

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3535

Appeal MA17-200

The Corporation of the City of Oshawa

November 30, 2017

Summary: The Corporation of the City of Oshawa received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to the information pertaining to a specific matter relating to the Mayor. The town identified responsive records and granted partial access to them, ultimately relying on section 38(a) (discretion to refuse requester's own information), in conjunction with section 12 (solicitor-client privilege) to withhold an email chain. In this order the Adjudicator finds that the information at issue qualifies for exemption under section 38(a) in conjunction with section 12 and dismisses the appeal.

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).

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

OVERVIEW:

[1] The Corporation of the City of Oshawa (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to "[a]ll emails from [named individual] and [named individual] to [named individual] related to the Mayor [named Mayor] RSP 2010 2011".

[2] The city identified responsive records and granted partial access to them, relying on section 12 (solicitor-client privilege) of the *Act* to deny access to the portion it

withheld.

[3] The requester (now the appellant) appealed the city's decision.

[4] Mediation did not resolve the appeal.

[5] I commenced my inquiry by seeking representations from the city on the facts and issues set out in a Notice of Inquiry. In light of the possible content of the records and the way the request was framed, I decided to add the possible application of section 38(a) (discretion to refuse requester's own information) as an issue in the appeal. The city provided responding representations. I then sent a Notice of Inquiry to the appellant along with the city's representations. The appellant provided responding representations.

[6] In this order, I find that the information at issue qualifies for exemption under section 38(a), in conjunction with section 12, and I dismiss the appeal.

RECORDS:

[7] The records at issue consist of an email chain.

ISSUES:

- A. Does the email chain 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 section 12, apply to the email chain?

DISCUSSION:

Issue A: Does the email chain contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[8] 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,
- (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;

[9] 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

[10] Sections 2(2.1) and 2(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.

[11] To qualify as personal information, the information must be about the individual

¹ Order 11.

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

[12] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.³

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

[14] The city submits that the email chain is comprised of legal advice in the form of email communications as necessary for that purpose between the city Solicitor and city staff regarding the legal interpretation of the city's Council Remuneration By-Law 39-2005 and its applicability to identifiable individuals including, but not limited to, the appellant.

[15] The city submits that the email chain includes:

- the views and opinions of individuals (i.e. between the city Solicitor and city Staff) regarding the interpretation and application of the Council Remuneration By-Law 39-2005 to both the [appellant] and to other individuals; and,
- the names of individuals along with personal information related specifically to those individuals, and where the disclosure of those names would reveal other personal information about those individuals.

[16] The appellant's representations do not address the issue of whether the records contain personal information and to whom it relates.

[17] Based on the city's representations and the manner in which the appellant's request is framed, I find that the email chain at issue contains the personal information of the appellant and other identifiable individuals that falls within the scope of the definition of personal information in section 2(1) of the *Act*.

Issue B: Does the discretionary exemption at section 38(a), in conjunction with section 12, apply to the email chain?

[18] 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 city may refuse to disclose that information to the appellant.

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.).

[19] 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.

[20] 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

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

Solicitor-client communication privilege

[22] 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.⁵ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.⁶ 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.⁷

[23] 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.⁸

The city's representations

[24] The city submits that the email chain represents a continuum of communications between the city solicitor and his client's staff, which the city submits resides at the highest end of the continuum, including the communication of specific legal advice and interpretation of Council Remuneration By-Law 39-2005, and which concerns the city's legal rights and obligations. The city submits that the communications between the city Solicitor and his client's staff members were expressly made in confidence. The city further submits that the privilege has not been waived.

⁵ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁶ Orders MO-1925, MO-2166, and PO-2441.

⁷ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

⁸ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

[25] Regarding the exercise of discretion, in its representations the city set out an extensive list of the factors it considered and added that:

For purposes of section 38(a) of the *Act*, the records constitute "highly confidential and sensitive" legal advice through communications between the city Solicitor and city staff respecting identifiable individuals, including but not limited to the requester. It is the city's historic practice not to disclose information to which solicitor-client privilege applies. In any event, solicitor-client privilege has not been waived by the city's Council in this case.

The city exercised its discretion under Section 12 in good faith on the basis that the appellant's request could be understood to encompass the solicitor-client privilege information contained in the city Solicitor's communications. In addition to its commitment to its obligations under the *Act*, the city remains committed to the sanctity of solicitor-client privilege, thus its continued good faith reliance on section 12.

As such, the city submits that it exercised its discretion reasonably in withholding records pursuant to section 38(a) in conjunction with section 12. It was required of the city to exercise its discretion and it did so in good faith and for no improper or other purpose, taking into account all relevant considerations.

The appellant's representations

[26] The appellant's representations do not specifically address the issue of whether section 12 applies, but instead includes a chronology generated by a member of staff setting out how matters unfolded in relation to a matter pertaining to the appellant. The appellant states that this chronology makes no mention of a remuneration meeting of interest to the appellant.

Analysis and finding

[27] I find that the withheld information at issue falls within the scope of section 12 because disclosure of this information would reveal 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 and aimed at keeping both informed so that advice can be sought and given. 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.

[28] I am also satisfied the city properly exercised its discretion under section 12 of the *Act*. It should be noted that the Supreme Court of Canada has stressed the categorical nature of the privilege when discussing the exercise of discretion in *Ontario*

*(Public Safety and Security) v. Criminal Lawyers' Association*⁹.

ORDER:

I uphold the city's decision and dismiss the appeal.

Original Signed by: _____
Steven Faughnan
Adjudicator

_____ November 30, 2017

⁹ 2010 SCC 23, [2010] 1 S.C.R. 815.