

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4576-F

Appeal MA19-00802

City of Hamilton

October 4, 2024

Summary: In a request made under the *Municipal Freedom of Information and Protection of Privacy Act*, an individual asked the City of Hamilton's fire and building departments for records relating to a specified city address. The city found relevant records and decided to provide some records to the individual. The city decided not to provide other records because they had previously been given to the individual in response to earlier requests and some were protected by solicitor client privilege.

In Interim Order MO-4510-I, the adjudicator ordered the city to provide the records previously released and to issue a decision for any records it had previously withheld. The adjudicator agreed that the other records withheld by the city were protected by solicitor-client privilege but ordered the city to make submissions showing the factors it had considered in reaching that decision.

In this final order, the adjudicator is satisfied that the city has now provided the relevant records to the individual and that it properly reached its decision not to provide the records protected by solicitor-client privilege. The adjudicator dismisses this appeal.

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

Orders Considered: Orders MO-4510-I and MO-1907.

Cases Considered: *Danyluk v. Ainsworth Technologies Inc.* 2001 SCC 44.

OVERVIEW:

[1] This final order disposes of the outstanding issues from Interim Order MO-4510-I. These issues are the release of records that had been the subject of the appellant's previous access requests and the exercise of discretion in deciding that some responsive information was subject to the solicitor-client privilege exemption in section 12 of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The appellant made a request under the *Act* to the City of Hamilton's (the city's) fire and building department for access to records relating to a specified municipal address. The city identified 291 pages of records that it said may be responsive to the request and decided to grant partial access to 203 pages of records. The city indicated that as some responsive records had been the subject of previous access requests and had already been disclosed to the appellant, it did not include the previously disclosed records in its access decision.

[3] In addition, the city stated that some information in the records was exempt from disclosure and cited several exemptions, including section 12 (solicitor-client privilege) of the *Act*.

[4] The appellant appealed the city's decision to pursue access to all the responsive records and to challenge the city's application of the exemption in section 12. During the appeal, the appellant received the record package from the city and advised that one page of the records was missing.

[5] In Interim Order MO-4510-I, I decided that there was insufficient information before me to determine the issues arising from the city's decision not to include in its decision the records previously disclosed to the appellant. I ordered the city to release to the appellant the records responsive to the request, including the records previously disclosed and the page that the appellant had identified was missing from the record package. If the city had previously denied access to any responsive records, I ordered the city to issue an access decision identifying those records and the basis for denying access.

[6] In addition, I determined that the solicitor-client privilege exemption in section 12 of the *Act* applied to the information the city had withheld on that basis. However, the city had not provided representations regarding its exercise of discretion. Accordingly, in Interim Order MO-4510-I, I deferred my finding on the issue of the exercise of discretion and ordered the city to provide written representations addressing the issue.

[7] In accordance with Interim Order MO-4510-I, the city submitted representations on its exercise of discretion in deciding to withhold portions of the records based on the solicitor-client privilege exemption in section 12 of the *Act* and provided the appellant with the page missing from the record package.

[8] In addition, the city provided the appellant with 41 pages of additional responsive records and issued an access decision to the appellant granting partial access to these records. The city indicated that the 41 pages comprised the responsive records it had identified that it had previously disclosed to the appellant in response to earlier access requests. The city stated that it had withheld a portion of those records pursuant to the personal privacy exemption in section 14(1). The city further stated that its application of the personal privacy exemption to the withheld information had been the subject of a previous appeal to the IPC and its decision had been upheld. The city stated that a second portion of the records was withheld because it related to a different municipal address and was therefore not responsive to the appellant's request.

[9] The city identified Order MO-3602 as the order disposing of the issues in the previous appeal, including the application of the personal privacy exemption in section 14(1) to the withheld portion of the record.

[10] I shared the city's representations and a copy of Order MO-3602 with the appellant.

[11] The appellant raised the issue of whether the IPC would "apply" Order MO-3602 in the final order disposing of the issues in her appeal. I invited the appellant to submit representations on this issue. The appellant did not submit representations. I consider the effect of Order MO-3602 as a preliminary issue below.

[12] In this final order, I find that the city has released to the appellant the records that it identified as responsive to the request giving rise to this appeal, including the responsive records that were previously disclosed to appellant. In addition, I find that the city properly exercised its discretion when applying the solicitor-client privilege exemption in section 12 of the *Act* and uphold the city's decision.

ISSUES:

- A. Has the city complied with Interim Order MO-4510-I and disclosed to the appellant the responsive records to which it has decided to grant access, including the records previously disclosed to the appellant?
- B. Did the city exercise its discretion under section 12? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

PRELIMINARY ISSUE: WHAT EFFECT DOES ORDER MO-3602 HAVE ON MY DETERMINATION OF THE REMAINING ISSUES IN THIS APPEAL?

[13] In response to Interim Order MO-4510-I, the city identified 41 pages of

responsive records that it had previously disclosed to the appellant. The city issued an access decision to the appellant granting access to all but one portion of a responsive record that it withheld under the mandatory personal privacy exemption at section 14(1). The city claims that the application of that exemption to the withheld information was considered and upheld in Order MO-3602.

[14] The appellant raised the issue of the effect of the findings in Order MO-3602 on the final disposition of the issues in this appeal. As the issue has been raised, I will consider whether the doctrine of issue estoppel applies to the application of the personal privacy exemption in section 14(1) to the portion of information that has been withheld from the appellant in the records disclosed to her as a result of Interim Order MO-4510-I.

[15] The doctrine of issue estoppel operates to prevent the re-litigation of an issue that a court or a tribunal has decided in a previous proceeding. Its objective is judicial finality so that issues determined in one case are conclusive and are not re-litigated, except on appeal. In *Danyluk v. Ainsworth Technologies Inc*, the Supreme Court of Canada held that the doctrine applies to administrative tribunals and set out the analysis for a decision maker to follow when the issue arises.¹

[16] The Supreme Court held that first, a decision-maker must be satisfied that the following three conditions are met:

1. That the same question has been decided;
2. That the judicial decision that creates the estoppel is final; and
3. That the parties to the judicial decision were the same as the parties to the proceedings in which the estoppel is raised or their privies.²

[17] Once these conditions are met, the decision maker must determine that, as a matter of discretion, the doctrine ought to be applied to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case.³

[18] The IPC has previously considered the application of the doctrine of issue estoppel to its decisions.⁴ In Order MO-1907, former Assistant Commissioner Sherry Laing held that judicial finality would be undermined if the issue of access to the same records were considered in two separate appeals.

[19] I have considered whether the same question has been previously decided;

¹ 2001 SCC 44 (*Danyluk*).

² *Danyluk*, at para 21.

³ *Danyluk*, at para 62.

⁴ See Orders PO-1676, P-1392 and MO-1907.

specifically, whether the personal privacy exemption in section 14(1) of the *Act* applies to the information withheld on that basis from the 41 pages of responsive records that the city disclosed to the appellant as a result of Interim Order MO-4510-I.

[20] In the access decision issued by the city to the appellant pursuant to Interim Order MO-4510-I, the city states that the 41 pages of responsive records were previously disclosed as a result of five previous access requests made to the city by the appellant and/or her family member. The city provides the file numbers identifying those five access requests.

[21] I have reviewed these file numbers and note that one of them corresponds with IPC appeal file MA16-517. Order MO-3602 disposed of the issues in appeal file MA16-517.

[22] I have reviewed the adjudicator's description of the information at issue and their findings in Order MO-3602 and the information withheld from the 41 pages of responsive records previously disclosed to the appellant.

[23] The city's position is that the withheld information is the same information that was in issue in the appeal giving rise to Order MO-3602. From my review of the withheld information, I am satisfied that the same information was the subject of that appeal and that one of the issues determined by the adjudicator was the application of the mandatory personal privacy exemption in section 14(1) to that information.

[24] In the access decision issued to the appellant, the city indicates that the 41 pages of responsive records were previously provided to the appellant and/or a family member in response to earlier access requests. Despite having an opportunity to do so, the appellant has not disputed the city's position that she and/or her family member was a party to the earlier appeal. Accordingly, I am satisfied that the parties to the appeal giving rise to Order MO-3602 are the same parties (or their privies) in this appeal.

[25] I find that the three conditions for the application of the doctrine of issue estoppel are met.

[26] I agree with the approach of the former assistant commissioner in Order MO-1907 and adopt it in this appeal. In exercising my discretion to apply the doctrine of issue estoppel, I have considered the interest of judicial finality that is served by deciding not to re-open the issue of the appellant's right of access to the withheld information that has been disposed of in an earlier appeal. In my view, the interests of judicial finality would be undermined by addressing this issue in respect of the same information again in this appeal.

[27] Accordingly, I decline to consider the appellant's access to the information withheld under section 14(1) in this appeal.

Issue A: Has the city complied with Interim Order MO-4510-I and disclosed to the appellant the responsive records to which it has decided to grant access, including the records previously disclosed to the appellant?

[28] As I noted in Interim Order MO-4510-I, 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.

[29] When I issued Interim Order MO-4510-I, I determined that I did not have sufficient information to determine whether responsive records had previously been disclosed to the appellant.

[30] Following Interim Order MO-4510-1, the city has provided the appellant with an additional 41 pages of records, which it states it had not included in its original response to the request because these pages were previously disclosed to the appellant. The city has also provided the appellant with the missing page from the record package.

[31] In addition, the city issued an access decision in respect of those 41 pages of records granting the appellant partial access, withholding a portion on the basis of the personal privacy exemption in section 14(1) of the *Act* and a portion that relates to a different municipal address and the city states is therefore not responsive to the request.

[32] The appellant has had an opportunity to respond to the city's representations and the 41 pages of responsive records that the city has identified as the records that were previously disclosed and has not done so.

[33] For these reasons and those set out in my determination of the preliminary issue above, I find that the city has disclosed to the appellant the responsive records to which it has decided to grant access, including the records that were previously disclosed to the appellant in accordance with section 19 of the *Act*. Accordingly, I find that it has complied with Order MO-4510-I.

Issue B: Did the city exercise its discretion under section 12? If so, should the IPC uphold the city's exercise of discretion?

[34] In Interim Order MO-4510-I, I found that the solicitor-client privilege exemption in section 12 applied to portions of the records at issue that were originally released to the appellant in response to her request. The section 12 exemption is discretionary and permits an institution to disclose information, even though it could withhold it. The institution must exercise its discretion.

[35] On appeal, the IPC may find that an institution failed to do so. In addition, the IPC may find that an institution erred in exercising its discretion where it does so in bad

faith or for an improper purpose or it takes into account irrelevant considerations or fails to take into account relevant considerations. In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.⁵ However, the IPC cannot substitute its own discretion for that of the institution.⁶

[36] The city did not provide me with representations for me to make a finding on whether the city had exercised its discretion in deciding to withhold portions of the records or whether it had done so properly. Accordingly, I deferred making a finding and in Interim Order MO-4510-I I ordered the city to submit representations addressing this issue.

[37] As noted above, the city submitted representations, which I shared with the appellant. The city states that it acted in good faith and for an appropriate purpose when it exercised its discretion to apply the solicitor-client privilege exemption in section 12 to withhold portions of the records.

[38] The city states that it took into account the purposes of the *Act* and the importance of protecting solicitor-client privilege, the fact that the contents of the record reflected confidential communications between city staff and the city solicitor and handwritten notes in the records were a continuum of those communications that detailed the substance of the legal advice received from the city solicitor.

[39] The city submits that it is its general practice not to disclose legal communications because of their sensitive nature and to enable city staff to have frank and free communications with their lawyer when seeking legal advice. The city states that there are no compelling or sympathetic reasons for the appellant to receive the withheld information.

[40] The city submits that it did not take into account any irrelevant considerations nor did it fail to take into account any relevant considerations when exercising its discretion to withhold the information from the appellant.

[41] The appellant was provided with an opportunity to respond to the city's representations and has not done so.

Analysis and findings

[42] Based on the city's representations, I am satisfied that it exercised its discretion when deciding to withhold portions of the records that contained information subject to solicitor-client privilege and exempt under section 12 of the *Act*. I also find that the city took into account relevant considerations and exercised its discretion properly.

⁵ Order MO-1573.

⁶ Section 43(2).

[43] There is no evidence before me that the city exercised its discretion in bad faith or for an improper purpose.

[44] For the above reasons, the appellant's appeal is dismissed.

ORDER:

Appeal dismissed.

Original signed by: _____
Katherine Ball
Adjudicator

_____ October 4, 2024