

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3734-I

Appeals MA14-106-2, MA14-107-2 and MA14-108-2

The Corporation of the City of Cambridge

February 21, 2019

Summary: The Corporation of the City of Cambridge (the city) received three requests from a requester for access to information under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*). The requester appealed the city's decisions on all three requests and they were assigned different appeal file numbers and were the subject of three separate interim orders. As a result of the interim orders, the only remaining issues to be addressed in the three appeals was whether records provided to this office by the city subsequent to the issuance of the interim orders were responsive to the requests, and if they were, whether the discretionary exemption at section 12 (solicitor-client privilege), either alone or in conjunction with the discretionary exemption at section 38(a) (discretion to refuse requester's own information) of the *Act*, applied to them. In this order, the adjudicator upholds the city's decisions that the records remaining at issue are responsive to the requests and are subject to the solicitor-client privilege at section 12 of the *Act* and thereby qualify for exemption under section 12, either alone, or in conjunction with section 38(a) of the *Act*. However, as the city provided no representations on its exercise of discretion he orders the city to exercise its discretion under section 12 alone, or in conjunction with section 38(a), as the case may be, with respect to the records remaining at issue on the considerations set out in the order.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, as amended, sections 2(1)(definition of "personal information"), 12, 17 and 38(a).

Orders Considered: Interim Orders MO-3599-I, MO-3610-I and MO-3614-I.

BACKGROUND:

[1] The Corporation of the City of Cambridge (the city) received three requests from a requester for access to information under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*). The requester appealed the city's access decisions and the three requests were assigned different Appeal File numbers¹ and were the subject of three separate interim orders².

[2] At issue in Appeal MA14-106-2 (which was the subject of Interim Order MO-3599-I) was a request for access to information pertaining to a specified property. In particular, the request indicated that the requester sought access to the following information in relation to the property:

- notes related to septic system complaints and permits
- building permit records since 1998
- by-law enforcement records since 1998
- all legal documents
- all emails, correspondence and reports pertaining to [the specified property] (including all by-laws) and all council decisions pertaining to [the specified property] from 1999, 2005, 2009

[3] At issue in Appeal MA14-107-2 (which was the subject of Interim Order MO-3610-I) was a request for access to information relating to a named individual. In particular, the request indicated that information was being sought pertaining to the following:

[The city] - [named individual] - or any related company involving [same named individual]

FOI - all detailed information in conjunction with the [city] and [same named individual] or any company related to [same named individual]

[The city] - Agreements

[The city] - money or financing

¹ MA14-106-2, MA14-107-2 and MA14-108-2.

² Interim Orders MO-3599-I, MO-3610-I and MO-3614-I.

[The city] - By-Law changes with respect to properties owned by [same named individual] or any company relating to [same named individual]

[The city] - notes - emails - faxes - documents - conversations with respect to [same named individual] or any company related to [same named individual]

Bell Canada - contact info - Tower Communication documents between [the city] and [same named individual] or any related companies to [same named individual].

[4] At issue in Appeal MA14-108-2 (which was the subject of Interim Order MO-3614-I) was a request for access to information pertaining to city by-law enforcement and temporary use permits, as well as requesting answers to certain questions.

[5] The history of the city's access decisions for each of the appeals, and the manner in which the appeals unfolded, are set out in Interim Orders MO-3599-I, MO-3610-I and MO-3614-I. The three interim orders addressed a number of issues but left two unresolved. This is explained below.

[6] At the mediation of the appeals, the city took the position that if the records it had withheld were not found to be excluded from the *Act* under section 52(2.1) (ongoing prosecution), then they would qualify for exemption under section 12 (solicitor-client privilege) or in the alternative would not be responsive to the request.

[7] This claim was initially addressed in paragraph 28 of Interim Order MO-3599-I³:

I am not satisfied that the city has provided sufficient evidence to establish the application of the section 52(2.1) exclusion and I find that it does not apply. However, without the opportunity to review the actual records that the city claims are subject to section 12, or a more detailed description of the records, I do not have sufficient materials or evidence to make a finding with respect to the application of section 12 or a determination whether these records are responsive to the request. Accordingly, I will defer any determination on the possible application of section 12 to these records, and/or their responsiveness, after I have sought further representations on these issues.

[8] As a result, whether these records were responsive to the requests, and if they were, whether section 12, either alone, or in conjunction with section 38(a) applied to them, were the only remaining issues to be addressed in all three appeals.

³ The same finding was made in Interim Order MO-3610-I at paragraph 32 and Interim Order MO-3614-I at paragraph 23.

[9] In order to conduct an inquiry into the issues of responsiveness and whether the records were subject to solicitor-client privilege, I initially sent the city a consolidated Notice of Inquiry on those issues. The city provided responding representations to this office along with copies of the records that it claimed were subject to section 12. In addition, the city sent a supplementary decision letter to the appellant disclosing some of those records to her. Accordingly, the pages of the records disclosed to the appellant are no longer at issue in the appeals. I then sent the appellant a Notice of Inquiry along with the city's non-confidential representations. As the records remaining at issue may have contained the personal information of the appellant, I decided to add the possible application of section 38(a) of the *Act* (discretion to refuse requester's own information) as an issue in the appeals. The appellant provided responding representations which were shared with the city for reply. The city provided a number of emails in response, which did not add to the city's earlier submissions and were, accordingly, not shared with the appellant.

[10] As the records were identified as being responsive to all three access requests and the city's position was the same on all three appeals, I am dealing with the remaining issues in each of the appeals together and addressing them in one order.

[11] In this order, I uphold the city's decisions that the records remaining at issue are responsive to the requests and are subject to the solicitor-client privilege at section 12 of the *Act* and thereby qualify for exemption under section 12, either alone, or in conjunction with section 38(a) of the *Act*. However, as the city provided no representations on its exercise of discretion I order the city to exercise its discretion under section 12 alone, or in conjunction with section 38(a), as the case may be, with respect to the records remaining at issue on the considerations set out in the order.

RECORDS:

[12] The records remaining at issue are from the city's in-house counsel's legal file that the city claims to pertain to an Ontario Court of Justice case involving the city and the owner of an identified property. The city originally claimed that these records pertained to a litigation matter.

ISSUES:

- A. What is the scope of the request? Are the records responsive to the request?
- B. Does the exemption for solicitor-client privilege at section 12 either alone, or in conjunction with section 38(a), apply to the records?
- C. Did the institution exercise its discretion under section 38(a) in conjunction with section 12, or section 12 alone, as the case may be? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: What is the scope of the request? Are the records responsive to the request?

[13] Throughout the course of the appeals, the city had taken the position that the records that it had withheld were subject to the application of the exclusion at section 52(2.1) of the *Act*, or qualified for exemption under section 12 or were non-responsive to the requests. As set out above, the application of the section 52(2.1) exemption was resolved in the previous interim orders. The issues of responsiveness and the possible application of section 12 alone, or in conjunction with section 38(a), remained to be addressed.

[14] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

(1) A person seeking access to a record shall,

(a) make a request in writing to the institution that the person believes has custody or control of the record, and specify that the request is being made under this Act;

(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[15] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.⁴

[16] To be considered responsive to the request, records must "reasonably relate" to the request.⁵

[17] The city made no specific representations on the responsiveness of the records.

⁴ Orders P-134 and P-880.

⁵ Orders P-880 and PO-2661.

The appellant submits that the city did not contact her to clarify her request and takes issue with the time within which she has not had access to the records.

[18] Adopting a liberal interpretation of the requests and in order to best serve the purpose and spirit of the *Act*, and now having the records to review, I find that the records remaining at issue are responsive in some way to all the three requests as the information contained in them reasonably relates to the appellant's requests.

Issue B: Does the exemption for solicitor-client privilege at section 12 either alone, or in conjunction with section 38(a), apply to the records?

[19] The legislative scheme established by the *Act* contains different entitlements to information, depending on whether the request is for an individual's own personal information, or for general records. In the former situation, requests would be processed under Part II of the *Act* as the right of access is found in Part II. In the latter case, requests would be treated under Part I of the *Act*.⁶

[20] Section 38(a) applies if a record contains the requester's own personal information. If it does, the analysis is conducted under Part II of the *Act*. If a record does not contain the requester's own personal information the analysis is conducted under Part I of the *Act*, and, in the circumstances of this appeal, only section 12 of the *Act* is considered.

[21] I have reviewed the records remaining at issue and find that a small portion of them contain the appellant's personal information as defined at section 2(1) of the *Act*. As a result, I will consider whether section 12, in conjunction with section 38(a) applies to the information in them. The other records do not contain the appellant's personal information and I will therefore consider whether section 12 alone applies to them.

[22] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[23] Section 38(a) provides a number of exemptions from an individual's rights of access to their own personal information and it reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 8.1, 8.2, 9, 9.1, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

⁶ Order M-352.

[24] 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.

[25] 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

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

Solicitor-client communication privilege

[27] 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.⁷ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.⁸ 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.⁹ The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.¹⁰

[28] 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.¹¹

Loss of privilege

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

- knows of the existence of the privilege, and

⁷ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁸ Orders MO-1925, MO-2166 and PO-2441.

⁹ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

¹⁰ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

¹¹ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

- voluntarily demonstrates an intention to waive the privilege.¹²

[30] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.¹³

[31] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.¹⁴ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.¹⁵

[32] Common law litigation privilege generally comes to an end with the termination of litigation.¹⁶

Branch 2: statutory privileges

Statutory solicitor-client communication privilege

[33] 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 exemption and common law privileges, although not identical, exist for similar reasons.

Statutory litigation privilege

[34] 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.¹⁷

[35] Records that form part of the Crown brief, including copies of materials provided to prosecutors by police, and other materials created by or for counsel, are exempt under the statutory litigation privilege.¹⁸ 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 privilege.

¹² *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

¹³ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

¹⁴ Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

¹⁵ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

¹⁶ *Blank v. Canada (Minister of Justice)*, (2006), 270 D.L.R. (4th) 257 (S.C.C.).

¹⁷ See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

¹⁸ Order PO-2733.

[36] The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.¹⁹

[37] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.²⁰

The city's representations

[38] The city had originally claimed that the records it withheld pertained to a litigation matter and in response to the very first Notices of Inquiry sent in the appeals, the city took the position that all the legal documentation is subject to solicitor-client privilege.

[39] In its representations in response to the consolidated Notice of Inquiry regarding the remaining issues to be addressed, which were accompanied by copies of the records remaining at issue, the city wrote:

Enclosed are the records maintained by our new in-house legal counsel and notes, etc. from her legal file regarding the appeal above and pertaining to the Ontario Court of Justice case involving [the city] and the owner of [specified address] in Cambridge.

[...] It is the city's position that the enclosed documents are solicitor/client privileged records that constitute legal interaction between the city and its solicitors and as such should be withheld

Within the city's in-house legal counsel file there were several documents forwarded in an email to [named IPC Adjudication Review Officer] that can be distributed to [the appellant] as per instructions from legal counsel²¹.

[40] Accordingly, the city appears to be claiming the application of the solicitor-client communication privilege as well as the statutory litigation privilege.

The appellant's representations

[41] The appellant challenges the city's exemption claim and submits that:

¹⁹ *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

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

²¹ These were the records that accompanied the supplementary decision letter sent by the city to the appellant.

Documents are not privileged merely because they are contained in the file of a legal counsel. There are many documents in a legal counsel's file that may not be privileged including correspondence with third parties, final copies of agreements with third parties, draft agreements exchanged between negotiating parties, and other publicly available documents on the web or in court houses or in any provincial public office. This [...] includes, building permits, draft plans, minor variances, zoning by-law applications, surveys, engineering drawings, property valuations and taxation, etc. ...

[42] The appellant further submits that while solicitor-client communication privilege protects direct communication of a confidential nature between a solicitor and a client, "if the communication is between a city solicitor or the city agent and a municipality, it must be able to establish a grant of authority within an enabling provincial statute to refuse to grant the appellant her request".

[43] The appellant submits:

The city must have a statutory authority to enact a by-law or give a building permit, etc. If the city solicitor, or agent's opinion determines the by-laws or building permits etc. are rendered inoperative, that are not expressed by the power in the statute, the solicitor or agent cannot hide behind a common law privilege and deny the appellant the records, having knowledge the records are in breach of the statute.

All municipal laws and policies including by-laws, resolutions, draft plans, building permits (etc.) are public records. Further, the solicitor privilege does not cover communications between a solicitor and a party on the other side of the transaction.

[44] The appellant recognizes that litigation privilege protects records created for the dominant purpose of litigation. She adds however:

... if the case never went to trial and the case was mutually resolved between the parties to the transaction, the [dominant] purpose of a litigation no longer applies. Thus, the records become public record. Secondly, this does not apply to records such as communication between opposing counsel.

[45] The appellant also acknowledges that records that form part of the lawyer's brief, and other materials created by or for counsel, qualify for exemption under the statutory litigation privilege, however, she asserts that this privilege does not apply to original records in the possession of the city, just because copies later become part of the lawyer's brief.

Analysis and finding

[46] With respect to the reference to “statutory authority” in the appellant’s representations, I note that the statutory framework for the city to follow when considering a request for access to information under *MFIPPA* is *MFIPPA* itself, which the city considered and applied in the appeals before me.

[47] I find that the information in the records remaining at issue falls within the scope of section 12. This is 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, or would reveal the substance of the confidential communication or legal opinion provided, or would qualify as a legal advisor’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 also satisfied that the records remaining at issue cannot be reasonably severed, without revealing information that is subject to section 12 or resulting in disconnected snippets of information being revealed.²²

[48] On the facts before me, I am satisfied that no waiver of privilege has occurred with respect to the information at issue in this appeal. Accordingly, I find that the records remaining at issue qualify for exemption under section 12 alone, or in conjunction with section 38(a), as the case may be.

Issue C: Did the institution exercise its discretion under section 38(a) in conjunction with section 12, or section 12 alone, as the case may be? If so, should this office uphold the exercise of discretion?

[49] The section 12 and 38(a) exemptions are discretionary, and permit 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.

[50] 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

²² See Order PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

- it fails to take into account relevant considerations.

[51] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²³ This office may not, however, substitute its own discretion for that of the institution.²⁴

Relevant considerations

[52] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²⁵

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information

²³ Order MO-1573.

²⁴ Section 43(2) of the *Act*.

²⁵ Orders P-344 and MO-1573.

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

[53] The city makes no representations on its exercise of discretion. Its decision letters are also silent in that regard.

[54] The appellant submits that:

- The city did not best serve the appellant and her business openly and transparently.
- All the information is commercial rather than personal in nature.
- Any exercise of discretion is in bad faith and for an improper motive and purpose.
- The city has improperly used the *Act* to deny access to the requested information.
- The appellant has a compelling need for the information because of the proximity of the subject property to her property, her family and her business, especially where her common law rights are not being protected.
- The city is in breach of its statutory duties to its citizens which has amounted to a failure in public confidence in the operations of the city.
- The city is improperly and in bad faith protecting her neighbour's corporation and the director of the corporation, without any regard to the safety and well-being of the appellant, her family, her property or her business.

Analysis and finding

[55] The city did not provide representations on its exercise of discretion under section 12, either alone, or in conjunction with section 38(a). In the absence of the city's representations on this issue, I will order the city to exercise its discretion with respect to those sections. In exercising its discretion, the city is to take into account the appellant's submissions and the relevant considerations listed above. The city is also to provide both the appellant and me with an outline of the factors it considered in exercising its discretion. I may then decide to seek representations from the appellant regarding the city's exercise of discretion.

ORDER:

1. I order the city to exercise its discretion with respect to the records remaining at issue under section 12 alone, or in conjunction with 38(a) of the *Act*, as the case may be, and to provide both the appellant and me with an outline of the factors it considered in exercising its discretion by **March 25, 2019**.

2. I remain seized of this matter in order to deal with any issues stemming from the exercise of discretion by the city.

Original signed by: _____
Steven Faughnan
Adjudicator

February 21, 2019 _____