompanied by a consent form signed by the requester consenting to the release to her of any information pertaining to him that is found in the records. This other request is the subject of Appeal MA15-477.

[2] After discussions between the requester and the TCHC, the request at issue in this appeal was clarified to be for access to all records relating to the requester, except the following records that he no longer required:

1. Correspondence between TCHC and the requester with regard to the rent calculation e.g. letters and forms that the requester submitted to the TCHC;
2. Notices based on rent calculations sent to the requester by the TCHC in connection with two addresses; and
3. Litigation records: Statement of Claim, Statement of Defence/Reply for the other party, motion and appeal materials and correspondence that was forwarded to the requester and to another party by the requester in connection with an identified Superior Court of Justice file and an identified Court of Appeal file.

[3] The TCHC issued a decision letter in which it identified categories of records and granted the appellant partial access to them. The TCHC relied on section 38(a) (discretion to refuse requester's own information), in conjunction with section 12 (solicitor-client privilege), as well as section 38(b) (personal privacy) to deny access to the portion it withheld.

[4] The requester, now the appellant, appealed the TCHC's decision.

[5] At mediation, the appellant maintained his request for access to the withheld information and asserted that additional records ought to exist. Accordingly, the reasonableness of the TCHC's search for responsive records was added as an issue in the appeal.

[6] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[7] I commenced my inquiry by sending the TCHC a Notice of Inquiry setting out the facts and issues in the appeal. The TCHC provided responding representations. I then

sent a Notice of Inquiry to the appellant along with a copy of TCHC's representations. The appellant provided responding representations.

[8] In this order I uphold the reasonableness of the TCHC's search for responsive records, and uphold the application of section 38(a), in conjunction with section 12 for the records for which it is claimed, but order the TCHC to disclose to the appellant the withheld information on pages B-4, B-8 and B-24, which I find to be about a property and not about an identifiable individual.

RECORDS REMAINING AT ISSUE:

[9] Remaining at issue in this appeal is the information withheld from 3 EasyTrac Request and Work Order History Reports, as well as the remaining records relating to an identified Superior Court of Justice file and an identified Court of Appeal file.

ISSUES:

- A. Did the institution conduct a reasonable search for records?
- B. Do the records contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?
- C. Does the discretionary exemption at section 38(a), in conjunction with section 12, apply to the information for which it is claimed?

DISCUSSION:

Issue A: Did the institution conduct a reasonable search for records?

[10] Where a requester 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 17.¹ 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.

[11] 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.² To

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

be responsive, a record must be "reasonably related" to the request.³

[12] 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.⁴

[13] 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.⁵

[14] 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.⁶

TCHC's representations

[15] The TCHC provided representations on the reasonableness of its search for responsive records as well as an accompanying affidavit of its Information Specialist responsible for the processing of all Freedom of Information Requests (information specialist).

[16] The TCHC submits that with respect to the appellant's electronic records kept with TCHC, its Information Specialist conducted a search of its tenant database stored in:

- a. TCHC's Housing Management System ("HMS") based on the appellant's account number [specified account number] for the period from January 1, 2007 to June 30, 2015;
- b. TCHC's EasyTrac Production System ("EasyTrac") based on the appellant's account number [specified account number] for the period from January 1, 2007 to June 30, 2015; and
- c. TCHC's Community Safety Online Application System based on the appellant's former address at [specified unit number and municipal address] and current address at [specified unit number and municipal address] for the period from January 1, 2007 to June 30, 2015 respectively.

[17] With respect to the appellant's physical records kept with TCHC for the period of January 1, 2007 to June 30, 2015, TCHC submits that its Information Specialist inquired with staff in TCHC's Operating Unit, and located the appellant's tenant files for both

³ Order PO-2554.

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

locations set out above. TCHC submits that she then conducted a detailed review of all the records and identified all records responsive to the appellant's clarified request.

[18] TCHC further submits that:

[The Information Specialist] also inquired with the Legal Services Division and the lawyer responsible for the appellant's litigation file. She was able to locate the records that pertain to the litigation matters at the Superior Court of Justice and the Court of Appeal in which the appellant's name appears as one of the parties involved. These records included pleading materials, such as a Statement of Claim, Statement of Defence from other parties, motion and appeal documents filed at the courts as well as notes and correspondence pertaining to these litigation matters.

[19] TCHC submits that it:

... has responded to the appellant's requests for information by conducting a diligent and exhaustive search of all records that relate to him and have provided him with access to copies of all documents related to him in his files subject to severences. To the best of [the TCHC's] knowledge no additional documents exist that relate to his files.

[20] In her affidavit, the Information Specialist sets out her efforts to assist the appellant with his and his wife's requests in an effort to "(i) help the appellant formulate his request, and (ii) avoid duplicated photocopying costs to be incurred for providing identical records if the two access requests were to be processed separately".

[21] She also details the searches that she conducted of TCHC's databases and physical records in order to locate records that were responsive to the appellant's request.

[22] She states that she searched TCHC's Housing Management System database and printed the appellant's rental history, ledger records and electronic notes made by staff with respect to the appellant's tenancies with TCHC, which contained a total of 16 pages. She also searched the appellant's name and account number [specified number], on the EasyTrac Production System and retrieved the most up-to-date EasyTrac Service Requests and Work Order Report under the appellant's account number, which resulted in an additional 36 pages of records. She also searched through all electronic security reports stored in the security database of TCHC's Community Safety Online Reporting Application (CORA) under the two specified addresses. She submits that:

... The results of this search revealed that no responsive reports could be found respecting the appellant's previous address at [specified address] However, two CORA reports that relate to the appellant (CORA Reports)

respecting his current address at [specified address] were found ... all of which contain a total of 8 pages.

[23] With respect to physical records she states that she reviewed the appellant's tenancy file records which consisted of 750 pages respecting the appellant's tenancy at the two specified unit addresses.

[24] With respect to the litigation records she submits:

In order to search for records that pertain to all of the appellant's litigation matters, I made inquiries with staff from TCHC's Legal Services Unit and consulted with the Legal Counsel ("Litigation Counsel") who has carriage of all of the appellant's litigation files ("Litigation Records").

A search and review of TCHC's records reveal that there were two litigation matters pertaining to the Superior Court of Justice [specified file number] and Court of Appeal [specified file number]. Accordingly, our Litigation Counsel compiled a detailed summary of the contents of the Litigation Records held by TCHC in relation to the litigation involving the appellant and TCHC.

[25] She states that she then retrieved the records and made necessary inquiries to identify the responsive records and conducted a detailed review of all the responsive records and identified and removed the records that the appellant no longer sought.

[26] She further states that:

While waiting for the appellant's payment of the reduced fees as required in the access decision, I further expended time to conduct an additional search and review of the Remaining Tenancy Records and noted that the total number of pages of the Remaining Tenancy Records had to be revised. As such, TCHC provided the appellant the revised Reduced Fees ("Revised Reduced Fees") in TCHC's letter to the appellant dated [specified date].

The Remaining Tenancy Records were provided to the appellant on [specified date], in accordance with TCHC's access decision, i.e. the same date when the appellant submitted his payment of the Revised Reduced Fees.

It is my understanding that one of the issues in dispute at this stage of [this appeal] is the reasonableness of TCHC's search for records the Appellant viewed as being responsive to his request. To the best of my knowledge, TCHC has responded to the appellant's clarified request by expending extensive hours to complete all diligent and exhaustive searches in providing him with access to copies of the records.

No additional documents exist that relate to the appellant with TCHC. TCHC has taken all reasonable steps to respond to the appellant's clarified request by completing diligent and exhaustive searches in providing the appellant with access to copies of all documents in response to his clarified request. To the best of our knowledge, no additional documents exist other than the said records that were provided to the appellant.

The appellant's representations

[27] The appellant provided wide-ranging representations in support of his position that additional records exist. He states that he is certain that additional records exist with respect to "an investigation pertaining to the appellant's residence/address" as well as matters involving his wife. In support of his position, amongst other things, he relies on a statement contained in a letter he received from another institution indicating that in response to a request he made to that institution "... it has been determined that the records requested are in the custody and control of [the TCHC]" and his assertion that a deponent of an affidavit in an identified proceeding stated that his wife's name was referred to in "different places such as the City of Toronto and/or Toronto Police Services and Toronto Community Housing"⁷.

Analysis and finding

[28] As set out above, the *Act* does not require the institution to prove with absolute certainty that further records do not exist. In order to satisfy its obligations under the *Act*, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody and control. In my opinion, the TCHC properly interpreted the scope of the request and its searches were extensive and wide-ranging. I find that, based on the searches it conducted, the TCHC has made a reasonable effort to locate records responsive to the request. In that regard, I find that the statement in the letter referred to by the appellant is simply a determination by another institution that the TCHC would have custody or control of the types of records that the appellant requested of it.

[29] Accordingly, I find that the TCHC has conducted a reasonable search for records responsive to the appellant's request at issue in this appeal.

Issue B: Do the records contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?

[30] In order to determine which sections of the *Act* may apply, it is necessary to decide whether a record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

⁷ He also cites Investigation Report I94-079M and Orders M-1013, MO-3288, MO-3261 and PO-3616 in support of his submissions.

“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;

[31] 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.⁸

[32] Sections (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.

⁸ Order 11.

(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.

[33] 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.⁹

[34] 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.¹⁰

[35] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.¹¹

TCHC's representations

[36] The TCHC's representations focus on its position that the information severed from the EasyTrac Service Request and Work Order History Reports satisfies the definition of personal information under section 2(1) of the *Act*.

[37] The TCHC submits that Order PO-3616 references a number of orders that discuss instances when an address can be characterized as personal information and that the guiding principle in making this determination is whether the information in the record reveals something of a personal nature about an individual.

[38] The TCHC submits:

All the records containing both the addresses and work order numbers of individuals other than the appellant reveal personal information about someone else.

With respect to severed record B-4, this record contains another person's address (street number and name) and work order number (identifying number).

The work order number is linked to an individual's personal tenancy account. This account reveals the name, date of birth, annual income and names of minor children and other occupants or lease holders in the unit.

⁹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

¹⁰ Orders P-1409, R-980015, PO-2225 and MO-2344.

¹¹ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

With respect to severed record B-8, this record contains several addresses (street numbers and name) of other individuals. This record also contains the work order number of another individual that is not the appellant. A number of addresses appeared in the record, none of which are the personal information of the appellant.

With respect to severed record B-24, this record contains the unit numbers of a home address of other individuals. Several unit numbers appear in the record. These unit numbers do not belong to the appellant and are not the personal information of the appellant, but rather the personal information of other individuals.

The personal information in records B-4, B-8 and B-24 identify the home address and unit number of other individuals and possible members of their households. The personal information does not relate to these other individuals in their professional, official or business capacity.

[39] The TCHC submits that the information at issue is not simply about a property address in isolation:

It is personal information because there is a personal dimension attached to the street name, number and unit address and it is reasonable to expect that these individuals will be identified and their personal home residence can be located if the information is disclosed. The appellant lives in the same community and complex as the addresses that are severed from disclosure. Coupled with the fact that by disclosing a street number, street name and unit number to the appellant who has lived in the complex for a number of years, it is highly likely that the appellant would be able to easily identify the occupants and the information associated in the record relating to their address.

There is a high likelihood that disclosing an individual's home address that is comprised of a street number, street name and unit number reveals something of a personal nature or personal dimension about the individuals. More importantly, it is reasonable to expect that if the street number and street name are disclosed an individual or potential members of their household may be able to be identified and located.

The appellant's representations

[40] The appellant states that if the complaints are related to him then they are fabricated. He adds that if the information is held to be personal information, he does not seek access to it.

Analysis and finding

[41] The question to be answered is whether the withheld information qualifies as personal information. I agree with the TCHC that Order PO-3616 sets out the guiding principles to be applied. In that order Adjudicator Gillian Shaw considered an argument that information about a property is not personal information. She wrote:

... Several previous orders of this office have considered whether information about a residential property is also "personal information".

In Order 23, Commissioner Sidney B. Linden made the following findings regarding the distinction between information that qualifies as "personal information" and information about residential properties:

In considering whether or not particular information qualifies as "personal information" I must also consider the introductory wording of subsection 2(1) of the *Act*, which defines "personal information" as "...any recorded information about an identifiable individual..." In my view, the operative word in this definition is "about". The Concise Oxford Dictionary defines "about" as "in connection with or on the subject of". Is the information in question, i.e. the municipal location of a property and its estimated market value, about an identifiable individual? In my view, the answer is "no"; the information is about a property and not about an identifiable individual.

...

In Order MO-2053, Adjudicator John Higgins reviewed the jurisprudence following Order 23 addressing this distinction between information about a residential property and "personal information":

Subsequent orders have further examined the distinction between information about residential properties and "personal information". Several orders have found that the name and address of an individual property owner together with either the appraised value or the purchase price paid for the property are personal information (Orders MO-1392 and PO-1786-I). Similarly, the names and addresses of individuals whose property taxes are in arrears were found to be personal information in Order M-800. The names and home addresses of individual property owners applying for building permits were also found to be personal information in Order M-138. In addition, Order M-176 and Investigation Report I94-079-M found that information about individuals alleged to have committed infractions against property

standards by-laws was personal information. *In my view, the common thread in all these orders is that the information reveals something of a personal nature about an individual or individuals.*

The information at issue in this case bears a much closer resemblance to information which past orders have found to be about a property and not about an identifiable individual. For example, in Order M-138, the names and home addresses of individual property owners who had applied for building permits were found to be personal information, but the institution in that case did not claim that the property addresses themselves were personal information, and the addresses were disclosed. In Order M-188, the fact that certain properties owned by individuals were under consideration as possible landfill sites was found not to be personal information. Similarly, in Order PO-2322, former Assistant Commissioner Tom Mitchinson found that water analysis and test results concerning an identified property were information about the property, not personal information. [Emphasis in original]

Adjudicator Higgins went on to find that two fields of information titled "street no" and "street name" for locations of septic systems were information about the property and not "about" an identifiable individual. Similarly, in Order PO-3088, Adjudicator Stephanie Haly found that environmental test results relating to the basements of certain homes were not the personal information of the homeowners.

I agree with Adjudicator Higgins that the guiding principle in distinguishing personal information from information about a property is whether the information in the record reveals something of a personal nature about an individual.

[42] The distinction between personal information and information about a property was also recently discussed in *Edmonton (City) v Alberta (Information and Privacy Commissioner)*,¹² a decision of the Alberta Court of Appeal. This decision is not binding on me, being a decision of another province applying a different statute. However, the approach upheld in that decision is consistent with this office's approach and I find it useful to review the Court's reasoning.

[43] At issue in the appeal before the Alberta Information and Privacy Commissioner was whether the requester's request to the city for all information relating to complaints about her property was a request for her own "personal information" or information

¹² 2016 ABCA 110.

about a property. The adjudicator found that information connected to a property might be "about an individual" if it had a personal dimension to it. For example, the adjudicator contrasted complaints made about the removal of snow from the requester's sidewalks (which would be about the requester's conduct), with complaints made about lot grading (which would be about the requester's property).

[44] In upholding the adjudicator's findings, the Alberta Court of Appeal stated as follows:

In general terms, there is some universality to the conclusion in *Leon's Furniture* that personal information has to be essentially "about a person", and not "about an object", even though most objects or properties have some relationship with persons. As the adjudicator recognized, this concept underlies the definitions in both the *FOIPP Act* and the *Personal Information Protection Act*. It was, however, reasonable for the adjudicator to observe that the line between the two is imprecise. Where the information related to property, but also had a "personal dimension", it might sometimes properly be characterized as "personal information". In this case, the essence of the request was for complaints and opinions expressed about [the requester]. The adjudicator's conclusion (at paras. 49-51) that this type of request was "personal", relating directly as it did to the conduct of the citizen, was one that was available on the facts and the law.

Analysis and finding

[45] I have considered the TCHC's representations and reviewed the withheld information at issue, which is found in records relating to complaints about no heat (pages B-4 and B-8) and removing and replacing a light fixture (B-24). In my view, applying the principles discussed in the references cited above, I find that all the information remaining at issue in those pages has no personal dimension to it and is about a property and not about an identifiable individual. In my view, the withheld information in the records does not reveal something of a personal nature about an identifiable individual. As a result, I find that the withheld information does not qualify as personal information in accordance with the definition at section 2(1) of the *Act*.

[46] Accordingly, I will order that the withheld information be disclosed to the appellant.

[47] On a final note, for the purposes of the analysis that follows, by virtue of the nature of the request the records that the TCHC claims are subject to section 38(a) in conjunction with section 12 of the *Act* would contain the appellant's personal information.

Issue C: Does the discretionary exemption at section 38(a), in conjunction with section 12, apply to the information for which it is claimed?

[48] Under section 38(a) of the *Act*, where a record contains the personal information of the appellant and section 12 would apply to the disclosure of that information, the ministry may refuse to disclose that information to the appellant.

[49] 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.

[50] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution...") is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[51] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[52] 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.¹³ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.¹⁴ The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.¹⁵

[53] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.¹⁶

[54] 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.¹⁷ The privilege does not cover communications between a

¹³ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

¹⁴ Orders PO-2441, MO-2166 and MO-1925.

¹⁵ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

¹⁶ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

¹⁷ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

solicitor and a party on the other side of a transaction.¹⁸

Litigation privilege

[55] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a “zone of privacy” in which to investigate and prepare a case for trial.¹⁹ Litigation privilege protects a lawyer’s work product and covers material going beyond solicitor-client communications.²⁰ It does not apply to records created outside of the “zone of privacy” intended to be protected by the litigation privilege, such as communications between opposing counsel.²¹ The litigation must be ongoing or reasonably contemplated.²²

Branch 2: statutory privilege

[56] Branch 2 is a statutory privilege that applies where the records were “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.” The statutory and common law privileges, although not identical, exist for similar reasons.

Statutory solicitor-client communication privilege

[57] Like the common law solicitor-client communication privilege, this privilege covers records prepared for use in giving legal advice.

Statutory litigation privilege

[58] This privilege applies to records prepared by or for counsel employed or retained by an institution “in contemplation of or for use in litigation.” It does not apply to records created outside of the “zone of privacy” intended to be protected by the litigation privilege, such as communications between opposing counsel.²³

[59] Documents not originally created for use in litigation, which are copied for the Crown brief as the result of counsel’s skill and knowledge, are also covered by this

¹⁸ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

¹⁹ *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).

²⁰ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

²¹ *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

²² Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

²³ See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.

privilege.²⁴

[60] The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.²⁵

[61] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.²⁶

TCHC's representations

[62] The TCHC provides the following explanation for why it claims that certain litigation records remain subject to the application of section 12 of the *Act*:

Record 1 - Notes and Correspondence from [a specified date to a specified date] The remaining records are comprised of notes and correspondence between TCHC's Lawyer, [named lawyer] and TCHC which contain privileged legal advice and litigation work product.

Record 2 - Legal Research: These records contain the litigation work product of TCHC's Lawyer and consist of case law with notations and highlights, working notes and various draft legal documents in preparation for the legal dispute.

[63] The TCHC takes the position that the documents contained in Records 1 and 2 are subject to solicitor-client communication privilege and litigation privilege explaining that:

TCHC's lawyer had carriage of the appellant's litigation file and she provided advice to the internal client on the corporation's behalf. In this particular matter, the client is considered to be the Asset Management staff that administers the appellant's tenancy in the building in which he resides. [Named lawyer] conferred with the client on matters pertaining to the legal files, and also advised her client on the progress of the proceedings.

Record 1 contains direct communications of a confidential nature between TCHC's lawyer and her client. These communications were necessary for [named lawyer] to gather information in order to render a legal opinion and provide legal advice to her client regarding the appellant's claims against TCHC to obtain instructions in relation to the litigation.

²⁴ *Ontario (Ministry of Correctional Services) v. Goodis*, cited above, and Order PO-2733.

²⁵ *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

²⁶ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

...

All records at issue in Record 1 involved correspondence containing private instructions from the client and legal advice to the client regarding the existing litigation involving the appellant and TCHC during the period of time that the litigation was ongoing.

TCHC employees must have a manner in which they can engage in candid, frank and open discussions with TCHC's lawyers in order to communicate the facts of the case for legal advice and guidance. The fact that almost all of these records were generated solely for the purposes of discussing the existing litigation during the time frame supports this portion of the test.

...

[64] It submits that the information that is communicated back and forth between TCHC's lawyer and the client is part of the continuum aimed at keeping both the client and the lawyer informed so that advice may be sought and given as required²⁷.

[65] The TCHC further submits that the content of Record 2 falls within the scope of solicitor-client privilege because it applies to a legal advisor's working papers directly related to seeking, formulating or giving legal advice, and that:

Record 2 contains the litigation work product of TCHC's lawyer. Specifically, this record contains draft pleadings, legal research notes, case law with notations and highlights created by TCHC's lawyer for the purpose of preparing for litigation. These records are clearly "working papers" and are directly related to formulating a legal strategy and providing the requisite legal advice to the client.

[66] It submits that all emails sent by its lawyer contain a warning that they contain information that may be confidential and/or subject to solicitor-client privilege. It submits that:

While this notice in and of itself is not determinative of whether the correspondence is subject to solicitor-client communication privilege, the email warning together with the fact that the total contents of Records 1 and 2 contain correspondence between TCHC's lawyer and client, drafts and legal research related to the litigation clearly show that the documents are privileged.

[67] The TCHC also submits that the records are subject to litigation privilege. It

²⁷ The TCHC relies on Order PO-3078 in support of this submission.

explains that:

In order for [named lawyer] to investigate the facts of the case for litigation, it was necessary to engage in the type of correspondence described in Record 1. The zone of privacy between the lawyer and client is essential in order to engage in candid and frank discussions necessary to defend the legal matters at hand.

As the lawyer employed by TCHC, [named lawyer] created the records at issue for purpose of litigating the matter at the Superior Court of Justice and the Court of Appeal. Therefore, it was necessary to create Records 1 and 2 in the zone of privacy to enable her to prepare and respond to legal claims submitted by the appellant.

Similarly, [named lawyer's] litigation work product is protected under litigation privilege, as it contains documents such as her working notes, case law with notations and highlights and draft pleadings. These documents as described fall squarely within the definition of litigation work product and are protected under section 12.

[68] The TCHC submits that Records 1 and 2 are subject to both solicitor-client communication privilege and litigation privilege as they were prepared by or for counsel employed by TCHC for use in giving legal advice pursuant to a litigation matter.

[69] Relying on Order P-538, the TCHC submits that the records remain subject to section 12 even if the litigation is over and that at no time was privilege waived.

The appellant's representations

[70] The appellant acknowledges that while some records may be subject to solicitor-client privilege it would not apply to all the records for which it is claimed. He further argues that as the litigation has terminated, litigation privilege would no longer apply. The appellant submits that the communication at issue must be made in the course of seeking legal advice and that only those communications between a solicitor and client made for the purposes of seeking and obtaining the solicitor's advice on legal matters are protected. He submits that it does not apply when the lawyer is acting as a business counsellor or in some other non-legal capacity.

Analysis and finding

[71] I find that the withheld information in the records that is claimed to be subject to section 12, falls within the scope of section 12 of the *Act* because disclosure of this information would reveal the nature of a confidential communication provided in the context of a confidential solicitor-client communication or would reveal the substance of the confidential communication or legal opinion provided, and/or would qualify as a solicitor's working papers and/or would qualify as a record "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". I am satisfied that no waiver of privilege has occurred with respect to this information. Accordingly, I find that this information qualifies for exemption under section 38(a) of the *Act*, in conjunction with section 12.

[72] Finally, considering the information that I have determined to qualify for exemption under section 38(a), in conjunction with section 12, and the overall circumstances of the matter, I am satisfied that the TCHC properly exercised its discretion with respect to the information that I have found to be exempt under section 38(a), in conjunction with section 12.

ORDER:

1. I order the TCHC to disclose to the appellant the withheld information on pages B-4, B-8 and B-24 by sending it to him by **March 28, 2017** but not before **March 23, 2017**.
2. I uphold the reasonableness of the TCHC's search for responsive records.
3. In all other respects, I uphold the TCHC's decision.
4. In order to ensure compliance with paragraph 1, I reserve the right to require TCHC to sent me a copy of the records as disclosed to the appellant.

Original Signed by: _____
Steven Faughnan
Adjudicator

February 21, 2017 _____