

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-4510- I

Appeal MA19-00802

City of Hamilton

April 15, 2024

Summary: The City of Hamilton received a request under the *Act* for access to information from the city's fire and building departments relating to a municipal address. The city issued an interim access decision identifying 291 pages of responsive records. In its final access decision, the city granted the requester partial access to some responsive records citing a number of exemptions, including section 12 (solicitor-client privilege). The city denied access to some records on the basis that they had been the subject of previous access requests and/or previously disclosed to the requester.

The requester appealed the city's decision not to grant access to records subject to previous access requests and its application of the exemption in section 12.

In this interim order, in the absence of any representations from the city, the adjudicator finds that there is insufficient information to determine whether any responsive records have previously been disclosed to the appellant. The adjudicator orders the city to disclose the records that have previously been disclosed to the appellant and to issue an access decision in respect of any records subject to previous access requests to which the city has previously denied access. The adjudicator also orders the city to disclose to the appellant one missing record to which it has decided to grant the requester access, in accordance with its final access decision.

In addition, the adjudicator finds that the solicitor-client privilege exemption in section 12 applies to the records for which it was claimed and upholds the city's decision to withhold them. The adjudicator defers her finding on the city's exercise of discretion to apply section 12, ordering the city to provide representations.

Statute Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 12 and 19.

Order Considered: Order PO-2624.

OVERVIEW:

[1] This interim order disposes of procedural issues arising in an appeal from the City of Hamilton's (the city's) decision regarding access to records from the city's fire and building departments pertaining to a specified municipal address.

[2] The city received a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to a specified municipal address, as follows:

Hamilton Fire Dept.

All records including property information forms, plans, surveys, notices, orders, exemptions, approvals etc. for the period 1949 to present.

Hamilton Building Dept.

All records for fire escape, repair and parts applications including application forms for [two specified building permits]. Also, any deficiency letters, plans, engineer reports, emails, *Amanda* files, inspector notes, etc. All permits, plans, application forms, deficiency letters, etc. for fire escape for the period 1974 to 1981.

[3] The city identified 291 pages of responsive records comprising handwritten notes, *Amanda* computer print-screens¹, inspection notes, licensing information, reports, emails, and general correspondence. In January 2018, the city issued an interim decision granting partial access and providing a fee estimate.

[4] In its interim decision, the city stated that it had identified that approximately 58 pages of the responsive records contain information that is exempt from disclosure pursuant to a number of exemptions including section 12 (solicitor-client privilege) of the *Act*.²

[5] The requester decided to pursue access to the records and paid the fee estimate

¹ *Amanda* is the case management platform used by the city's building and fire departments.

² The city also relied upon section 8(1)(d) (law enforcement) and section 14(1) (personal privacy) for withholding portions of the records. In her representations, the appellant has confirmed that she is no longer pursuing access to the portions of the records released to her that have been withheld on this basis. The application of these exemptions is therefore outside the scope of this Interim Order.

in full.

[6] The city issued a final access decision granting partial access to the responsive records. The city stated that some of the responsive records had been the subject of previous access requests and had already been disclosed to the requester. The city indicated that it had not included the previously disclosed records in its final access decision.

[7] The city identified the 203 pages of records to which it was granting the appellant partial access and cited the exemptions relied upon in its interim decision.

[8] The requester, now appellant, appealed the city's decision to the Information and Privacy Commissioner of Ontario (IPC). The appellant also raised the issue of the city's failure to release the records to which it had decided to grant her access, contrary to section 19 of the *Act*. A mediator was appointed to explore resolution.

[9] Mediation did not resolve the issues on appeal and the file was transferred to the adjudication stage, where an adjudicator may conduct an inquiry.

[10] Before beginning my inquiry, I wrote to the city asking it to produce to the IPC the 291 pages of responsive records in order for me to adjudicate the issues in the appeal. The city did not respond to my request.

[11] I then began my inquiry by inviting the city to submit representations addressing the facts and issues set out in a Notice of Inquiry. The city did not provide representations.

[12] I then invited and received representations from the city on the steps it had taken to disclose to the appellant the records to which it had decided to grant access, in accordance with its access decision. The city provided me with a copy of the severed record package prepared for the appellant, which comprised 202 pages. It subsequently provided me with a copy of the unsevered records, comprising 203 pages.

[13] I then invited and received representations from the appellant addressing the facts and issues set out in a Notice of Inquiry. The appellant's representations raised a number of issues regarding the disclosed records.

[14] The appellant notes that a page is missing from the record package. As the city has granted the appellant partial access to this page, the issue of whether the city has released this page in accordance with section 19 of the *Act* remains an issue.

[15] In addition, the appellant identifies records that she believes exist in addition to those disclosed by the city. Generally, when an appellant believes that additional records exist, the issue to be decided is whether an institution has conducted a reasonable search in accordance with the *Act*. However, in the circumstances of this appeal, where the city has denied access to responsive records on the basis that they have already been disclosed to the appellant, I decided to give the city an opportunity to identify these

records.

[16] I invited the city to submit representations in reply, addressing the issues raised by the appellant and repeated my request that the city provide me with all the records that it had initially identified as responsive to the request giving rise to this appeal, which it had stated in its interim access decision totalled 291 pages.

[17] The city has not submitted reply representations or provided me with the 291 pages of responsive records.

[18] For the reasons that follow, in this Interim Order, I find that there is insufficient information for me to determine the issues arising from the city's decision not to grant access to records previously disclosed records to the appellant. Accordingly, I order the city to disclose the records responsive to the request giving rise to this appeal that have previously been disclosed.

[19] In addition, I find that the city has failed to release a record to which it has decided to grant partial access and I order it to disclose page 160 to the appellant, in accordance with its access decision of October 4, 2019. Finally, I find that the solicitor-client privilege exemption in section 12 applies to the information remaining at issue in the released records. However, in the absence of any representations from the city, I am unable to find that the city exercised its discretion and I order the city to provide representations on this issue.

RECORDS:

[20] The information remaining at issue in the disclosed records consists of a portion of page 58 and page 110 in full, which the city has withheld on the basis of the solicitor-client privilege exemption in section 12.

[21] The records to which the city has denied access because they have been the subject of previous access requests and already disclosed to the appellant are also at issue in this appeal. The city has not identified these records.

ISSUES:

- A. Has the city previously disclosed to the appellant records that are responsive to the request giving rise to this appeal?
- B. Has the city failed to release to the appellant a portion of a record to which it has decided to grant access, contrary to section 19 of the *Act*?
- C. Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the information at issue?

DISCUSSION:

Issue A: Has the city previously disclosed to the appellant records that are responsive to the request giving rise to this appeal?

[22] In its access decision, the city states that some of the responsive records have been the subject of previous access requests and had previously been disclosed to the appellant. The city states that these records have not be provided to the appellant in response to the request giving rise to this appeal.

[23] The appellant's position is that she is unable to confirm whether records responsive to the present request have been the subject of previous requests or have been previously disclosed to her, as the city has not identified the records that it has denied access to on this basis.

[24] I have given the city a number of opportunities to clarify its position with regard to the records that it has previously disclosed to the appellant. The city has not provided the IPC with copies of all the responsive records nor identified those that it claims have been the subject of previous access requests or previously disclosed to the appellant.

[25] Accordingly, and for the reasons set out below, I will order the city to disclose to the appellant the records that it has identified as responsive to the request giving rise to this appeal and that it has previously disclosed.

[26] The city's position is that the request in this appeal is, in part, a duplication of freedom of information requests previously made by the appellant.

[27] In its initial response to the appellant's request, the city stated:

I have reviewed the details of your request and note that there may be some duplication with the previous freedom of information requests for the same [specified] address that [you] have filed over the past two years. Records found to be previously addressed and/or provided to [you] in response to your earlier requests will be excluded from the City's response to [this] freedom of information request [...].

[28] In its interim access decision issued to the appellant the city stated that its searches had located 291 pages of records that may be responsive to the appellant's request.

[29] In its final access decision, the city stated:

[S]ome of the request details including date parameters, are a duplication of previous freedom of information requests for the same address that [you] have filed since 2015, and for which access decisions and records have already been disclosed. Records found to be previously addressed and/or

provided to [you] in response to your earlier requests will be excluded from the City's response to the subject freedom of information request.

[30] The city identified the records to which it was granting partial access as 203 pages of records.

[31] In its representations submitted to me in August 2023 on the issue of whether it had released to the appellant the records to which it had decided to grant access, the city refers to the appellant's previous requests. The city states that the appellant has submitted 22 requests under the *Act* over a five-year period from 2015 and 2020.³ The city states that these requests involve three municipal properties and multiple city departments.

[32] The appellant has maintained that the records to which the city decided to grant access in response to the request giving rise to this appeal were released to her in October 2023. The appellant's position is that she is unable to confirm whether the responsive records that the city has not included in the record package have previously been disclosed to her because the city has not identified the records that it has withheld on that basis.

[33] In her representations, the appellant sets out the discrepancies between the city's descriptions of the records identified as responsive to the request, those subject to exemptions and those the city states have previously been disclosed.

[34] I have shared the appellant's representations with the city and invited it to provide representations in reply. Specifically, I asked the city to provide clarification and respond to the appellant's submissions. The city has not done so.

[35] In the circumstances and to avoid further delay to the disposal of the issues in this appeal, I require the city to disclose to the appellant the responsive records that it claims have previously been provided to the appellant.

[36] From my review of the city's decision letters and its representations, there are 88 outstanding pages⁴ of responsive records that the city has not included in its response to the appellant's request.

[37] Accordingly, I will order the city to disclose to the appellant the 88 outstanding pages of records that it has previously disclosed. In the event that some records have been the subject of previous access requests, but the city did not previously grant access to them, I will order the city to issue an access decision citing any exemptions/exclusions

³ The request giving rise to this appeal was submitted in October 2017.

⁴ The city states in its January 18, 2018, decision letter that it located records 291 pages of responsive records. The city has granted the appellant partial access to 203 pages of records. There are therefore 88 pages of responsive records that have been excluded from the city's response to the request giving rise to this appeal.

relied upon for denying access.

Issue B: Has the city failed to release to the appellant a record to which it has decided to grant access, contrary to section 19 of the *Act*?

[38] It is the appellant's position that one page of the record package released by the city is missing (page 160). In its access decisions, the city has granted partial access to the missing page.

[39] Section 19 of the *Act* sets out the obligations of an institution when responding to requests made under the *Act*. Section 19 provides that once an institution has decided to grant access to a record, it is obliged to provide the record (or, part of the record) to the requester.

[40] In its final access decision, the city decided to grant the appellant partial access to page 160. The appellant's position is that this page is missing from the record package.

[41] The city has not responded to my letter asking it to explain why page 160 of the record package is missing.

[42] In the absence of any explanation for the missing page, I will order the city to disclose page 160 of the record package to the appellant, in accordance with its final access decision of October 4, 2019.

Issue C: Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the information at issue in the released records?

[43] For the following reasons, I find that the solicitor-client privilege exemption in section 12 of the *Act* applies to information withheld from page 58 of the record package and to page 110, in full, subject to the city demonstrating that it exercised its discretion.

[44] Section 12 exempts privileged records from disclosure under the *Act*. Section 12 exempts records 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.

[45] 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*. In order for me to uphold the application of section 12 in this appeal, I must be satisfied that at least one branch applies to the records that the city claims are privileged.

[46] From my review of pages 58 (the withheld portion) and 110 (in its entirety), I am satisfied that they are subject to common law solicitor-client communication privilege (the first branch).

[47] At common law, solicitor-client 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 legal advice.⁵ 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.⁶

[48] Confidentiality is an essential component of solicitor-client privilege. Therefore, an institution must demonstrate that the communication was made in confidence, either expressly or by implication.⁷

[49] As already noted, the city has not provided representations addressing the issues set out in the Notice of Inquiry, including the application of the solicitor-client privilege exemption in section 12 of the *Act* to the portions of the records withheld on that basis. The city cites section 12 as the basis for withholding a portion of page 58 and page 110, in its entirety. In the absence of any representations, I have reached my findings on these portions of the records based on my review of the records and the circumstances of the appeal.

[50] The appellant submits that the privilege must not be used by the city to conceal fraud. Otherwise, the appellant's representations do not address the issues that determine the application of the solicitor-client privilege exemption in section 12.

[51] I am satisfied that the withheld portion of page 58 and page 110, in its entirety, comprise confidential communications made between city staff and between city staff and the city solicitor for the purpose of obtaining and receiving legal advice. Page 110, which has been withheld in full, comprises a direct communication in the form of an email between city staff and the city solicitor. I am satisfied that the common law solicitor-client communication privilege attaches to this email, in which the city is seeking legal advice from its counsel.

[52] The withheld portion of page 58 comprises a note made by city staff communicating the substance of advice received from the city solicitor to other staff members. I am satisfied that the context of this note, being a means of communicating between city staff, and the content of the note, which refers to legal advice from the city solicitor, is part of a continuum of communications between the city and its lawyer for the purpose of obtaining and receiving legal advice.

⁵ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁶ *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.

⁷ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

[53] In reaching this finding, I adopt the approach of the adjudicator in Order PO-2624. In that order, emails between non-legal ministry staff that referred directly to legal advice originally received from ministry counsel were found to be part of a continuation of communications because they addressed the subject matter for which counsel had been consulted and referred to counsel's advice. I agree with this approach and adopt it in this appeal. I find that the withheld portion of page 58 qualifies for common law solicitor-client privilege.

[54] As I have found that the portions of the released records at issue are exempt under section 12 of the *Act*, it is unnecessary for me to consider the application of the exemption in section 7 (advice or recommendations), claimed by the city in the alternative.

[55] The section 12 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. The institution must exercise its discretion. On appeal, the IPC may determine whether an institution has failed to exercise its discretion. In addition, 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 fails to take into account relevant considerations.

[56] In the absence of any representations from the city, there is no reasonable basis for me to find that the city has exercised its discretion in applying the section 12 solicitor-client privilege exemption or that it has done so properly.

[57] Accordingly, I will defer my finding on the issue of whether the city has exercised its discretion until the final order disposing of the issues in this appeal. In the meantime, I will order the city to provide me with written representations on its exercise of discretion.

ORDER:

1. I order the city to disclose to the appellant by **May 21, 2024**, but not before **May 16, 2024**, the outstanding records responsive to the appellant's request identified in its interim access decision of January 18, 2018, as records that it has previously disclosed to the appellant.
2. If any of the outstanding responsive records referred to in provision 1 of this order have been the subject of previous access requests and access has previously been denied, I order the city to issue an access decision in respect of those pages of records, identifying those records and the basis for denying access, including any exemptions/exclusions in the *Act* upon which it relies.
3. I order the city to disclose to the appellant by **May 21, 2024**, but not before **May 16, 2024**, the missing page 160 to which it has granted the appellant partial access, in accordance with its final access decision of October 4, 2019.

4. I order the city to provide written representations by **April 29, 2024**, on its exercise of discretion in its decision to apply the solicitor-client privilege exemption in section 12 of the *Act* to a portion of page 58 of the released records and to withhold page 110 in its entirety.

Original signed by: _____
Katherine Ball
Adjudicator

_____ April 15, 2024