Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3716

Appeal MA17-101

City of Toronto

December 31, 2018

Summary: The appellant submitted a request to the City of Toronto (the city) seeking access to email records relating to athletic field domes at specified Toronto schools. The city issued a decision granting the appellant access to most of the records responsive to the request. However, it withheld certain records and information on the basis that they were exempt from disclosure under the mandatory personal privacy exemption in section 14(1) or the discretionary solicitor-client privilege exemption in section 12 of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The city also claimed that some records were not in its custody or under its control as required under section 4(1) for the application of the *Act.* In this order, the adjudicator upholds the personal privacy and custody or control parts of the city's decision, and its solicitor-client privilege claim, in part. Some records, including all of those for which the city claimed litigation privilege, are not exempt under section 12, and the adjudicator orders these records disclosed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M56, as amended, sections 2(1) (definitions of "personal information" and "institution"), 4(1), 12, 14 and 42.

Orders Considered: Orders MO-2821, MO-2842, MO-3471 and MO-3608.

Cases Considered: *Descôteaux v Mierzwinski* (1982), 141 DLR (3d) 590 (SCC), *Balabel v Air India*, [1988] 2 WLR 1036 at 1046 (Eng CA), *Ontario (Ministry of Correctional Service) v Goodis*, 2008 CanLII 2603 (ON SCDC).

OVERVIEW:

[1] The appellant made a request to the city under the *Act* for all emails sent or received from January 1, 2012 to February 4, 2016 by three named individuals – a city councillor, the councillor's executive assistant, and a staff member of the mayor's office – that contained any of several specified names, words or phrases. The names, words or phrases all related to an arrangement between the Toronto District School Board (the TDSB) and a company for the construction and operation of athletic field domes at certain schools.

[2] The background of this request is that the stakeholders in this arrangement disagreed on issues of compliance with zoning regulations, resulting in legal and administrative proceedings. Various land use, planning and zoning matters relating to the development of the school fields and domes involved the city, with City Council receiving reports and issuing decisions on aspects of the development.

[3] In response to the appellant's request, the city issued a decision granting him partial access to the responsive records. It denied access to information that it claimed was exempt under the discretionary solicitor-client privilege exemption in section 12 and the mandatory personal privacy exemption in section 14(1) of the *Act*. The city also advised the appellant that some of the councillor's records were confidential constituent interactions that were not in its custody or under its control for the purpose of section 4(1) of the *Act*.

[4] The appellant was not satisfied with the city's decision and appealed it to the Office of the Information and Privacy Commissioner (the IPC). The IPC attempted to mediate the appeal. During mediation, the city issued a revised decision granting the appellant access to some previously withheld records. In its revised decision, the city claimed the discretionary personal privacy exemption in section 38(b) of the *Act* for one record that it previously withheld under section 14(1). The city maintained its claim of sections 12 and 14(1) to the remaining withheld information, and its claim that it did not have custody or control of some of the councillor's records. The appellant confirmed that he wished to pursue access to all of the information withheld by the city, including the councillor records the city claimed were not in its custody or under its control. Accordingly, the appeal was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act.*

[5] The adjudicator originally assigned to this appeal sought and received representations from the city and the appellant on the issues set out below, and shared the parties' representations with them in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure.* The appeal was then transferred to me for a determination of the issues. I decided to notify the councillor about the appeal and seek her position on page 339 of the records – a portion of which the city withheld under section 38(b) on the basis that it contained both the councillor's and the appellant's personal information, and that disclosing it would constitute an unjustified invasion of

the councillor's personal privacy. The councillor provided written consent to the disclosure of the information withheld under section 38(b). The councillor's consent engages the exception in section 14(1)(a) to the mandatory personal privacy exemption in section 14(1), eliminating any personal privacy concern about disclosing this information. Accordingly, page 339, which I order disclosed below, and section 38(b) are no longer at issue in this appeal. I also sought and received from the city the pages missing from some emails withheld under section 12, in order to review the records as complete email chains.

[6] For the reasons set out below, I uphold the city's decision to deny access to records under section 14(1) (personal privacy) or on the basis that they are not in its custody or under its control as required for the right of access under section 4(1) of the *Act*. I partly uphold the city's decision under section 12 (solicitor-client privilege), but I order the city to disclose seven pages of records that are not subject to communication or litigation privilege.

RECORDS:

[7] At issue in this appeal are emails withheld in part or in full as follows:

- Information withheld under section 14(1) on pages 107, 111, 112, 255, 281, 319, 427-429 and 887.
- Information withheld under section 12 on pages 74, 82, 83, 90, 210, 213, 327, 333, 345, 351, 365, 550, 805, 817, 827, 835, 859, 865, 879, 889 and 906; and pages 73, 209, 217, 241, 243, 309, 389, 397, 398, 423, 425, 426, 549, 687, 897, 905 and 925.
- Information on pages 261 and 273, and pages 243-247, 249-251, 262, 263, 271, 272, 317, 335-337, 619-621 (duplicates of pages 245- 247), 623-625 (duplicates of pages 249-251), 649-651 (duplicates of pages 261-263) and 653-657 (pages 655-657 are duplicates of pages 261-263), which the city claims are not in its custody or under its control.

ISSUES:

A. Are the identified emails "in the custody" or "under the control" of the city under section 4(1)?

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

C. Is the withheld personal information exempt from disclosure under section 14(1)?

D. Does the discretionary exemption at section 12 apply to the records remaining at issue?

E. Did the city properly exercise its discretion under section 12?

DISCUSSION:

A. Are the identified emails "in the custody" or "under the control" of the city under section 4(1)?

[8] Under section 4(1) of the *Act*, individuals are granted the "the right of access to a record or a part of a record in the custody or under the control of an institution." The term "institution" is defined in section 2(1) and includes a municipality, but it does not specifically refer to elected offices such as that of a municipal councillor.

[9] A record will be subject to the *Act* if it is in the custody or under the control of an institution; it need not be both.[1] "Custody" and "control" are not defined terms in the *Act*. In deciding the custody or control question, the courts and the IPC have applied a broad and liberal approach.[2]

[10] The IPC has developed a non-exhaustive list of factors to consider in determining whether or not a record is in the custody or under the control of an institution.[3] Some of the listed factors may not apply in a specific case, while other unlisted factors may apply. The key factors that apply in this appeal are the following:

- Was the record was created by an officer or employee of the institution?[4]
- What use did the creator intend to make of the record?[5]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?[6]
- Does the content of record relate to the institution's mandate and functions?[7]

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[1] Order P-239 and *Ministry of the Attorney General v Information and Privacy Commissioner*, 2011 ONSC 172 (Div Ct).
[2] *Ontario (Criminal Code Review Board) v Ontario (Information and Privacy Commissioner)*, [1999] OJ No 4072; *Canada Post Corp. v Canada (Minister of Public Works)* (1995), 30 Admin LR (2d) 242 (Fed CA) and Order MO-1251.
[3] Orders 120, MO-1251, PO-2306 and PO-2683.
[4] Order 120.
[5] Orders 120 and P-239.
[6] Order P-912, upheld in *Ontario (Criminal Code Review Board) v Ontario (Information and Privacy Commissioner)*, cited above.

- Does the institution have physical possession of the record because it has been voluntarily provided by the creator?[8]
- If the institution does have possession of the record, is it more than "bare possession"?[9]
- Does the institution have a right to possession of the record?[10]
- Does the institution have the authority to regulate the record's content, use and disposal?[11]
- To what extent has the institution relied upon the record?[12]
- How closely is the record integrated with other records held by the institution?[13]
- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?[14]
- If the record is not in the physical possession of the institution, who has possession of the record, and why?[15]
- Is the individual who has physical possession of the record an "institution" for the purposes of the *Act*?
- Who owns the record?[16]
- Who paid for the creation of the record?[17]
- What are the circumstances surrounding the creation, use and retention of the record?[18]

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[7] *Ministry of the Attorney General v Information and Privacy Commissioner*, cited above; *City of Ottawa v Ontario*, 2010 ONSC 6835 (Div Ct), leave to appeal refused (March 30, 2011), Doc. M39605 (CA) and Orders 120 and P-239.
[8] Orders 120 and P-239.
[9] Order P-239 and *Ministry of the Attorney General v Information and Privacy Commissioner*, cited above.
[10] Orders 120 and P-239.
[11] Orders 120 and P-239.
[12] *Ministry of the Attorney General v Information and Privacy Commissioner*, cited above and Orders 120 and P-239.
[13] Orders 120 and P-239.
[14] Order MO-1251.
[15] PO-2683.
[16] Order M-315.
[17] Order M-506.

- Is there any other practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?

- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?[19]

[11] To determine whether the email records listed above are in the custody or under the control of the city, I must review each record and consider the factors contextually in light of the purpose of the legislation.[20]

The city's representations

[12] The city explains that it provides councillors with two separate emails accounts for two different types of records to ensure that the two types of records are not integrated. One email address is to be used for the first type of records, those that relate to city business and the councillor's official responsibilities as a member of City Council. The second email address is to be used for the second type of records, those that consist of the councillor's personal/political/constituent-relations communications. The city submits that it only has custody or control of the first type of records; it does not have custody or control of the second type of records, which relate to the councillor's personal/political/constituency actions as an individual outside of her duties as a member of City Council.

[13] The city states that it was given bare possession of the councillor's constituency records so that it could prepare a complete response to the access request and ensure an orderly disposition of any appeal. Beyond this, the city asserts it has no right to deal with these records. Relying on Order MO-3471, it submits that the simple provision of electronic and other resources by it for use by individual members of City Council does not constitute more than bare possession. In its confidential representations, the city describes the three topics addressed in these records, all of which it claims are constituency matters. It adds that the constituency records are simply emails that contain words listed in the access request that are unrelated to matters in which the city, as an institution under the *Act*, is involved.

[14] Addressing the factors listed above, the city states the following about the constituency records:

- They were not created in the councillor's role as an elected official.

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[18] PO-2386.
[19] Order MO-1251.
[20] *City of Ottawa v Ontario,* cited above.

- Their intended use does not relate to any city business.
- The activity that resulted in their creation was not in furtherance of a statutory power or duty of the city as an institution.
- They relate to activity of an individual councillor interacting with a member of the public, outside of the councillor's role as a member of Council, which is not a core, central or basic function of the city.
- It has not relied on them for any purpose, nor are they integrated with other records it holds.
- Any relationship between their content and the city's mandate and functions is of a general nature and not tied to specific aspects of the city's operations.
- It believes it has no right to possess them or regulate their content, use and disposal.
- Its bare possession of them is not indicative of whether it could objectively and reasonably expect to obtain them for the purposes of its operations generally.

[15] The city concludes by noting that various IPC orders have found that constituency records arising from matters outside an individual member of Council's official responsibilities to a municipality are not under the institution's custody or control.

The appellant's representations

[16] In his representations, the appellant does not address this issue directly. He does not comment on the list of factors, set out above, that was provided to him in the Notice of Inquiry. He also does not respond to the city's extensive representations on this issue, the non-confidential portions of which he received during the inquiry. The appellant's representations contain his views about how and why his company was treated unfairly by the councillor who, he claims, has been concealing emails that he should be able to access. The appellant also provides information relating to events between 2012 and 2017 that he considers to be relevant background to this appeal.[21]

Analysis and finding

[17] Having reviewed the records that the city claims are not in its custody or under

[21] The city's representations also include background information on disputes involving the appellant and its views on these disputes. The background information provided by both parties is not relevant to my determination of the issues in this appeal and, apart from the brief summary I provide in my overview above, I have excluded it from my order for this reason.

its control, and for the following reasons, I agree with the city's position. The city's submissions accurately describe the records at issue and reflect the courts' and the IPC's approach in determining the custody or control issue. The appellant's representations do not assist me in my determination because they do not address the relevant factors I must consider in determining whether the city has custody or control of the records in question.

[18] The records that the city claims are not in its custody or under its control are all councillor communications about constituency issues. They are all emails sent or received by the councillor using her email account designated by the city for constituency matters. The city's practice in relation to constituency records is to isolate them in a designated email account controlled by the councillor. While the city provided the councillor with the email account in which these records appear, it did so for the express purpose of segregating the councillor's constituency records from her non-constituency records, the latter of which relate to city business and are in the city's custody or under its control for the purposes of the *Act.* Although the account in which the records are found is not determinative of custody or control, the city's customary practice of providing councillors with a designated email account for constituency records is a relevant factor.

[19] Having read all of the identified email records, I accept that the councillor did not create them in her role as a member of City Council and she was not acting as an officer or employee of the city when she created them. The city has only bare possession of these records because the councillor provided the records to the city to enable it to respond to the appellant's access request. The city does not have a right to possess the records, nor does it have the authority to regulate their content, use and disposal.

[20] Many IPC orders have held that a city councillor's personal/political/constituency records are not in a city's custody or under its control because they relate to the councillor's activities as an elected representative.[22] Taking the same approach in this appeal, and for the reasons set out above, I find that the city does not have custody of, or control over, pages 243-247, 249-251, 261, 262, 263, 271-273, 317, 335-337, 619-621, 623-625, 649-651 and 653-657 of the records within the meaning of section 4(1) of the *Act.*

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

[21] In order to determine whether section 14(1) of the *Act* applies to the withheld information, I must first determine whether the records contain "personal information"

[22] See Orders MO-2821, MO-2842, MO-3471 and MO-3608.

and, if so, to whom it relates. That term is defined in section 2(1), in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
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> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,
> >
> > (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual[.]

[22] 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.[23] 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.[24] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[25]

[23] The city submits, and I find, that the identified records contain the personal information of multiple identifiable individuals. Specifically, the withheld information at pages 107, 111, 112, 255, 281, 319, 427-429 and 887 contains the names of identifiable individuals, along with an individual's family status, personal email address, telephone number or other information about them, engaging one or more of paragraphs (a), (d) and (h) of the definition of "personal information" in section 2(1) of the *Act*. I further find that none of the records contains the personal information of the appellant.

[24] Having found that these pages contain the personal information of identifiable individuals other than the appellant, I will consider whether the mandatory personal privacy exemption in section 14(1) of the *Act* applies to them.

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[23] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[24] Orders P-1409, R-980015, PO-2225 and MO-2344.
[25] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v Pascoe*, [2002] OJ No 4300 (CA).

C. Is the withheld personal information exempt from disclosure under section 14(1)?

[25] Section 14(1) is a mandatory exemption that prohibits the disclosure of an individual's personal information to another individual unless the disclosure is authorized under one of a number of exceptions found in the remainder of section 14. The city bears the burden of proving that the withheld information in the records falls within the section 14(1) exemption.[26] In his representations, the appellant does not directly address the application of section 14(1) to the records. Accordingly, my determination of whether section 14(1) applies is based on my review of the records for which the city has claimed the exemption along with the city's corresponding representations.

[26] The exceptions at sections 14(1)(a) through (e) permit disclosure. The city submits, and I find, that none of the exceptions in sections 14(1)(a) to (e) applies in this appeal. Section 14(4) lists situations that would not be an unjustified invasion of personal privacy. The city submits, and I find, that section 14(4) does not apply because none of the situations described in sections 14(4)(a), (b) and (c) exists in this appeal. The city suggests that the only exception that could apply is section 14(1)(f), which permits disclosure of an individual's personal information if disclosure would not be an unjustified invasion of the individual's personal privacy. Section 14(1)(f) states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, if the disclosure does not constitute an unjustified invasion of personal privacy.

[27] Sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Paragraphs (a) through (i) of section 14(2) provide a non-exhaustive list of factors that weigh in favour of, and against, disclosure. Paragraphs (a) through (h) of section 14(3) describe circumstances in which disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy under section 14. The city does not assert the application of any of the section 14(3) presumptions and I find that none applies.

[28] Turning to the factors in section 14(2), the city argues that those favouring disclosure, paragraphs (a), (c) and (d), have limited application and are outweighed by the factor that supports withholding access at paragraph (h). These paragraphs state:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

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[26] Section 42 of the *Act* states: If a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this Act lies upon the head.

> (a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;
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> (c) access to the personal information will promote informed choice in the purchase of goods and services;
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> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request.
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence

[29] The city states that the nature of the correspondence indicates that its authors had an expectation that the correspondence would be treated confidentially. I agree with the city's representations that the factor in section 14(2)(h), weighing against disclosure, applies and should be given the most weight. The withheld information relates to individuals who were communicating specific information in their personal capacity. It also reveals their personal contact information. Considering both the nature of the withheld information and the context in which it appears, I am satisfied that this personal information was supplied in confidence.

[30] However, from my review of the records, I do not find that the factors at paragraphs (a), (c) and (d) of section 14(2), or any other factors favouring disclosure, are relevant in this appeal. The withheld personal information is primarily contact information and other personal details shared between individuals in confidence. It does not relate to the city's activities as a public institution or to the purchase of goods and services. Nor does it relate to the appellant, his business interests, or the background events. Accordingly, I find that none of the factors in section 14(2) favouring disclosure applies to the information at issue, while the factor at paragraph (h) of section 14(2), weighing against disclosure, does. As a result, I find that the exception in section 14(1)(f) is not established and that the mandatory exemption in section 14(1) of the *Act* applies to the personal information on pages 107, 111, 112, 255, 281, 319, 427-429 and 887 of the records.

D. Does the discretionary exemption at section 12 apply to the records remaining at issue?

[31] Section 12 gives institutions the discretion to withhold solicitor-client privileged records. It states:

> 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.

[32] The first branch of section 12 – "subject to solicitor-client privilege" – is based on

the common law, while the second – "prepared by or for counsel employed or retained by an institution…" – is a statutory privilege. To successfully rely on the exemption, the city need only establish that one of the two branches applies.

Solicitor-client communication privilege

[33] The solicitor-client communication privilege, under both branches, 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.[27] The rationale for this privilege is to ensure that a client may freely confide in her lawyer on a legal matter.[28] 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.[29] Confidentiality is an essential component of the privilege, which does not cover communications between a solicitor and a party on the other side of a transaction.[30]

Litigation privilege

[34] Litigation privilege, under both branches, 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.[31] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[32] 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.[33] Unlike the common-law litigation privilege, however, the statutory litigation privilege does not end at the conclusion of the litigation.

Waiver of privilege

[35] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[34] However, waiver may not apply where the record is disclosed to another

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[27] *Descôteaux v Mierzwinski* (1982), 141 DLR (3d) 590 (SCC).
[28] Orders PO-2441, MO-2166 and MO-1925.
[29] *Balabel v Air India*, [1988] 2 WLR 1036 at 1046 (Eng CA).
[30] *Kitchener (City) v Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div Ct).
[31] *Blank v Canada (Minister of Justice)* (2006), 270 DLR (4th) 257 (SCC) (also reported at [2006] SCJ No
[32] *Ontario (Attorney General) v Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 OR (3d) 167 (CA).
[33] *Ontario (Ministry of Correctional Service) v Goodis*, 2008 CanLII 2603 (ON SCDC).
[34] J. Sopinka et al., *The Law of Evidence in Canada* at p669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v Big Canoe*, [1997] OJ No 4495 (Div Ct).

party that has a common interest with the disclosing party.[35]

The city's representations

[36] Only the city submitted representations addressing this issue. In them, the city submits that the records it has withheld under section 12 are all exempt solicitor-client privileged records because solicitor-client communication privilege or litigation privilege under one or both of the two branches applies to each of them. It states that the records consist primarily of emails between city staff and city solicitors that relate to the seeking and provision of advice on matters of legal concern, namely, site plan agreements, the proceedings before courts and administrative bodies, and the corresponding developments in these matters. The city asserts that these direct communications between city solicitors and staff, along with internal staff emails, represent a continuum of correspondence in which legal advice was requested or provided about developments in certain disputes.

[37] The city continues that some of the records, including pages 333, 425 and 426, are internal communications between city staff that are not directly to or from city solicitors, but that contain information that would directly or indirectly reveal the content of solicitor-client communications. The city argues that these internal staff communications are solicitor-client privileged because they reference or directly reveal the content of discussions between city solicitors and staff. It submits that disclosure of these emails would reveal information to which section 12 applies by giving the appellant access to documents indicating topics directly identified as the subject of communications with the city's legal department. The city states the appellant would be able to compare these emails to publicly available documents, including documents it has already disclosed to him in response to his access request, and determine the topics and nature of its discussions with its solicitors. The city relies on Order MO-2211 in support of this assertion. The city argues that privilege recognizes that a lawyer's client is entitled to have all communications made with a view to obtaining legal advice in confidence, and is recognized as a principle of fundamental justice.

[38] The city states the remaining records are litigation communications between city solicitors and another party, and it provides confidential representations on them. The city's non-confidential representations on its litigation privilege claim are somewhat unclear. The city states that pages 82 and 83 (partly duplicated in page 90) are portions of an email chain between the solicitor and client indicating matters related to litigation needed to be discussed and that advice on next steps would be provided. The city adds that page 213 contains communications concerning matters which were the subject of litigated disputes with other parties to the dispute. Finally, the city submits that page 241 is part of an email chain between a solicitor and client forwarding a copy of an

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[35] *General Accident Assurance Co. v Chrusz,* cited above; Orders MO-1678 and PO-3167.

earlier communication concerning matters which were the subject of litigation disputes with other parties to the dispute. The city identifies the other party as being counsel at a named firm and "involved in the outstanding disputes." This last submission on page 241 is difficult to follow. I understand the city to be arguing that these pages of the records were used in contemplation of, or for use in, litigation and that they were shared among parties that shared a "zone of privacy" in respect of the litigation. The city concludes by claiming that there has been no waiver of privilege by anyone authorized to act on its behalf.

Analysis and finding

Records that qualify for exemption

[39] In order for me to find that section 12 applies, the city must satisfy me that the records and information it has withheld under section 12 are solicitor-client privileged either at common law or under the statutory privilege. I accept the city's submissions regarding the records described below, which are all direct communications between city solicitors and staff used in giving legal advice. On their face, all of these pages of the records consist of solicitor-client privileged communications. They include pages 73 and 74 of the records (duplicated in pages 549 and 550), which are the first two pages of a four-page email chain between a city solicitor and city staff. This email chain is continued with new emails between the city solicitor and staff in pages 209, 210 and 217 of the records. They also include emails between city staff and solicitors at pages 309, 327 (duplicated in pages 805 and 817), 351, 365 (duplicated at pages 879 and 906), 389 (duplicated in page 905), 397, 398, 423 (duplicated in page 925), 687, 835, 859, 865, 889 and 897. I find that all of the pages set out above are solicitor-client privileged communications that qualify for exemption under section 12 of the *Act*, subject to my review of the city's exercise of discretion below.

[40] The next group of records I must consider are the email communications between city staff only. They are found at pages 333 (duplicated at page 827), 345,[36] 425 and 426. I accept the city's submissions that pages 333 and 827 fall within a continuum of communications in which legal advice was sought or given. The city's representations, that these pages indicate a specific topic of discussion with city solicitors, establish that these pages are subject to either or both the common law and statutory solicitor-client communication privilege. Page 345 is the first page of an email chain between two city staff members that contains a direct solicitor-client communication about an ongoing legal issue being forwarded from one staff member to the other. I accept that this page of the records is subject to solicitor-client privilege on

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[36] The city's representations incorrectly state that: page 365 is duplicated in page 925; page 423 is duplicated in page 906; and page 345 is duplicated in page 835 and that it is a direct solicitor-client communication. Page 835 is a partial duplicate of page 365. Page 345 is an email between city staff.

the basis that it forms part of a continuum of confidential communications made for the purpose of obtaining legal advice. I find that pages 333, 827 and 345 qualify for exemption under section 12 of the *Act*, subject to my review of the city's exercise of discretion below.

Records that do not qualify for exemption

[41] I am not satisfied that the city's representations establish that section 12 applies to pages 425 and 426 of the records. The city's non-confidential representations do not address pages 425 and 426 specifically, and insofar as they address them generally, they do not align with the city's confidential representations. I am not able to describe the city's confidential representations in this order, but I can state that they do not support the assertion that these pages of the records are subject to solicitor-client communication or litigation privilege, either at common law or under the statutory privilege. I also note that the records, on their face, are not solicitor-client privileged. As the city has not met its burden of proof in respect of pages 425 and 426, I find that they do not qualify for exemption under section 12 and I will order them disclosed.

[42] The remaining records, pages 82, 83, 90, 213 and 241, are ones for which the city claims litigation privilege. For the reasons below, I find that none of them is exempt under section 12 of the *Act*. Pages 82 and 83 are the second and third pages of a five-page email chain, while page 90 is the fourth page of an email chain. As I must review the entire record in making my determination, I sought and received the first pages of these two email chains from the city to assess the city's privilege claim. The first page of each of these email chains, pages 81 and 87 respectively, shows that the appellant is one of the listed recipients. On this basis, I find that the communications did not take place in a "zone of privacy" and I therefore reject the city's claim that these emails are litigation-privileged records.

[43] Page 213 of the records is the first page of a four-page email chain between a city solicitor and a representative of the TDSB. Having sought and received from the city the remaining pages in this email chain, I note that the appellant is again listed as a recipient of pages two through four of the email chain. The city has not satisfied its burden of proving that the email starting at page 213 is litigation privileged. It has not identified the litigation to which this email pertains, nor has it explained why litigation privilege should apply despite the fact that the appellant is a recipient of most of the email chain.

[44] Finally, page 241 of the records is the last page of a three-page email chain. Having sought and received from the city the first two pages of this email chain, I note that the second page of the email chain is an email from the appellant forwarding page 241 to city staff. The first page of the email shows that it is a staff communication and it is not solicitor-client privileged on its face. I find that the city has not satisfied its burden of establishing that this email chain is subject to solicitor-client privilege. Because of my findings above, I will order all of the pages for which the city claimed litigation privilege (82, 83, 90, 213 and 241), and pages 425 and 426, disclosed.

E. Did the city properly exercise its discretion under section 12?

[45] The section 12 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. 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.

[46] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[37] This office may not, however, substitute its own discretion for that of the institution.[38] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[39]

- 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
- 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 historic practice of the institution with respect to similar information.

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[37] Order MO-1573.
[38] Section 43(2).
[39] Orders P-344 and MO-1573.

[47] The city submits that it exercised its discretion in withholding records under section 12 in good faith, taking into account all relevant considerations. It explains that it considered the purposes and principles of the *Act* including that information should be available to the public, individuals should be able to access their personal information, privacy should be protected, and exemptions should reflect the specific and limited circumstances where non-disclosure is necessary for the proper operation of municipal institutions. It states that it considered the fundamental importance to Canadian society of the protection of solicitor-client privilege, and the fact that the information to which it applied section 12 is highly sensitive. The city concludes by asserting that it thoroughly considered these factors in responding to the request and applying section 12 as sparingly as possible to deny access in a specific and limited way.

[48] I accept that the city exercised its discretion in applying section 12 of the *Act* to various records, and that it did so properly with respect to the records that I have found above are subject to solicitor-client privilege. The city considered the significance of the interests that section 12 seeks to protect, which are of supreme importance in Canadian law. It also applied the exemption in a limited and specific way. For these reasons, I uphold the city's exercise of discretion to deny access to the solicitor-client exempt records under section 12.

ORDER:

1. I uphold the city's decision regarding custody or control, section 14(1) and, in part, section 12.

2. I order the city to disclose to the appellant:

   - the withheld information at page 339 of the records, and

   - pages 82, 83, 90, 213, 241, 425 and 426 of the records.

   by **February 6, 2019**, but not before **February 1, 2019** and to copy me on its disclosure letter to the appellant.

Original signed by: December 31, 2018

Stella Ball
Adjudicator