

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3550-F

Appeal MA14-557

The Corporation of the City of Kingston

January 19, 2018

**Summary:** This final order follows Interim Orders MO-3294-I and MO-3405-I. The appellant sought access to records related to the removal of a temporary sales office. The city denied access in full claiming that the records fall outside of the scope of the *Act* as a result of the operation of the exclusion for records relating to a prosecution at section 52(2.1). In the alternative, it claimed that they are exempt from disclosure pursuant to the solicitor-client privilege exemption at section 12 of the *Act*. The appellant appealed the decision. In Interim Order MO-3294-I, I found that the exclusion at section 52(2.1) had not been established and the records fall within the scope of the *Act*. In Interim Order MO-3405-I, I found that the city established that section 12 applies to the responsive records and I upheld their decision not to disclose them. In this final order, I find that the city conducted a reasonable search for responsive records and dismiss the appeal.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 17.

**Orders Considered:** Order MO-3294-I and MO-3405-I.

### OVERVIEW:

[1] This is a final order for Appeal MA14-557. This order follows Interim Order MO-3294-I and Interim Order MO-3405-I.

[2] This appeal arises from a request that was submitted to the Corporation of the City of Kingston (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for records relating to the removal of a temporary

sales office. The appellant, an individual acting on behalf of the Board of Directors of a condominium corporation whose lands are adjacent to the land occupied by the sales office, sought access to information relating to a specific amending agreement that was registered in the Land Registry Office.

[3] In its first decision in response to the request, the city advised that records relating to the subject property were available for public viewing at the Planning Development Department and also that:

[s]earches have been conducted through the city's records holdings, and there are no further records responsive to your *MFIPPA* request.

[4] The requester contacted the city to attempt to clarify his request. Subsequently, the city issued a supplementary decision in which it indicated that any records in the prosecutor's office are privileged and exempt pursuant to the exemption for solicitor-client privileged records at section 12 of the *Act*. The appellant appealed the decision.

[5] During mediation, the appellant advised that in addition to seeking access to the information that the city claimed was subject to the solicitor-client privilege exemption, he sought access to a list of all the responsive records and the court file number. The city advised that it would not produce a list of responsive records and also, that the appellant could contact them directly to obtain information relating to the court file.

[6] Additionally, during mediation, the city confirmed its position that the responsive records are subject to solicitor-client privilege. The city also issued a supplemental decision in which it claimed that the exclusion for records relating to a prosecution at section 52(2.1) of the *Act* applies, stating that "the records are contained within a prosecutor's file where all proceedings in respect of a prosecution that has not yet been completed."

[7] The appeal proceeded to the adjudication stage of the appeal process and during my inquiry in the issues on appeal, representations were sought and received by the parties.

[8] In Interim Order MO-3294-I, I addressed the preliminary jurisdictional issue of whether the exclusion at section 52(2.1) for records relating to a prosecution applies in the circumstances of this appeal and found that it had not been established. As I found that the exclusion does not apply, the responsive records fall within the scope of the *Act*. Accordingly, I was then required to determine whether the records are exempt from disclosure by virtue of the application of the solicitor-client privilege exemption set out in section 12 of the *Act*.

[9] I then sought and received representations from the parties on the possible application of section 12 to the records. The city provided an affidavit of responsive records detailing the records at issue in the appeal. The appellant advised that he was of the view that responsive records, in addition to those identified by the city in its affidavit, should exist. Although the issue of the reasonableness of the city's search for

responsive records was not canvassed at the outset of this appeal, given that the city had not provided the appellant with any indication of the nature or number of responsive records at that time, this was the first opportunity for the appellant to raise this issue. In the circumstances, I advised that I would seek further representations on the reasonable search issue and not address them in the second interim order (Interim Order MO-3405-I), in which I considered the issue of the application of the exemption at section 12 of the *Act*. In that order, I found that the solicitor-client exemption at section 12 applies to the records and I upheld the city's decision to deny access to them.

[10] The sole issue that remains for me to consider is the issue of whether the city conducted a reasonable search for responsive records. I sought and received representations from the parties on the issue of search. The city's representations were shared with the appellant. I decided that it was not necessary for me to share the appellant's representations with the city.

[11] In this final order, I find that the city's search for responsive records was reasonable and I uphold it.

## **DISCUSSION:**

### **Did the city conduct a reasonable search for responsive records?**

[12] The city asserts that it conducted a reasonable search for and has located all records responsive to the request. The appellant takes the position that additional responsive records should exist. 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. 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.

### ***Representations***

[13] The city submits that it provided the appellant with the opportunity to view the contents of the Planning Department file with respect to the subject property but that the records that he was looking for were not in the file.

[14] With respect to its search for responsive records, the city submits:

Upon receipt of the initial request, [named individual], Corporate Records & Information Officer, contacted various City Departments to inquire about the records responsive to the request. Contact was made with staff of the City's Planning, Building, and Property Standards Divisions, as well as the Mayor's Office (see emails contained in Exhibit A). Planning, Building and Property Standards records were provided to the appellant. After receipt of the records, the appellant made it clear that the records

he sought were the records contained in the City's Prosecutor's file. [named individual, above] contacted the City's Legal Services Division and inquired about the records responsive to the request. The Legal Services Division indicated that they did have some responsive records, but they fall outside of the scope of *MFIPPA* pursuant to *MFIPPA* section 52(2.1), and they are subject to solicitor-client privilege pursuant to *MFIPPA* section 12. Please see Exhibit B, which is an affidavit of responsive records. No further responsive records exist.

[15] As indicated in their submissions, Exhibit A and Exhibit B were attached to the city's representations.

[16] Finally, the city submits that no records that might be responsive to the request were subject to destruction pursuant to the City's Recorded Information Management Police and Records Retention By-Law #2008-182, which was also attached to its representations.

[17] The city maintains that no further responsive records exist.

[18] In his representations, the appellant states that he is satisfied that the city has conducted a reasonable search and has disclosed all information that is available, "subject, however, to the questions of 'privilege.'"

[19] The appellant submits that a review of all documents indicates that there is no communication by the City with the owner of the property that would have supported a prosecution. He submits that there is nothing in the records that indicate that the city was potentially subject to prosecution. He concedes however, that the records did include correspondence and documents relating to the amendment of the original Site Plan Agreement to allow the continued use of the Sales Office for an additional five-year period.

[20] The appellant reiterates that the city has "strongly maintained the existence of a 'prosecution'" but submits that there is no record of the risk of prosecution being communicated to the alleged "offender." The appellant submits that if the city "truly believed an offence had been committed it had a duty to bring this to the attention of the alleged offender so that the breach could be remedied." He submits that it has not done so. The appellant concludes his representations by stating:

It is my submission that the failure of the city in this respect, for whatever reason, renders the suggestion of a "prosecution" an abstract fantasy. As such, subject to review by the Commissioner, there may be no privileged content in any of the documents or records in respect of which privilege has been claimed. I respectfully submit that it is open to the Commissioner to find that all such documents are no longer subject to any right of privilege.

### ***Analysis and finding***

[21] As indicated above, the appellant states that he is satisfied that the city has conducted a reasonable search and has disclosed all information that is available, "subject, however, to the questions of 'privilege.'" His submissions suggest that I find the records responsive to his request are no longer subject to the solicitor-client privilege exemption at section 12 of the *Act*.

[22] With respect to the issue of whether the city has conducted a reasonable search, as previously set out, the *Act* does not require the institution to prove with absolute certainty that further records do not exist but must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.<sup>1</sup> Additionally, previous orders have established that 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 records, in addition to those identified by the institution, exist.<sup>2</sup>

[23] In the circumstances of this appeal, I accept that the city has demonstrated that it has made a reasonable effort to identify and locate records responsive to the request. Also, in my view, the appellant has not provided a reasonable basis for concluding that additional records responsive to his request exist. Moreover, in his representations, the appellant indicates that he is "satisfied that the city has conducted a reasonable search and has disclosed all information that is available, with the exception of the records which were subject to privilege and previously found to be exempt pursuant to section 12 of the *Act*. Accordingly, I uphold the city's search for responsive records.

[24] As set out in the overview of this order, the issue of whether the records responsive to the request are subject to the exemption at section 12 was addressed in Interim Order MO-3405-I. In that order, I found that the exemption applied and I upheld the city's decision not to disclose them to the requester. Specifically, in Order MO-3405-I, I found that the records fell within both the common law solicitor-client communication privilege and the statutory solicitor-client communication privilege. Accordingly, I will not revisit that decision in this order based on the arguments made by the appellant.

[25] It should be noted that it is the city's prerogative, as holder of the privilege, to waive it and disclose some or all of the records to the appellant, notwithstanding my finding that the exemption at section 12 applies.

### **ORDER:**

I uphold the city's search for responsive records and dismiss the appeal.

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<sup>1</sup> Order PO-2554.

<sup>2</sup> Order PO-2554.

Original Signed by: \_\_\_\_\_  
Catherine Corban  
Adjudicator

January 19, 2018 \_\_\_\_\_