

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3972

Appeal MA17-616

City of Toronto

November 5, 2020

Summary: A requester made an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Toronto (the city) for records relating to an application for a parking pad that was submitted by one of his neighbours. The city granted partial access to the records withholding portions of them pursuant to sections 7 (advice and recommendations), 12 (solicitor-client privilege) and 14(1) (personal privacy). Other portions of the records were withheld as not responsive to the request. The city also identified section 173 of the *City of Toronto Act, 2006* (*COTA*) as a basis for withholding some information. The requester appealed the city's decision. During mediation, section 38(a) (refuse a requester's own information), read in conjunction with section 12, and section 38(b) (personal privacy) were added as potentially relevant.

In this order, the adjudicator upholds the city's decision to withhold some of the information as not responsive to the request and pursuant to the exemptions at sections 7(1), 14(1) and 38(a), read in conjunction with section 12. She finds that section 38(b) does not apply to the information for which it was claimed but that the mandatory exemption at section 14(1) applies to that information. She further finds that section 173 of *COTA* does not apply to the information for which it has been claimed and that as a result, access to the portions of the records that were denied under *COTA* is to be decided under the *Act*. She orders the city to issue an access decision with respect to the information for which section 173 of *COTA* was claimed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 7, 12, 14(1), 38(a), and 53(1); *City of Toronto Act, 2006*, S.O. 2006, c. 11, schedule A, section 173.

Orders and Investigation Reports Considered: Orders MO-1570, MO-2439, MO-2843 and MO-3541.

OVERVIEW:

[1] A request was submitted under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Toronto (the city) for records relating to an application for a parking pad submitted by one of the requester's neighbours. Specifically, the requester sought access to:

All records including emails, the drawing and the landscaping calculations, etc. in connection with the front yard parking pad application for [a specified address] from February 1, 2017 until the present ... There have been changes to the front yard drawings, so please provide the updated [drawings] and all revisions.

[2] The city issued a decision granting partial access to the responsive records. Access to portions of the records was denied pursuant to the discretionary exemptions at sections 7 (advice and recommendations) and 12 (solicitor-client privilege) and the mandatory personal privacy exemption at section 14(1) of the *Act*. The city also cited section 173 of the *City of Toronto Act, 2006 (COTA)* as a basis for withholding portions of some records. Finally, the city advised that some portions of the records were withheld because they were not responsive to the request.

[3] The requester, now the appellant, appealed the city's decision to this office.

[4] During mediation, the appellant stated that although he is appealing the city's decision to withhold portions of the records responsive to his request, he is not seeking access to any duplicate records, certain other pages of the records or any credit card information that was severed from the records. Accordingly, none of this information remains at issue.

[5] The appellant stated that within the responsive records he seeks access to the names of five affected parties who had permits issued to them on one specified date. The affected parties were contacted by this office but none of them consented to the disclosure of their information.

[6] Also during mediation, it was noted that some of the records appear to contain the appellant's personal information as well as that of other identifiable individuals. As a result, the discretionary exemptions at section 38(a) and (b) were added as issues on appeal. Specifically, section 38(a) (discretion to refuse access to one's own personal information), read in conjunction with section 12, was claimed for the information on page 15 and section 38(b) (personal privacy) was claimed for the information on page 68.

[7] As a mediated resolution was not reached, the appeal was transferred to the adjudication stage of the appeal process. I decided to conduct an inquiry, and sought and received representations from the parties to the appeal. The city's representations were shared with the appellant in accordance with the sharing principles set out in this

office's *Code of Procedure and Practice Direction 7*. In lieu of representations, the appellant submitted a detailed email that he had previously written to the mediator outlining his position with respect to the disclosure of the requested information, the portion of the appeal form in which he describes how he feels that the appeal could be resolved, and a partially severed application form for on-street parking provided to the city's Transportation Services Department. I determined that it was not necessary for me to share the information provided to me by the appellant with the city.

[8] In this order, I find that the exemptions at sections 7(1), 38(a), read in conjunction with section 12 and 14(1) of the *Act* apply to the information for which they were claimed and that the information that was withheld as not responsive to the request is properly identified as not responsive. I also find that the information that the city has withheld under the discretionary personal privacy exemption at section 38(b) is not exempt under that section but is exempt under the mandatory personal privacy exemption at section 14(1). I further find that section 173 of *COTA* does not apply to the information for which it has been claimed and that as a result, access to the portions of the records that were denied under *COTA* is to be decided under the *Act*. I order the city to issue an access decision with respect to the information for which section 173 of *COTA* was claimed.

RECORDS:

[9] The records identified as responsive to the request include letters, emails, invoices, application forms and notices related to an application filed with the city for a parking pad at a specified address. Much of the information has been disclosed to the appellant but the city has withheld portions of information from 25 pages. Specifically, the information that remains at issue is that which has been severed from the following pages:

- pages 25, 38 and 39 (on the basis of the application of section 173 of the *City of Toronto Act, 2006*);
- pages 9, 13, 26, 53, 56, 58, 59 and 106 (on the basis that it is not responsive to the request);
- pages 1, 29, 30, 31, 32, 33, 36, 37, 56, 64, 93, 106 and 118 (pursuant to section 14(1));
- page 15 (pursuant to section 38(a), read in conjunction with section 12);
- page 68 (pursuant to section 38(b)); and,
- page 57 (pursuant to section 7(1)).

ISSUES:

- A. Does the confidentiality provision relating to the Ombudsman in section 173 of the *City of Toronto Act, 2006* apply to the information for which it has been claimed?
- B. Is the information identified as not responsive to the request, responsive?
- C. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- D. Does the mandatory exemption at section 14(1) apply?
- E. Does the discretionary exemption at section 38(a), read in conjunction with the solicitor-client privilege exemption at section 12 apply?
- F. Does the discretionary exemption for advice or recommendations at section 7(1) apply?
- G. Did the city exercise its discretion under sections 7(1) and 38(a), read in conjunction with section 12? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the confidentiality provision relating to the Ombudsman in section 173 of the *City of Toronto Act, 2006* apply to the information for which it has been claimed?

[10] The city submits that as a result of the application of section 173 of *COTA*, it is not required to disclose portions of pages 25, 38 and 39. Section 173 of *COTA* is a confidentiality provision related to the city's Ombudsman. The provision prevails over the *Act* and is read in conjunction with section 53(1) of the *Act*. Section 173 of *COTA* reads:

- 1. Subject to subsection (2), the Ombudsman and every person acting under the instructions of the Ombudsman shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this part.
- 2. The Ombudsman may disclose in any report made by him or her under this Part such matters as in Ombudsman's opinion ought to be disclosed in order to establish grounds for his or her conclusion and recommendations.
- 3. This section prevails over the *Municipal Freedom of Information and Protection of Privacy Act*.

[11] Section 53(1) of the *Act* reads:

This Act shall prevail over a confidentiality provision in any other Act unless the other Act or this Act specifically provides otherwise.

[12] If the portions of pages 25, 38 and 39 that the city has withheld are subject to the confidentiality provision in section 173(1) of *COTA*, then section 53(1) of the *Act* acts to remove the information from the scope of the *Act*.

[13] The city explains that the Ombudsman is one of four accountability officers created by *COTA*. The city further explains that the request covers records related to an investigation by the Ombudsman's Office and submits that the disclosure of the withheld information on pages 25, 38 and 39 would reveal matters that came to the Ombudsman's knowledge in the course of her duties as contemplated by section 173(1). The city submits that this information is therefore subject to subsection (1) of section 173 of *COTA* (set out above), which stipulates that the Ombudsman and every person acting under the instructions of the Ombudsman shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under Part V of *COTA*.

[14] The city takes the position that section 173 of *COTA* "establishes a jurisdictional barrier" to the application of the *Act* for documents held by the Ombudsman or a person acting under her instructions. The city argues that while an individual is not prevented from making a request for records held by the Ombudsman, section 173(1) "does prevent the operation of [the *Act*] to impede the mandated requirement to 'preserve secrecy' with respect to this information." More specifically, the city submits:

In the current situation, the specific employees had been instructed to undertake certain actions with respect to the Ombudsman's office. There is no dispute that the Ombudsman was undertaking duties under Part V of *COTA*, and that the instructions to these employees outside of the Ombudsman's office were in relation to these issues.

Subject to the obligation to preserve secrecy imposed by section 173, these specific records for which [...] section 173 of *COTA* [is claimed] relate to communications in which matters came to the knowledge of these employees in the context of acting under instructions in the Ombudsman's Part V matter. The records at issue do not relate to information that was received in the course of the employee's normal duties. The city submits, in conclusion, that access must be denied to any records responsive to the request that may be held by the Ombudsman or a person acting under her instructions.

[15] The information submitted by the appellant does not address the possible application of section 173(1) of *COTA* to portions of the pages of records at issue or the *COTA* provision's interaction with section 53(1) of the *Act*.

Analysis and finding

[16] As mentioned above, section 173(1) is a confidentiality provision in *COTA* that applies to the Ombudsman, one of four accountability officers established in *COTA*. Section 171(1) of *COTA* describes the Ombudsman's function as follows:

The function of the Ombudsman is to investigate in an independent manner any decision or recommendation made or any act done or omitted in the course of the administration of the City, its local boards (restricted definition) and such city-controlled corporations as city council may specify and affecting any person or body of persons in his, her or its personal capacity.

[17] This office has previously considered confidentiality provisions related to accountability officers that specifically provide that they prevail over the *Act*, including section 173 of *COTA*. In Order MO-2843, Senior Adjudicator Frank DeVries considered the confidentiality provision in section 173 of *COTA* and found that correspondence from the Toronto Community Housing Corporation to the Ombudsman, including attachments, was a record falling within the ambit of that section. Senior Adjudicator DeVries found that although the staff member who sent the information to the Ombudsman was not staff of the Ombudsman, he or she was compelled to provide the information to the Ombudsman and in doing so was acting under the instructions of the Ombudsman.

[18] In addition to section 173(1) of *COTA*, this office also has also considered the effect of similar confidentiality provisions set out in other Acts or that relate other types of accountability officers. These include section 181(1) of *COTA* which is a confidentiality provision relating to the city's Auditor General and section 223.22 of the *Municipal Act* which is the municipal equivalent of section 181(1) of *COTA* as it relates to the Auditor General of municipalities covered by that Act.

[19] In Order MO-2439 (reconsidered on other grounds in Order MO-2628-R), Senior Adjudicator John Higgins considered the meaning of the phrase "in the course of duties under this Part" in section 181(1) of *COTA*. He stated:

[I]nformation provided pursuant to section 179(1) [of *COTA*] is subject to the confidentiality requirement in section 181(1) where this information is in the hands of the Auditor General or a person acting under his or her "instructions." But this is to be distinguished, in my view, from information in the hands of a staff member of the City that such person receives in the course of his or her normal duties, which later becomes the subject of a request for information by the Auditor General. In my view, such information (as opposed to knowledge of the "matter" of the investigation or complaint) would *not* be caught by section 181(1) because it did not come to the staff member's knowledge "in the course of duties under" Part V of the *COTA* as the section requires.

Moreover, imposing the non-disclosure obligation on original information in the hands of such staff members would, in many instances, render them unable to perform their day-to-day functions to which original information relates. Where applicable, this analysis would also apply to staff of another institution under the *Act* that is compelled to provide information to the Auditor General under section 179(1), such as a local board or city-owned corporation.

Accordingly, I conclude that, in the hands of City staff (or staff of another institution under the *Act* compelled to provide information to the Auditor General under section 179(1), such as a local board or city-owned corporation), and who are not staff of the Auditor General, original information that remains in the hands of the staff member for the purposes of his or her ordinary tasks would not be subject to section 181(1), even if a copy has been given to the Auditor General. Only the information about the complaint or investigation being conducted by the Auditor General would be caught.

With respect to the nature of "duties" under Part V, I conclude that providing information when "instructed" to do so by the Auditor General would be a duty under Part V, but as already noted, if the information came to the knowledge of the staff member as part of his or her everyday work, and not in connection with Part V of the *COTA*, the information itself would not be caught by section 181(1) in the hands of the staff member. Only information about the Auditor General's investigation that was acquired by the staff member as a consequence of being instructed or asked to provide information to the Auditor General would be covered.

[20] In Order MO-3541, Senior Adjudicator Gillian Shaw reviewed the orders mentioned above when considering the confidentiality provision related to the Auditor General in section 223.22(1) of the *Municipal Act* (the municipal equivalent of section 181(1) of *COTA*). She stated that records in the hands of city staff that such a person receives in the course of his or her normal duties, and not under the Auditor General's instructions, do not fall within section 223.22(1). Applying this reasoning, she found that a report prepared by the Auditor General and presented to Council in Committee of the Whole did not fall within section 223.22(1) because the report, including confidential attachments, was given to the city itself through council, which was not acting under the Auditor General's instructions.

[21] I agree with the reasoning expressed in the orders mentioned above and find it relevant to my analysis here. In my view, the effect of the confidentiality provision at section 173 of *COTA* is that records or information in the hands of the Ombudsman, or anyone acting under her instructions, who came into the knowledge of the information contained in those records in the course of their duties under *COTA*, fall within section 173(1). However, records in the hands of city staff who were not acting under the

instructions of the Ombudsman are not subject to section 173(1) of the *COTA*.

[22] Applying this reasoning to the information withheld from pages 25, 38 and 39, I find that section 173(1) of *COTA* does not apply. Although the city submits that “the specific employees had been instructed to undertake certain actions with respect to the Ombudsman’s office,” I do not accept that those employees were acting under the instructions of the Ombudsman in the context of the communications to which the city claims section 173(1) applies. In my view, the information that the city has withheld under section 173(1) *COTA* consists of communications between city staff that were sent and received in the course of their normal duties as part of their everyday work. The content reveals that city staff were not acting under the instructions of the Ombudsman in making those communications, nor did they come into the knowledge of the information that features in those communications in the course of duties under *COTA*.

[23] I find that the information for which the city has claimed section 173(1) *COTA* is information prepared by, and in the hands of, city staff who were not acting under the instructions of the Ombudsman with respect to it and that it is therefore not subject to section 173(1). Accordingly, I find that section 173(1) of *COTA* does not apply to the withheld portions of pages 25, 38 and 39. As section 173(1) of *COTA* does not apply, the *Act* is the controlling statute for determining access to the records at issue. As the city has not claimed that any of the exemptions in the *Act* apply to the information that it has withheld from pages 25, 38 and 39, I will order it to issue an access decision under the *Act*, with respect to that information.

B. Is the information identified as not responsive to the request, responsive?

[24] The city withheld portions of pages 9, 13, 26, 53, 56, 58, 59 and 106 on the basis that the information is not responsive to the appellant’s request.

[25] The city submits that the information that it has withheld as not responsive does not relate to the subject matter of the access request. The city explained that the non-responsive information consists of information about internal staff matters including attendance, duties, administrative issues and operational processes. It submits none of the information relates “in any fashion” to the appellant’s request for the information relating to the front yard parking pad application and accordingly, it is properly characterized as non-responsive information. The city submits its decision not to disclose this non-responsive information is in keeping with orders issued by this office such as Order MO-3602 where information related to matters other than the property address specified in the request was found to be non-responsive.

[26] The city submits that in finding this information to be non-responsive to the request, it followed the IPC’s general approach as set out in Orders P-880 and PO-2661: It adopted a liberal interpretation of the request, in order to best serve the purpose and spirit of the *Act* and resolved any ambiguity in the request in the appellant’s favour.

[27] The information provided by the appellant in lieu of representations does not address the information that the city has withheld as not responsive to his request.

[28] To be considered responsive to the request, records must “reasonably relate” to the request.¹ Having reviewed pages 9, 13, 26, 53, 56, 58, 59 and 106 and having considered the information that the city withheld as not responsive, I accept its position that the withheld information does not relate in any way to the appellant’s request for information relating to the front yard parking pad application for the specified address; it relates to entirely different matters. I find that the information that the city withheld because it is not responsive to the appellant’s request has been properly withheld on that basis.²

C. Do the records contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?

[29] The city submits that information on pages 1, 29, 30, 31, 32, 33, 36, 37, 56, 64, 93, 106 and 118 is exempt pursuant to section 14(1)); that information on page 15 is exempt pursuant to section 38(a), read in conjunction with section 12 and that information on page 68 is exempt pursuant to section 38(b).

[30] In order to determine whether any of these exemptions apply, it is first necessary to decide whether the records contain “personal information” and, if so, to whom it relates. The approach taken by this office to determine whether a record contains personal information is a record-by-record approach; that is, it is the record as a whole that must be examined to determine whether it contains personal information and not just the portion of the record that is at issue.³

[31] “Personal information” is defined in section 2(1) of the *Act*, in part, as follows:

“personal information” means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or

¹ Orders P-880 and PO-2661.

² I note that for records 56 and 106, in addition to the information that it has withheld as non-responsive, the city has withheld other information under section 14(1). I will consider the city’s application of that exemption to those pages below.

³ Order M-352.

information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of other individuals about the individual, and

(h) the individual's name where 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.

[32] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.⁴

[33] 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.⁵ 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.⁶

[34] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁷

⁴ Order 11.

⁵ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁶ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁷ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

The parties' representations

[35] The city submits that the records that remain at issue in this appeal contain information relating to individuals in a personal capacity. It submits that the individuals identified in these records are private citizens who own residential property on the identified street. Specifically, the city submits that the records contain the personal information of these individuals, including their names, telephone numbers, email addresses and "limited financial account information." It further submits that in some instances the disclosure of that personal information would also implicitly reveal additional personal information about those individuals such as their race, ethnic origin, age, sex and marital or family status. The city submits that the disclosure of this personal information is reasonably expected to reveal the identity of the individuals to whom it relates.

[36] The information provided by the appellant in lieu of representations does not explicitly outline his position on whether the information at issue is the personal information of other individuals, although it does implicitly recognize that some of the records likely contain his personal information and/or the personal information of others.

Analysis and finding

[37] As indicated above, the city submits that the records from which portions of information have been withheld on pages 1, 15, 29, 30, 31, 32, 33, 36, 37, 56, 64, 68, 93, 106 and 118, contain personal information. From my review of the records it is clear that this is the case.

[38] The city submitted, and I find, that the personal information includes information relating to race, ethnic origin, age, sex and marital or family status (paragraph (a) of the definition of "personal information"), information relating to financial transactions in which the individual has been involved (paragraph (b)), addresses and telephone numbers (paragraph (d)), and individuals' names where they appear with other personal information about that individual or where the disclosure of the name would reveal other personal information about them (paragraph (h)). Some of the records contain the personal information of the appellant while others contain only the personal information of individuals other than the appellant.

[39] Under the *Act*, different exemptions may apply depending on whether a record contains or does not contain the personal information of the appellant. Where the records contain the appellant's own personal information, access to the records is considered under Part II of the *Act* and the discretionary exemptions at section 38 may apply. Where the records contain the personal information of individuals other than the appellant but do not contain the appellant's personal information, access to the records is considered under Part I of the *Act* and the mandatory exemption at section 14(1) may apply. As indicated above, when determining which exemption might apply, the record as a whole is considered and not only the information that has been withheld.

[40] From my review, the records that contain pages 1, 29, 30, 31, 32, 33, 36, 37, 56, 64, 68, 93, 106 and 118 contain the personal information of individuals other than the appellant but do not contain the personal information of the appellant. I will therefore review the information at issue in those pages under section 14(1). Although during mediation the exemption at section 38(b) was raised for the information at issue on page 68, my review of that record reveals that while it contains the personal information of individuals other than the appellant, it does not contain the personal information of the appellant. Accordingly, I will review page 68 under section 14(1). As no other information was claimed to be exempt under section 38(b), it is not necessary for me to address section 38(b) in this appeal.

[41] The record that contains page 15, however, contains the personal information of the appellant. Accordingly, I must review it under Part II and the exemptions at section 38. The city has claimed the information withheld from page 15 is exempt under section 38(a), read in conjunction with section 12 and I will consider that information under that section.

D. Does the mandatory exemption at section 14(1) apply to the personal information at issue?

[42] Where a requester seeks the personal information of another individual, section 14(1) prohibits an institution from disclosing information unless one of the exceptions in paragraphs (a) to (e) of section 14(1) applies, or unless disclosure would not be an unjustified invasion of personal privacy in section 14(1)(f).

Do any of the exceptions in paragraphs (a) to (e) of section 14(1) apply to permit the disclosure of the information at issue?

[43] The city has claimed that section 14(1) applies to portions of pages 1, 29, 30, 31, 32, 33, 36, 37, 56, 64, 68, 93, 106 and 118 and disclosure of that information would amount to an unjustified invasion of the personal privacy of the individuals to whom the personal information relates. It takes the position that none of the exceptions set out in sections 14(1)(a) to (e) apply in this case. The appellant however, submits that the exception at section 14(1)(a) applies. That section reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access[.]

[44] The appellant submits that because a number of individuals whose information appears in the records applied for street parking permits, they consented in writing to their name being considered public information. He submits that the city's street parking permit application contains a stipulation that the applicant's name will be released publicly.

[45] Having considered the evidence before me, including the records themselves and the submission of the appellant, I do not agree that the exception at section 14(1)(a) applies. I have no evidence that any of the identified individuals previously consented to have their identities disclosed in the context of applying for street parking permits. Even if I did, I do not accept that consent obtained in another context applies to the disclosure of the portions of the records that are at issue in this appeal. There is no evidence before me to suggest that any of the identified individuals have consented in writing to the disclosure of their personal information to the appellant in the context of his access request under *Act*. In fact, during mediation consent was sought from five affected parties but was not obtained.

[46] Accordingly, I find that the exception at section 14(1)(a) does not apply in the circumstances of this appeal. Additionally, none of the exceptions at sections 14(1)(b) to (e) were raised and I find that they do not apply.

Would disclosure of the information at issue be an unjustified invasion of personal privacy under section 14(1)?

[47] In determining whether disclosure of the personal information in the records would not be an unjustified invasion of personal privacy under the exception to section 14(1) found in section 14(1)(f), sections 14(2) to (4) provide guidance.

[48] The factors and presumptions at section 14(2) and 14(3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Additionally, if any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 14(1).

Is disclosure of the information at issue presumed to be an unjustified invasion of personal privacy under section 14(3)?

[49] If any of the paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy section 14(3) can only be overcome if section 14(4) of the “public interest override” at section 16 applies.⁸ None of the circumstances identified in section 14(4) are present here and section 16 was neither raised by either of the parties, nor does it appear to be applicable in the circumstances.

[50] The city claims that the presumption at section 14(3)(h) applies to the information that it has withheld from page 68. Section 14(3)(h) states:

⁸ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767(Div. Ct.).

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

indicates an individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[51] Page 68 is an On-Street Permit Parking Application Report from the city's Transportation Division that lists the on-street parking permits that have been issued by permit holder name and address. The city has severed the parking permit holders' names, claiming that disclosure of this information is presumed to constitute an unjustified invasion of the personal privacy of these individuals as it would indicate the individual's racial or ethnic origin as contemplated by section 14(3)(h).

[52] The appellant does not make any submissions on whether any of the presumptions in section 14(3) might apply to any of the information that the city has withheld under section 14(1), nor does he comment on the city's position that section 14(3)(h) applies to the personal information that it has severed from page 68.

[53] Previous orders have considered whether certain types of information "indicates the individual's racial or ethnic origin" within the meaning of the presumption at section 14(3)(h). In particular, in Order MO-1570, Adjudicator Donald Hale considered the application of the presumption to a videotape containing footage from a common area of a secondary school. In that decision, Adjudicator Hale stated:

I do not accept the position taken by the [school board] with respect to the application of section 14(3)(h) to the personal information contained in the videotape. While some of the physical characteristics of some of the affected persons are evidence, I find that the presumption in section 14(3)(h) requires something more. In order to satisfy the requirements of the presumption, the record must "indicate the individual's racial or ethnic origin." In the present situation, the videotape does not convey this type of specific information. Rather, it simply displays a photographic image of the individual without any accompanying indication as to the racial or ethnic origin of the person. While it may be possible to draw certain assumptions about the racial or ethnic origin of the people who appear on the videotape, I find that the tape itself does not "indicate" such information with the requisite degree of specificity.

[54] I agree with Adjudicator Hale's reasoning and I find it is applicable for the purposes of my analysis to the names of individuals as they appear in the records before me. I do not accept that the disclosure of individuals' names alone, particularly in the context in which they appear in the records at issue, provides sufficient detail to indicate the racial or ethnic origins of the identifiable individuals with "the requisite degree of specificity." Although an individual's name may suggest an individual's particular racial or ethnic origin, in the records at issue there is no accompanying information or indication as to whether or not that is actually the case. In my view,

disclosure of the names can only permit one to draw an assumption about the racial or ethnic origin of an individual; names, by themselves, do not necessarily provide an accurate indication of an individual's actual racial or ethnic origin. Accordingly, I find that the presumption at section 14(3)(h) does not apply to the specific personal information that is at issue in this appeal.

[55] I have reviewed, and I find, that none of the other presumptions set out in section 14(3) are applicable in the circumstances.

Do any of the factors in section 14(2) weighing in favour or against disclosure of the information at issue apply?

[56] If the information is not subject to a section 14(3) presumption against disclosure, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.⁹ The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).¹⁰

[57] I will first consider whether there are any factors weighing in favour of the disclosure of the personal information at issue.

[58] The city submits that when determining whether disclosure of the personal information at issue would consist of an unjustified invasion of the personal privacy of the individual to whom it relates, it considered the criteria set out in section 14(2)(a) to (i). It submits that none of the factors favouring disclosure apply in the circumstances.

[59] The appellant suggests that the factor at section 14(2)(a) applies in the circumstances of this appeal. Section 14(2)(a) contemplates whether information should be disclosed in order to subject the activities of the government to public scrutiny. If section 14(2)(a) applies, it weighs in favour of the disclosure of the personal information at issue.

[60] Section 14(2)(a) reads:

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

the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny[.]

⁹ Order P-239.

¹⁰ Order P-99.

[61] The appellant submits that the disclosure of the personal information at issue is desirable for the purpose of subjecting the activities of the city to public scrutiny. He submits that the city granted street parking permits to a number of individuals who do not require them.

[62] The only personal information that is at issue in this appeal consist of individuals' names and personal contact information. Having considered the records as a whole, the personal information contained in the portions of the pages at issue and the appellant's representations, I do not have sufficient evidence to conclude that the disclosure of any of that personal information would assist in subjecting the city's activities to public scrutiny. I find that disclosure of the personal information that has been withheld would not be desirable for the purposes of subjecting the city's activities to public scrutiny.

[63] The appellant submits that the factor at section 14(2)(d) is also applicable because he was "denied his right to voice [his] concerns about the front yard parking pad to Community Council where the owner of [specified address], [identified individual and spouse], would have had to request a hearing." Section 14(2)(d) contemplates whether disclosure is relevant to the fair determination of the appellant's rights. If it applies, it weighs in favour of disclosure. Section 14(2)(d) reads:

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

the personal information is relevant to a fair determination of rights affecting the person who made the request[.]

[64] For section 14(2)(d) to apply, the appellant must establish that:

1. the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on oral or ethical grounds; and
2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
3. the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question and

4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.¹¹

[65] Although the appellant submits that the factor at section 14(2)(d) applies, other than his submission on this issue that I have reproduced above, he has not provided sufficient evidence to establish that the disclosure of the specific information that the city has withheld under section 14(1) is relevant to the fair determination of his rights. Specifically, there is no evidence before me of a legal right related to an existing or contemplated proceeding, that the personal information at issue has some bearing on or is significant to the determination of that right or that it is required in order to prepare for the proceeding or to ensure an impartial hearing.

[66] The appellant has not argued that any of the other factors at section 14(2) favouring disclosure apply and based on my consideration of these factors in light of the content of the records and the specific information at issue, I find that no other factors, whether listed or unlisted, apply.

[67] In order to find that disclosure does *not* constitute an unjustified invasion of personal privacy, one or more of the presumptions in section 14(3) or the factors and/or circumstances favouring disclosure in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory exemption at section 14(1) applies.¹² In this appeal, since I have found that no presumptions apply and there are no factors favouring the disclosure of the personal information at issue, I find that the exception at section 14(1)(f) has not been established and the personal information at issue is exempt from disclosure under section 14(1) of the *Act*.

E. Does the discretionary exemption at section 38(a), read in conjunction with the solicitor-client privilege exemption at section 12, apply to the portion of page 15, for which it has been claimed?

[68] The city submits that a portion of page 15, is exempt from disclosure under section 38(a), read in conjunction with the solicitor-client privilege exemption at section 12. Above I have found that the record in which page 15 is located contains the personal information of the appellant. As a result, the appellant's right of access to this information must be considered under the discretionary exemption at section 38(a).

[69] 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

¹¹ Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

¹² Orders PO-2267 and PO-2733.

this right. Section 38(a) states:

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[.] [emphasis added]

[70] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.¹³ Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information. I will consider the city's exercise of discretion below.

[71] In this case, the city relies on section 38(a), read in conjunction with section 12, to withhold a portion of page 15. Section 12 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.

[72] 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.

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

[74] 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.¹⁴ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.¹⁵ 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

¹³ Order M-352.

¹⁴ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

¹⁵ Orders PO-2441, MO-2166 and MO-1925.

keeping both informed so that advice can be sought and given.¹⁶

[75] 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.¹⁷ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.¹⁸

[76] 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 voluntarily demonstrates an intention to waive the privilege.¹⁹ 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.²⁰ Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.²¹ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.²²

The city's representations

[77] The city submits that the withheld portion of page 15 is subject to the discretionary exemption at section 38(a), read in conjunction with the solicitor-client privilege exemption at section 12. It submits that the withheld portion of page 15 is part of an email chain that discusses the need to obtain legal advice from a solicitor employed by the city on a particular issue.

[78] The information provided by the appellant during the course of this inquiry does not address the possible application of the solicitor-client privilege exemption.

Analysis and finding

[79] Having reviewed the city's representations and having considered the record for which section 12 was claimed, I find that the portion of page 15 that the city withheld is subject to the exemption at section 38(a), read in conjunction with section 12, because it qualifies as a privileged solicitor-client communication under branch 1.²³

¹⁶ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

¹⁷ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

¹⁸ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

¹⁹ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

²⁰ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

²¹ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

²² *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

²³ This finding is subject to my finding regarding the city's exercise of discretion.

[80] It is clear from the city's representations and the portion of the record that was severed that the withheld information forms part of the continuum of confidential communications between the city staff and their legal counsel. I accept that disclosure of that information would reveal legal advice sought by the city, from its counsel. Additionally, there is no evidence that the city has waived its solicitor-client privilege. Therefore, I uphold the city's denial of access under section 38(a), in conjunction with section 12, subject to my review of the city's exercise of discretion.

F. Does the discretionary exemption for advice or recommendations at section 7(1) apply to the portions of page 57 for which it has been claimed?

[81] The city claims that the discretionary exemption for advice or recommendations at section 7(1) of the *Act* applies to the information that it has withheld on page 57. Section 7(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[82] The purpose of section 7(1) is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.²⁴

[83] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[84] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.²⁵

[85] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[86] Advice or recommendations may be revealed in two ways:

²⁴ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

²⁵ See above at paras. 26 and 47.

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.²⁶

[87] Sections 7(2) and (3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of the categories, it cannot be withheld under section 7. None of those exceptions are relevant in the circumstances here.

[88] The information provided by the appellant in the course of my inquiry does not respond to or address the city's claim that the information severed from page 57 is exempt under section 7(1).

The city's representations

[89] The city submits that the withheld portion of page 57 contains advice or recommendations, given by an employee to another employee within the city's Transportation Services Division. The city submits that "the employee provided [...] advice to another employee with respect to the preparation of an internal briefing note." It submits that advice was in the form of a specific recommendation on information to be included in the briefing note. The city submits that the recommendation was part of the deliberative process, suggesting a course of action on a specific issue that was ultimately accepted or rejected by the person that was so advised. The city submits that it considered whether any of the exceptions to the advice and recommendations exemption set out in section 7(2) applied, but determined that the information for which it claimed section 7(1) did not fall within any of them.

Analysis and finding

[90] I accept that the withheld information on page 57, which consists of portions of an email chain between two city employees, consists of recommendations that fall within the scope of section 7(1). Based on my review of that exchange between those employees, it is clear that the information consists of a suggested course of action, from one employee to another, and that the recipient employee is in a position to ultimately accept or reject that recommendation. Accordingly, I find that section 7(1) applies to the portion of page 57 for which it has been claimed.

G. Did the city exercise its discretion under section 7(1) and 38(a), read in conjunction with section 12? If so, should this office uphold the exercise of discretion?

[91] The exemptions at sections 7(1) and 38(a) are discretionary and permit an

²⁶ Order P-1054.

institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[92] This office 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.

[93] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper consideration.²⁷ This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

The parties' representations on its exercise of discretion

[94] The city submits that it properly exercised its discretion under sections 7(1) and 38(a) of the *Act*.

[95] The city submits that the head exercised her discretion in good faith and took into account all relevant considerations with respect to the application of each of the three claimed sections. It submits that these considerations included:

- individuals should be able to access their own personal information;
- that exemptions to access should reflect the limited and specific circumstances where non-disclosure is necessary for the proper operation of municipal institutions;
- the wording of the relevant exemptions;
- the fundamental importance to Canadian society that the interests sought to be protect by the section 12 exemption (solicitor-client privilege);
- the majority of the information sought by the appellant is not his own personal information;
- the lack of any sympathetic or compelling need on the part of the appellant to receive the specific information that has been withheld;

²⁷ Order MO-1573.

- the disclosure will not increase public confidence in the operation of the city;
- the requested information for which section 12 has been applied is of a sensitive nature; and,
- the recent nature of the requested information.

[96] The city submits that it thoroughly deliberated the disclosure of the requested information and that it used the discretionary exemptions as sparingly as possible to deny access in a specific and limited fashion. It submits that in exercising its discretion not to disclose the information for which it claimed sections 7(1) and 38(a), it did so in a logical and fair manner, considering all relevant factors.

[97] The information submitted by the appellant in lieu of representations does not address the city's exercise of discretion.

Analysis and findings

[98] Based on my review of the specific and limited information that has been withheld from the records and the representations of the city, I find that it properly exercised its discretion to withhold that information, which I have found to be exempt under section 7(1) and section 38(a), in conjunction with section 12.

[99] I find that the city properly considered the purpose of the exemptions and the interests that they seek to protect. I am satisfied that the city balanced the importance of the solicitor-client privilege exemption and the purpose of exemption for advice and recommendations against the appellant's right to his own personal information. More generally, I am satisfied that the city took relevant considerations into account and did not act in bad faith or consider irrelevant or improper factors in exercising its discretion not to disclose the information that remains at issue, to the appellant.

[100] I am satisfied that the city's exercise discretion not to disclose the information that it withheld under section 7(1) and section 38(a), in conjunction with section 12, was appropriate, and I uphold it.

ORDER:

1. I do not uphold the city's decision that section 173(1) of *COTA* applies to the information at issue in pages 25, 38 and 39.
2. I order the city to issue an access decision addressing the information at issue in pages 25, 38 and 39 under the *Act*. For the purposes of the procedural requirements of the access decision, the date of this order should be treated as the date of the request.
3. I uphold the city's decision to withhold the remaining information.

4. In order to ensure compliance with this order provision 2, the city is to provide me with a copy of the access decision sent to the appellant.
5. The timelines noted in order provision 2 may be extended if the city is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting extension request.

Original signed by _____
Catherine Corban
Adjudicator

_____ November 5, 2020