Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-4446-I

Appeals MA20-00219, MA20-000293 and MA20-00294

Corporation of the City of Belleville

September 28, 2023

Summary: The City of Belleville (the city) received three requests under the *Act* related to the appellant's property. The city issued decision letters granting the appellant partial access, withholding information under the discretionary legal privilege exemption under section 38(a) in read with section 12. The city also takes the position that disclosure of some of the withheld information would constitute an unjustified invasion of personal privacy under the discretionary exemption at section 38(b). The appellant appealed the city's decision regarding the application of the exemptions to the IPC. The appellant also claims that additional records should exist. The city, in turn, claims that the requests before me are frivolous and vexatious.

In this order, the adjudicator determines that one of the appellant's requests is frivolous and vexatious and dismisses the appeal filed in relation to that request. The adjudicator then considers the application of the discretionary exemptions to the information withheld pertaining to the two other requests. She finds that the discretionary exemptions apply to all but two emails, which she orders the city to disclose to the appellant. The adjudicator finds that the city exercised its discretion properly in relying on the exemptions to withhold these emails.

With respect to the appellant's claim that the city did not conduct a reasonable search, the adjudicator finds that the city failed to conduct a reasonable search for records responsive to one of the three requests and orders it to conduct a further search.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 4(1)(b), 12, 14(2)(d), 14(2)(f), 38(a) and 38(b).

Related Cases: Interim Order MO-4216-I, Reconsideration MO-4273-R and Interim Order MO-4342-I.

OVERVIEW:

[1] The background of the appeal is that the Corporation of the City of Belleville (the city) and the appellant have been involved in civil litigation matter for a lengthy time related to a property owned by the appellant. The parties were also involved in municipal proceedings relating to the city's allegations of building and fire code violations. In addition, the appellant filed complaints against city employees with their regulator.

[2] This order resolves three appeals related to three separate requests the appellant filed under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the city.

The request and mediation stages

[3] The **first request** sought access to:

> …a copy of all emails to or from [the city's Manager of Approvals] regarding [the appellant] and/or [the appellant's property] for the period July 4th, 2011 to December 31st, 2016."

[4] The city issued an access decision granting the appellant partial access to responsive records. The city claimed that the withheld portions of the records qualify for exemption under the personal privacy provisions under section 14(1) or contain legal privileged information under section 12. The appellant appealed the city's decision to the Information and Privacy Commissioner of Ontario (IPC) and appeal file MA20-00219 was opened. A mediator was assigned to explore settlement with the parties. During mediation, the appellant confirmed that she did not require duplicate copies of any records already provided to her during litigation. She identified a specific record she believes should have been located as responsive to her request. The appellant provided search terms and date ranges to the city and the city agreed to conduct a further search. However, no additional records were located as a result of the city's further search. At the end of the mediation process, the appellant maintained her position that additional records responsive to the request should exist. The appellant also confirmed that she wished to pursue access to the portions of the records withheld under sections 12 and 14(1). The parties were unable to reach a settlement and appeal file MA20-00219 was transferred to the adjudication stage of the appeals process in which an adjudicator may conduct an inquiry.

[5] The **second request** sought access to:

> "…all documents and records (in all formats) of all communications between [the city's] Information and Privacy Officer/Deputy City Clerk and all persons at [named law firm] for the period January 1, 2014 to the present, regarding any/all freedom of information requests from [the appellant] to the City of Belleville."

[6] The city issued an access decision denying the appellant access to responsive records. The city claimed that the withheld records contain legal privileged information and qualify for exemption under section 12 of the *Act*. The appellant appealed the city's decision to the IPC and appeal file MA20-00293 was opened and assigned to a mediator. However, the parties were unable to reach a settlement and the file was subsequently transferred to adjudication.

[7] The **third request** sought access to:

> "…a copy of all records related to the entry to [the appellant's property] by [two named employees in the city's Engineering and Development Services department] on [a s p e c i f i e d d a t e]. 'All records' is meant to include all telephone, email and letter communications and notes leading up to, during and after the entry between [the two named city employees] and any and all persons, both employees of the Corporation of the City of Belleville and non-employees."

[8] The city issued an access decision indicating it located one responsive two-page email. However, the city denied the appellant access to the email claiming the application of the legal privilege exemption under section 12. The appellant appealed the city's decision to the IPC and appeal file MA20-00294 was opened. During mediation, the appellant took the position that additional records should exist and search was added as an issue to the appeal. As the parties did not reach a settlement, the file was transferred to adjudication.

The Adjudication Stage

[9] I decided to commence an inquiry into the three appeals by inviting the written representations of the city. In doing so, I joined the three (MA20-00219, MA20-00293 and MA20-00294) and sent a Notice of Inquiry to the city which set out the facts and issues in each appeal and invited the city's representations.

[10] The city's written representations and supplemental representations[1] were shared with the appellant who had an opportunity to submit written representations.[2]

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[1] The city raised the possible application of the frivolous and vexatious provisions under section 4(1) in its initial representations and made supplemental representations at my invitation in support of its position that this provision applies in the circumstances.

[2] The parties' representations were shared in accordance with the confidentiality criteria in IPC *Practice Direction 7*. In this matter, complete copies of the city's initial and supplemental representations were

Each of the parties, in their representations, make the point of correcting what they allege are the misstatement of issues relating to the litigation or other proceedings. I will not mention the parties' arguments in this regard unless directly relevant to the issues I am to consider under the *Act*.

[11] In this order, I find that the appellant's second request is frivolous and vexatious. As a result of my finding, I dismiss the appellant's appeal of the city's decision responding to the second request (MA20-00293). However, I dismiss the city's frivolous and vexatious claim regarding the first and third request and go on to consider the application of the discretionary exemptions claimed by the city. I find that the personal privacy or legal privilege exemptions apply to most of the emails and that the city properly exercised its discretion. As a result, I uphold the city's access decision to deny the appellant access to these mails. However, the city is ordered to disclose two emails (records 3 and 4) to the appellant.

[12] While I uphold the city's search in response to the appellant's first request, I find deficiencies in the city's search in response to the third request. As a result, the city is ordered to conduct a further search for records responsive to the third request.

PRELIMINARY ISSUE:

Are the appellant's requests frivolous or vexatious?

[13] The city submits that the appellant submitted the three requests before me for an improper purpose.[3]

[14] Section 4(1)(b) of the *Act* provides institutions with a straightforward way of dealing with frivolous or vexatious requests. However, institutions should not exercise their discretion under section 4(1)(b) lightly, as this can have serious implications for access rights under the *Act*.[4] Section 4(1)(b) reads:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
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> > the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

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shared with the appellant. The city was not provided with a copy of the appellant's representations as I determined that I did not need to seek the city's reply representations.

[3] In its supplemental representations, the city says that the appellant filed 13 requests under the *Act* which establish a pattern of conduct that amounts to an abuse of the right of access contemplated in section 5.1(a) of Regulation 823 under *MFIPPA*. I decline to consider the city's claim in this regard as only three of the requests identified in the city's representations are before me. In addition, it appears that the city already issued decisions in most, if not all, of the requests referenced in its representations.

[4] Order M-850.

[15] Section 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the phrase "frivolous or vexatious":

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
>
> > (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

[16] An institution that concludes that an access request is frivolous or vexatious has the burden of proof to justify its decision.[5] A request is made for a purpose other than to obtain access if the requester is motivated not by a desire to obtain access, but by some other objective.[6]

[17] In this case, the city says that the appellant's first and third requests seek to obtain access to records she "can get from her lawyer" or speak to issues related to a site visit it says was arranged by the appellant's lawyer. The appellant says that she "has a right to avail herself of the FOI process" to access information regardless of the litigation matter. I find that the city has adduced insufficient evidence to establish that the first and third requests were made for a purpose other than to obtain access.

[18] The IPC has previously found that an intention by the requester to take issue with a decision made by an institution, or to take action against an institution, is not enough to support a finding that the request is "frivolous or vexatious."[7] In order to qualify as a "purpose other than to obtain access," the requester would need to have an improper objective above and beyond an intention to use the information in some legitimate manner.[8] Evidence that the appellant could access the documents outside the freedom of information legislative scheme is not sufficient to make a case that her requests under the *Act* were motivated not by a desire to obtain access.

[19] Accordingly, I dismiss the city's claim that the appellant's first and third requests are frivolous and vexatious. As a result of my finding, I will go onto determine the city's claim that the information withheld in the responsive records qualify for exemption under the *Act*. I will also go on to decide the appellant's claim that the city failed to conduct a reasonable search for records responsive to the first and third requests.

[20] However, I find the appellant's second request frivolous and vexatious. This request only seeks access to documents the city exchanged with its legal representative in relation to her freedom of information requests. The appellant says that she filed this request to learn why the law firm hired by the city to handle the litigation matter "[was]

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[5] Order M-850.
[6] Order M-850.
[7] Orders MO-1168-I and MO-2390.
[8] Order MO-1924.

in control of FOI searches and responsive record releases." Throughout her representations, the appellant questions the appropriateness of the law firm that handled the litigation matter being involved with the city's response to her access requests under the *Act*. The appellant alleges that "... the facts seem to show that the Head of the institution is now for all intents and purposes, the City defence lawyer who is exercising her new-found discretion, as regards to this appellant, in a dishonest manner." The appellant also argues that access to communications exchanged between the city and its legal representative would enable her to "assess if the freedom of information process [was] actually being followed at all". I note that the access decision sent to the appellant in response to this request was sent by the city's Deputy Clerk and that the letter indicates that this individual is responsible for making the access decision. The appellant raised a similar concern in Interim Order MO-4216-I. In that order, I stated that I saw "… no issue with the city's lawyer providing representation to the city in the civil matter and the appeal before me."[9] Similarly in this appeal, I see no issue with the city consulting its legal representative during the request stage or having it respond to any matters arising from any appeal the appellant filed with the IPC, including participating in the mediation process and submitting representations on the city's behalf.

[21] While I note, as stated above, that evidence that a requester intends to take issue with a decision made by an institution is not enough to support a finding on its own that the request is "frivolous or vexatious" I find that here there is sufficient evidence to demonstrate that the appellant's second request was not motivated by a desire to obtain access to the records. Given that the number of access requests she filed over the years, I am satisfied that the appellant was aware that a significant amount of records must exist in the city's record-holdings which could potentially respond to this request. In addition, I am not satisfied that the appellant was motivated by a desire to actually obtain access to the requested records. In my view, the appellant, given her long history as the opposite party against the city in legal proceedings had to know that she would not be entitled to access communications exchanged solely between the city and lawyer in which the city seeks legal advice.

[22] Having regard to the above, I find that the appellant's second request was not motivated by a desire to obtain access. As a result of my finding, I dismiss the appellant's appeal of the city's decision responding to the second request (MA20-00293).

RECORDS:

[23] The records at issue are email records identified in the charts below. The record numbers correspond with the numbers assigned in the Index of Records prepared by the city:

[9] Interim Order MO-4216-I, para. 8.

Withheld email records in first request (MA20-00219)	**Exemption claimed**
Records 30, 56-57, 62-65[10]	Section 38(b)
Records 3, 4, 12-27, 35-55, 58-61, and 66-72.	Section 38(a)/12
Records 31-34	Sections 38(a)/12 and 38(b)

Withheld email record in third request (MA20-00294)	**Exemption claimed**
One record	Section 38(a)/ 12

ISSUES:

A. Did the city conduct a reasonable search for records responsive to the first and third requests?

B. Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

C. Does the discretionary legal privilege exemption at section 38(a) read with section 12 of the *Act* apply to records 3, 4, 12-27, 31-34, 35-55, 58-61, and 66-72?

D. Does the discretionary personal privacy exemption at section 38(b) apply to records 30, 56, 57 and 62-65?

E. Did the city exercise its discretion under sections 38(a) and (b)?

DISCUSSION:

Issue A: Did the city conduct a reasonable search for records responsive to the first and third requests?

[24] The city says in its representations that the appellant alleges that "further documents must exist, though no evidence has ever been put forward to say why."

[25] The appellant says that the city did not ask her to clarify her requests and questions whether the city's searches were conducted by individuals knowledgeable

[10] The city also identified record 9 in its Index of Records. However, it claimed that the only portions of this record withheld from the appellant was information about an unrelated property. A redacted copy of record 9 was provided to the IPC. Given that this issue was not identified in the mediator's report and the appellant has not adduced evidence seeking access to the withheld portions, I have removed this record from the scope of the appeal.

about the subject-matter of the request. The appellant also submits that the city has failed to provide the IPC with a written explanation of the steps it took to respond to the requests, including "who conducted the search, the places searched, who was contacted in the course of the searches, what type of files were searched and the results of those searches."

[26] The appellant argues that she is aware of the existence of at least one responsive email she says the city's search failed to locate. She says that she saw the email in her former lawyer's office and that it was part of the small book of documents. The appellant says that the subject-matter of the email had to do with "minimizing her access to her property". During mediation, the appellant suggested that the keywords "minimize" and/or "access" be used to conduct a further search and the city agreed to conduct a further search for this record. The city submits that its IT department conducted a search for "any emails to/from [the Managers of Approval] between 2012 and 2018 [using] the keywords identified by the appellant" but that no additional record was located.

[27] In her representations, the appellant takes the position that additional records responsive to the first request should exist and says that the city's submissions do not "indicate what knowledge of the subject matter of the requests the IT searcher has, or what other departments they searched." The first request sought access to "…a copy of all emails to or from [the city's Manager of Approvals] regarding [the appellant] and/or [the appellant's property] for the period July 4th, 2011 to December 31st, 2016." The appellant says that "IT departments generally do not have access to all records the government has, and rarely have reason to be involved in the subject matter of the requests. They have no access to paper records."

[28] The appellant submits that the city's submission in its representations that it "already disclosed a significant number of emails from [the Manager of Approvals]" demonstrates that it did not also conduct a search for emails that were addressed to the same individual. The appellant argues that the city should be ordered to conduct a further search for emails "to" the Manager of Approvals.

[29] With respect to the third request, the appellant says that two city employees attended her residence and conducted inspections without proper authority. The third request sought access to "…a copy of all records related to the entry to [the appellant's property] by [two named employees in the city's Engineering and Development Services department] on [a specified date]."

[30] The appellant says that additional records other than the one email record located by the city should exist. In support of this argument, the appellant says there should be records discussing how the scheduled site visit "morphed into a full-blown inspection of the inside of the house." In addition, the appellant says that additional records such as minutes or reports of the site visit should exist.

[31] The appellant also says that during mediation, she was told that additional records responsive to the third request exist but that they were already released to her during the litigation matter. The appellant says that the only documents released to her during the litigation matter were "some of the unauthorized photos [the city's employees] took while in the building" and that she is entitled to request access to records in the city's record holdings which would help her understand what happened at the site visit.

Decision and analysis

[32] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.[11] If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[33] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.[12]

[34] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[13] that is, records that are "reasonably related" to the request.[14]

[35] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[15] The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[16]

The first request (MA20-00219)

[36] In this case, the appellant questions the experience and knowledge of the individuals coordinating the city's search. The appellant also questions the city's IT's department access to the city's email record holdings. In my view, this argument has no merit as electronic records would be the very type of records one would expect IT departments to have access to. I also find that the appellant's argument that the city should have located paper records has no merit given that she specifically requested

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[11] Orders P-85, P-221 and PO-1954-I.
[12] Order MO-2246.
[13] Orders P-624 and PO-2559.
[14] Order PO-2554.
[15] Orders M-909, PO-2469 and PO-2592.
[16] Order MO-2185.

email records.

[37] The appellant alleges that the city failed to explain all of the steps it took to respond to the requests remaining at issue. I disagree and am satisfied, based on the evidence before me, that the city's initial and further searches were coordinated and conducted by individuals knowledgeable about the subject of the request and the city's record-holdings. As noted above, the *Act* does not require the city to prove with certainty that further records do not exist. The city must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records, which I am satisfied that it did. I accept the city's evidence that its IT department conducted a further search using the keywords identified by the appellant but that no records were located. I am also satisfied that the parameters of the city's further search would have located any emails sent whether the Manager of Approvals was the recipient or sender. Accordingly, I find that the city conducted a reasonable search for records responsive to the first request.

The third request (MA20-00294)

[38] However, I find that the city did not conduct a reasonable search for records responsive to the third request. The city located one email in response to this request. The city says the email was sent by one of the employees in question after the site visit. The city says that the email details what the employees had observed and was sent to the city's lawyer. However, the appellant does not just seek access to records created after the site visit. The request clearly states that the appellant also seeks access to "all telephone, email and letter communications and notes leading up to, during and after the entry between [the named employees] and any and all persons, both employees of the Corporation of the City of Belleville and non-employees."

[39] The city's representations did not provide an explanation of the steps it took to locate other records that would respond to the request, such as communications exchanged between the employees in question and other individuals before and after the site visit. Instead, the city says that during the litigation matter, it already released the type of records that would respond to the appellant's third request. The city's response is similar to the one it provided me in the appeal which led to Interim Order MO-4216-I where it took the position that additional responsive records exist but that they were already provided to the appellant during the litigation matter. In that order I stated that:

> … the city is obligated under the *Act* to locate and identify records that are responsive to a request, regardless of whether an exemption under the *Act* applies or the record was previously provided to the appellant.[17]

[40] The city also advanced similar arguments in the appeal which led to Interim

[17] Interim Order MO-4216-I, para 33.

Order MO-4342-I and Reconsideration Order MO-4273-R. In those orders, I also found that the city was obligated under the *Act* to locate and identify records responsive to a request, regardless of whether an exemption under the *Act* applies or the record was previously provided to the appellant outside of the *Act*.[18]

[41] Having regard to the lack of evidence before me, I find that the city has not demonstrated that it has expended a reasonable effort to locate records that would respond to the third request. In addition, I am satisfied that the city's own evidence establishes that there is a reasonable basis for concluding that such records exist. Accordingly, I will order the city to conduct a further search for records responsive to the third request.

Issue B: Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[42] In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the record contains "personal information," and if so, to whom the personal information relates. Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual."

Information relating to the appellant or her property

[43] The city did not specifically address this issue in its representations. However, the city says that it has been "involved in protracted litigation" with the appellant relating to "Building and Fire Code violations at a property she owns and was renovating in Belleville." There is no dispute that records responsive to the first and second requests relate to a property owned by the appellant. Given the city's allegation that building and fire violations occurred at the property in question, I find that the records contain information which would reveal something of a personal nature of the appellant.

Information about employees in record 3

[44] In its representations, the city says that its Index of Record incorrectly identifies record 3 as containing personal information and being withheld under section 38(b). The city in its representations says that this record "… is an email between City staff discussing witnesses required for a hearing involving the appellant." The city now says it relies on the legal privilege exemption to withhold this record. However, later in this decision, I explain my reasons for finding that the legal privilege exemption does not apply to record 3. In examining this record, I also find that it does not contain information which would reveal something of a personal nature of the employees the appellant filed a complaint about. Accordingly, I find that record 3 does not contain "personal information" of the city's employees as defined in section 2(1).

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[18] Interim Order MO-4342-I, paras 24 and 25 and Reconsideration Order MO-4273-R, para 8.

Information about employees in the remaining records

[45] I am also satisfied that any withheld information in the records relating to the employees the appellant complained about would reveal something of a personal nature about them. Though this information relates to the employees in a professional, official or business capacity, it constitutes "personal information" as it reveals something of a personal nature about them as it relates to complaints the appellant filed against them.[19]

[46] Accordingly, I am satisfied that paragraphs (d) and (h) of the definition of "personal information" under section 2(1) apply to the information withheld in the records.[20]

Summary

[47] I find that the emails, but for record 3, contain the personal information of the appellant and/or the city's employees. The relevance of this finding is that sections 38(a), read with section 12, and 38(b) of the *Act* applies. Sections 38(a) and (b) of the *Act* read:

> A head may refuse to disclose to the individual to whom the information relates personal information,
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> (a) 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;
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> (b) if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

[48] The discretionary nature of sections 38(a) and (b) ("may" refuse to disclose) 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 own personal information.[21]

[49] Accordingly, if the city refuses to give the appellant access to her own personal information under sections 38(a) or (b), there must exist evidence to show that it considered whether a record should be released to her because the record contains her

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[19] Orders P-1409, R-980015, PO-2225 and MO-2344.

[20] Section 2(1) of the *Act* gives a list of examples of personal information:

> "personal information" means recorded information about an identifiable individual, including,
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> (d) the address, telephone number, fingerprints or blood type of the individual,
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> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[21] Order M-352.

personal information.

Issue C: Does the discretionary legal privilege exemption at section 38(a) read with section 12 of the *Act* apply to records 3, 4, 12-27, 31-34, 35-55, 58-61, and 66-72.

[50] Section 12 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It states:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[51] Section 12 contains two different exemptions, referred to in previous IPC decisions as "branches." The first branch ("subject to solicitor-client privilege") is based on common law. The second branch ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege created by the *Act*. For section 12 to apply, the evidence must establish that at least one branch applies.

[52] In this case, the city's submissions do not indicate which branch it assessed applies. Instead, in its representations, the city states:

> In all cases where the s.12 exemption was claimed, all records were email exchanges between a lawyer at [named law firm retained by the city] and a City employee, discussing various steps and legal opinions relating to the litigation.

[53] The appellant's **first request** sought access to emails to or from the city's Manager of Approvals regarding the appellant and/or her property for the time period of July 4, 2011 to December 31, 2016. In its representations, the city says that records 3, 4, 12-27, 31-34, 35-55, 58-61, and 66-72 comprise of "email exchanges between a lawyer at [the law firm retained by the city] and a City employee, discussing various steps and legal opinions relating to the litigation." The appellant says "there was no legal advice to give" given the dates of the emails. The appellant says that the building prosecution matter had already ended and that all issues relating to the complaints she filed against employees were handled "with their professional body alone and with no mention of a lawyer."

[54] The appellant's **third request** sought access to records related to the entry of two city employees to her property on a specified day. The city identified one email as responsive to the request. The city says that the email is "covered by both solicitor-client and litigation privilege" and says that its employee sent the email to the city's legal representative after the site visit. The appellant does not believe that the identified record "went directly" to the city's lawyer. The appellant says:

> The litigation was long underway and a trial was ready to start within days, therefore the handing over of photos taken without authorization are hardly records created for the dominate purpose of litigation, or that caused the lawyers to produce a work product. If there was discussion with the 2 employees, it would have been outside the zone of privacy in any event and there is no indication legal advice resulted from some of the photos being handed to the lawyers by an unidentified party.

Decision and analysis

[55] I have considered the parties' submissions along with the email records itself and find that the emails at records 12-27, 31-34, 35-55, 58-61 and 66-72 responsive to the first request and the one email responsive to the third request, qualify for exemption under the solicitor-client communication privilege (branch 1).

[56] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.[22] This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.[23] The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.[24]

[57] I have examined the emails at records 12-27, 31-34, 35-55, 58-61 and 66-72 and am satisfied that they comprise of direct communications of a confidential nature between city employees and the city's lawyers. I am also satisfied that the purpose of the communications was for the purpose of obtaining and giving legal advice or keeping the client and lawyer informed so that advice could be sought and given.

[58] Under the common law, a client may waive solicitor-client privilege. An express waiver of privilege happens where the client knows of the existence of the privilege, and voluntarily demonstrates an intention to waive the privilege.[25]

[59] In the absence of evidence in the contrary, I am satisfied that the city did not waive solicitor-client communicative privilege. I am also satisfied that the emails were exchanged in confidence, either expressly or by implication.[26] Having regard to the above, I find that emails at records 12-27, 31-34, 35-55, 58-61 and 66-72 fall under the ambit of branch 1. I will go on to determine whether the city properly exercised its discretion in relying on section 38(a) read with 12 to deny the appellant access to the

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[22] Orders PO-2441, MO-2166 and MO-1925.
[23] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[24] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.
[25] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[26] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

emails.

Records 3 and 4

[60] For the communication privileges to apply to records 3 and 4, the city would have to demonstrate that the emails reveal direct communications of a confidential nature with its lawyer. In its representations, the city says that record 3 "… is an email between City staff discussing witnesses required for a hearing involving the appellant." The city describes record 4 in the Index of Records as an "email containing legal advice."

[61] I have examined records 3 and 4 and note that they are communications solely exchanged between city staff members. Based on the contents of these emails, I find that they cannot be said to contain information, if released to the appellant, that would reveal direct communications of a confidential nature between the city and its lawyer. As a result, they do not fall within the ambit of the communicative privileges in branch 1 and 2.

[62] Other than a bald assertion, the city does not explain how records 3 and 4 are subject to the litigation privileges in branch 1 and 2. Common law litigation privilege is based on the need to protect the adversarial process by ensuring that legal counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[27] The litigation must be ongoing or reasonably contemplated for the common law litigation privilege to apply.[28] The statutory litigation privilege applies to records prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation."

[63] As noted above, records 3 and 4 were solely exchanged between city staff members. In my view, there is insufficient evidence to establish that these emails aided the city's lawyers "zone of privacy" or were prepared by or for the lawyers "in contemplation of or for use in litigation." Accordingly, I find that the litigation privileges in branch 1 and 2 do not apply.

[64] Having regard to the above, I find that section 12 does not apply to records 3 and 4 and will order the city to disclose these records to the appellant as the city has not claimed that any other exemption apply and I am satisfied that none could apply.[29]

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[27] *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

[28] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

[29] See paragraph 44 regarding my determination that the withheld information in record 3 does not constitute the "personal information" of the city's employees.

PERSONAL PRIVACY

Issue D: Does the discretionary personal privacy exemption at section 38(b) apply to records 30, 56, 57 and 62-65?

[65] Under the section 38(b) exemption, if a record contains the personal information of both the requester and another individual, the institution may refuse to disclose the other individual's personal information to the requester if disclosing that information would be an "unjustified invasion" of the other individual's personal privacy.[30]

[66] The section 38(b) exemption is discretionary. This means that the institution can decide to disclose another individual's personal information to a requester even if doing so would result in an unjustified invasion of other individual's personal privacy.[31]

[67] Sections 14(2), (3) and (4) also help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). Section 14(4) lists situations where disclosure would not be an unjustified invasion of personal privacy, in which case it is not necessary to decide if any of the factors or presumptions in sections 14(2) or (3) apply. The parties do not rely on section 14(4), and I find that it does not apply in the present appeal.

[68] Otherwise, in deciding whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), I must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[32]

Representations, decision and analysis

[69] The city says that disclosure of emails 30, 56, 57 and 62-65[33] to the appellant would constitute an unjustified invasion of personal privacy of the employees who are the subject of the emails. In support of its position, the city states that the emails "relate to communications between City staff and the Ontario Professional Planners Institution ("OPPI")" concerning complaints the appellant filed against two employees.

[70] The city did not specifically refer to the presumptions in section 14(3) or factors in section 14(2) in their representations and the appellant did not address the issue in hers.

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[30] However, the requester's own personal information, standing alone, cannot be exempt under section 38(b) as its disclosure could not, by definition, be an unjustified invasion of another individual's personal privacy; Order PO-2560.

[31] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's exercise of discretion under section 38(b).

[32] Order MO-2954.

[33] The city also claims that records 31-34 qualify for exemption under section 38(b). However, it is not necessary that I consider the city's argument as I already found that these records qualify for exemption under section 38(a) read with 12.

[71] Based on my examination of the records, I am satisfied that the factor at section 14(2)(f) applies to the withheld information. Section 14(2)(f) states:

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

[72] Section 14(2)(f) is intended to weigh against disclosure when the evidence shows that the personal information is highly sensitive. To be considered "highly sensitive," there must be a reasonable expectation of significant personal distress if the information is disclosed.[34]

[73] The personal information at issue comprises of information city staff exchanged regarding the appellant's complaints about two employees. Having examined the information at issue, I am satisfied that there is a reasonable expectation of significant distress to the employees in question if the information is disclosed.

[74] Accordingly, I am satisfied that the factor weighing in favour of privacy protection at section 14(2)(f) applies and weighs against disclosure. When I consider this factor and balance the interests of the parties, I find that disclosure would constitute an unjustified invasion of the employees' personal privacy under section 38(b).

[75] In arriving at my decision, I also considered whether the appellant's representations gave rise to any of the factors weighing in favour of disclosure and determined that they did not. In particular, I considered whether the personal information at issue is relevant to a fair determination of the appellant's rights as contemplated under section 14(2)(d).[35] Throughout her representations, the appellant says that she felt compelled to seek access to documents through the freedom of information legislative scheme because she felt that documents should have been provided to her through the litigation process but were not. However, I note that the appellant herself indicated that her complaints to the employees' regulator, which is the subject-matter of the personal information at issue, had already concluded. One of the requirements for section 14(2)(d) to apply is that the personal information at issue is required in order for the requester to prepare for a proceeding or to ensure an impartial

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[34] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

[35] Section 14(2)(d) states:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether, the personal information is relevant to a fair determination of rights affecting the person who made the request.

hearing.[36]

[76] Having regard to the above, I find that the withheld personal information at issue in records 30, 56, 57 and 62-65 is exempt under section 38(b) and will go on to determine whether the city properly exercised its discretion in relying on section 38(b).

EXERCISE OF DISCRETION

Issue E: Did the institution exercise its discretion under sections 38(a) and (b)?

[77] The exemptions at sections 38(a) and (b) are discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[78] The representations of the parties did not specifically address this issue. However, the appellant did submit that portions of the city's representations seek to characterize her in a negative light.

[79] The IPC 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; or
- it fails to take into account relevant considerations.

[80] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[37] The IPC cannot, however,

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[36] Section 14(2)(f) weighs in favour of allowing requesters to obtain someone else's personal information where the information is needed to allow them to participate in a court or tribunal process. The IPC uses a four-part test to decide whether this factor applies. For the factor to apply, all four parts of the test must be met:

> 1. Is the right in question a right existing in the law, as opposed to a non-legal right based solely on moral or ethical grounds?
>
> 2. Is the right related to a legal proceeding that is ongoing or might be brought, as opposed to one that has already been completed?
>
> 3. Is the personal information significant to the determination of the right in question?
>
> 4. Is the personal information required in order to prepare for the proceeding or to ensure an impartial hearing?

[37] Order MO-1573.

substitute its own discretion for that of the institution.[38]

[81] Based on the circumstances of the appeal, I am satisfied that the city properly exercised its discretion in withholding access to the information I found exempt under section 38(a) read with 12 (legal privilege) and 38(b) (personal privacy). In making my decision I find that the city applied the principle that exemptions from the right of access should be limited and specific and in doing so released non-exempt information to the appellant. I also am satisfied that the city balanced the principle that individuals should have a right of access to information which impacts them with the principle that the privacy of individuals should be protected. I also considered the wording of the exemptions and the interests that sections 12 and 38(b) seek to protect.

[82] Having regard to the above, I am satisfied that the city properly exercised its discretion and took into account relevant considerations. I am also satisfied that the city did not take into account irrelevant considerations or exercise its discretion in bad faith or for an improper purpose.

[83] Accordingly, I find that the city properly exercised its discretion and uphold its decision to withhold the emails I found exempt under sections 38(a) and (b).

ORDER:

1. I order the city to disclose records 3 and 4, which respond to the first request (MA20-00219) to the appellant by November 2, 2023 but not before October 28, 2023.

2. I uphold the city's decision to withhold the remaining email records under sections 38(a)/12 or 38(b) of the *Act* identified as responsive to the first (MA20-00219) and third request (MA20-00294).

3. I find that the second request (MA20-00293) was frivolous and vexatious under section 4(1)(b) and dismiss the appeal related to this request.

4. I uphold the city's search related to the first request (MA20-00219).

5. I order the city to conduct a further search for records responsive to the third request (MA20-00294).

6. I order the city to issue an access decision to the appellant regarding any records located in its further searches conducted pursuant to provision 5 even if no records are located, in accordance with the *Act*, treating the date of the request for administrative purposes.

[38] Section 43(2).

7. I order the city to provide me with an affidavit sworn by the individual(s) who coordinated or conducted the city's searches pursuant to this order by **November 2, 2023**, describing the search efforts. The affidavits should include the following information:

    - The names and positions of the individual(s) who conducted the search;
    - Information about the types of records searched, the nature and location of the searches and steps taken in carrying out the search;
    - The results of the search; and
    - Details of whether additional records could have been destroyed, including information about record maintenance policies, practices and retention schedules.

8. I remain seized of this appeal in order to deal with any outstanding issues arising out of provisions 5 to 7.

Original signed by: September 28, 2023

Jennifer James
Adjudicator