

Information and Privacy Commissioner,  
Ontario, Canada



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

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## FINAL ORDER MO-3744-F

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

The Corporation of the City of Cambridge

March 22, 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, leaving only two issues remaining. In Interim Order MO-3734-I, the adjudicator upheld 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 ordered 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 interim order. In this final order, the adjudicator upholds the city's exercise of discretion and dismisses the appeals.

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

**Orders Considered:** Interim Orders MO-3599-I, MO-3610-I, MO-3614-I and MO-3734-I.

**Case 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 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 numbers<sup>1</sup> and were the subject of three separate interim orders<sup>2</sup>.

[2] The history of the city's access decisions for each of the appeals, and the manner in which the appeals unfolded, is 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.

[3] 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.

[4] This claim was initially addressed in paragraph 28 of Interim Order MO-3599-I<sup>3</sup>:

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.

[5] 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.

[6] In Interim Order MO-3734-I, I upheld 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 ordered it 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. At paragraph 55 of Interim Order

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<sup>1</sup> MA14-106-2, MA14-107-2 and MA14-108-2.

<sup>2</sup> Interim Orders MO-3599-I, MO-3610-I and MO-3614-I.

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

3734-I, I wrote:

... .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.

[7] In response to Interim Order MO-3214-I, the city provided me with a letter. In the letter, the city repeats some of its earlier arguments, recounts in detail its understanding of the purposes for which the appellant may wish to have disclosure of the withheld information and sets out the historical treatment of solicitor-client privilege, writing that:

In 2010, the Supreme Court of Canada in the [*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*<sup>4</sup>] case concerning the *Charter* and access to information, that "the only exceptions recognized to the solicitor- client privilege are the narrowly guarded public safety and the right to make full answer and defense exceptions". ...

In a series of cases over the past three decades, the Supreme Court of Canada has greatly strengthened solicitor-client privilege, elevating it from a limited evidentiary privilege into a quasi-constitutional right. It is an important legal concept that allows clients to trust their lawyers with private information. The Supreme Court of Canada has called it, "a principal of fundamental justice and civil right of supreme importance in Canadian law".

[8] The appellant was provided an opportunity to comment on the city's letter and provided extensive responding submissions. In them, she repeats some of the arguments she made in the appeal. She also provides further submissions on how her land and its value was adversely affected with an emphasis on her view regarding the use of the land adjoining her property, how the city failed to adequately respond to the use of the land, and how receiving the information is important to protecting the health and safety of her, her family and her business as well as the public.

## **DISCUSSION:**

[9] I concluded in Interim Order MO-3734-I that no waiver of privilege had occurred with respect to the information remaining at issue in the appeals. At this stage of the appeals we are dealing with the city's exercise of discretion, only.

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<sup>4</sup> 2010 SCC 23, [2010] 1 S.C.R. 815.

[10] An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law.<sup>5</sup> It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.<sup>6</sup>

[11] I am satisfied overall that the city properly exercised its discretion under section 12 of the *Act*, either alone or in conjunction with section 38(a). 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*<sup>7</sup>.

[12] I am satisfied that the city was aware of the reasons for the requests and why the appellant wished to obtain the information. I am satisfied that in proceeding as it did, and based on all the circumstances, the city considered why the appellant sought access to the information, whether the appellant had a sympathetic or compelling need to receive the information as well as the nature of the information. In addition, the city considered whether the appellant was an individual or an organization. In all the circumstances and for the reasons set out above, I uphold the city's exercise of discretion.

## **ORDER:**

I uphold the city's exercise of discretion and dismiss the appeals.

Original signed by  
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Steven Faughnan  
Adjudicator

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March 22, 2019

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<sup>5</sup> Order MO-1287-I.

<sup>6</sup> Order P-58.

<sup>7</sup> 2010 SCC 23, [2010] 1 S.C.R. 815, a case dealing with the provincial equivalent to section 12.