

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4600

Appeal MA22-00378

City of Mississauga

November 29, 2024

Summary: The appellant sought access under the *Municipal Freedom of Information and Protection of Privacy Act* for records related to the construction of a residential pool and related structures. The City of Mississauga (the city) denied access to records and portions of the records on the basis that they contain third party information (section 10(1)), information that is subject to solicitor-client privilege (section 12), and information that, if disclosed, would be an unjustified invasion of personal privacy (section 14(1)).

In this order, the adjudicator upholds the city's decision and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, sections 2(1) (definition of personal information), 10(1), 12, 14(1), 14(2)(h), 14(3)(b), and 38(b).

Orders Considered: Order PO-3742.

OVERVIEW:

[1] This order concerns a request for city records about a proposed demolition and development application for the construction of a residential pool and related structures on an identified residential property.

[2] The City of Mississauga (the city) received the following request for records under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

... access to the following records within the custody and control of the City of Mississauga (the "City"), and specifically, the Committee of Adjustment, City Planning, City Building, By-law Enforcement, and Transportation and Works, and any other departments responsible for zoning, development, construction, stormwater management and grading:

1. All plans, drawings, surveys, studies, reports, staff reports, staff memoranda, letters, emails and other documents in relation to any development, works, demolition and/or construction on [a specified] property in the City [the property].
2. All documents in Committee of Adjustment File No. [#] (the "COA Application");
3. All documents relating to demolition permits and/or building permits for the [property];
4. All documents relating to requests or proposals to regrade lands, remove or add fill to lands, and/or alter the flow of groundwater or surface water on or adjacent to the [property];
5. All correspondence, including but not limited to emails, comments and letters between the owner(s) of the [property] or their representatives, the City, and/or third parties, or internally within the City, in relation to the [property] and/or the COA Application;
6. All notes, memoranda, agendas or minutes of meetings or discussions that may have occurred between the owner(s) of the [property] or their representatives, the City, and/or third parties, or internally within the City, in relation to the [property] and/or the COA Application; and
7. All notes, reports, logs, correspondence and other documents in relation to City inspections of the [property].

We request that the above search be conducted for records created or modified from January 2020 to present [April 28, 2022].

In addition, we request access to the siting, grading and drainage plans for the [property] which were associated with the building permit(s) issued in or around 2013-2014 for the original construction of the house on the [property], which construction commenced in 2014.

[3] During the processing of the request, the city communicated with the requester, seeking clarification. During those communications, the appellant requested that the city not notify any affected third parties of the request or seek their views on the disclosure

of the information.¹

[4] The city granted partial access to records found responsive to the request. Some information was denied pursuant to sections 10(1) (third party information) and 14(1) (personal privacy) of the *Act*. The city advised that access could not be granted to building and/or demolition permit records as no responsive records exist. In addition, the city stated:

Please, however, be advised that an application for a pool enclosure permit (maintained by the Enforcement Division of [Transportation & Works Department] (T&W)) is currently in progress. As such, no permit has been issued by the City at this time. Given the status of this application and in the absence of the applicant's consent, this office will deny access to the records contained in this file under sections 10(1) and 14(1).

[5] The requester, now the appellant, appealed the city's decision to the Information and Privacy Commissioner (the IPC).

[6] The city then issued three additional decision letters to the appellant granting partial access to additional records, denying access to some information in the records pursuant to section 14(1) of the *Act*.

[7] In the first letter, the city advised that there were no building/demolition permits issued for the property for the period of January 2020 to the date of the decision. The city also wrote the following:

We are revising our decision for the following records, as identified in our decision letter dated June 1, [2022], whose access were denied in full:

- Email correspondence with attachments (pages 209 to 262) maintained and provided by the Infrastructure Planning and Engineering Services Division of the Transportation & Works Department (T&W)
- [specified Pool Enclosure Permit] application (16 pages in total)

¹ Section 21(1) of the *Act* states:

A head shall give written notice in accordance with subsection (2) to the person to whom the information relates before granting a request for access to a record,
(a) that the head has reason to believe might contain information referred to in subsection 10(1) that affects the interest of a person other than the person requesting information;
or
(b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause section 14(1)(f).

- In addition, the following files have also been located and identified as responsive to your request by staff in their recent searches since your conversation with [the city's Access & Privacy Officer]:
 - [specified file number]: 3 new accessory structures in rear yard. This file, which is maintained the Building Division staff, consists of 16 pages of documents including architectural drawings/plans and a form containing personal information.
 - [specified file number]: Inground Pool, landscaping, 3 structures. This file, which is maintained by the Development & Design Division, consists of 46 pages of documents containing personal information; they include correspondence, reports and architectural drawings/plans.

Given the status of these files and records, as well as in the absence of the third party notification in accordance with section 21 of the *Act*, the City cannot issue a decision regarding access of these records at this time.

Please contact [the city's Access & Privacy Officer] when you would like to proceed with the third party notification process as per your discussion with him on July 5.

[8] In the second letter, the city wrote to the appellant to confirm that it had requested searches of the Planning and Building Department, the Transportation and Works Department and Legal Services. The city provided partial access to additional records. Some information in the Development and Construction Records was denied pursuant to section 14(1) of the *Act*. In addition, the city advised that additional records regarding the (specified Pre-Zoning Application) were located, however, the city advised:

Our preliminary review of the records (approximately 80 pages) has indicated that exemptions from release, in part or in full, under sections 8 (law enforcement), 12 (solicitor-client privilege), and 14 of the *Act* may be applicable.

Given the status of this file and its contents, it will be necessary for our office to conduct a third party notification in accordance with section 21(1) of the *Act* before the City can issue a decision regarding access and disclosure of these records.

Please contact [the city's Access & Privacy Officer] if you would like to proceed with the notification process.

[9] In the third letter, the city issued a decision granting access to the comments contained in a specified email. Some information in the record was denied under section 14(1) of the *Act*.

[10] During mediation, the appellant advised the mediator that he believes additional responsive records should exist including records regarding a Committee of Adjustment application and correspondence between particular individuals and the city. The appellant requested that the city provide "details on the city's search efforts and the criteria/search terms it used to conduct the searches to date." As such, reasonable search was added as an issue in this appeal.

[11] In addition, the appellant advised that he continues to seek access to the information the city withheld under sections 10(1) and 14(1) as outlined in the index of records provided to him.

[12] Lastly, the appellant reiterated that he does not want any affected third parties to be contacted by the city or the mediator about either the request or the appeal.

[13] As mediation did not resolve the appeal, it moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry.

[14] Before I began my inquiry, the city issued a supplemental access decision addressing the records for which it had not yet issued a decision. It stated:

...Access is granted in part to a copy of the following records...:

- Record 1 – T&W Correspondence with the homeowners (11 pages) as provided by Infrastructure Planning and Engineering Services Division of the Transportation and Works Department (T&W)
- Record 2 - Pool Enclosure Permit [#] (15 pages) as provided by the Enforcement Division of the Corporate Services Department
- Record 3 - PREAPP [#] - 3 new accessory structures in rear yard (66 pages) as provided by Building Division
- Record 4 - PRE-[#] - Inground Pool, landscaping, 3 structures (42 pages) as provided by the Development & Design Division

Access is denied to parts of these records under sections 10(1), 12, and 14(1) of the Act...

[15] I sought and received the representations of the city, which were provided to the appellant for a response.

[16] In response to the city's representations, the appellant confirmed that the city's search for responsive records is no longer at issue. Therefore, this issue has been removed from the scope of the appeal and I will not consider it in this order. The appellant also reiterated that he did not want any affected third parties whose personal or third party information is contained in the records contacted to obtain their views on disclosure

of their information. The appellant did not address any of the other issues in this appeal in his representations.

[17] In this order, I find that sections 10(1), 12, and 14(1) of the *Act* apply to the information that the city has withheld under those sections. Therefore, I uphold the city's decision and dismiss the appeal.

RECORDS:

[18] The records at issue in this appeal are identified in the table at Appendix A to this order and include emails, reports, plans, and photographs related to the construction of a pool and related structures on an identified residential property.

ISSUES:

- A. Does the mandatory exemption at section 10(1) for third party information apply to the records?
- B. Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- C. Does the mandatory personal privacy exemption at section 14(1) apply to the information at issue?
- D. Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the records?

DISCUSSION:

Issue A: Does the mandatory exemption at section 10(1) for third party information apply to the records?

[19] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,² where specific harms can reasonably be expected to result from its disclosure.³

[20] The relevant portions of section 10(1) state:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information,

² *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

³ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency....

[21] For section 10(1) to apply, the party arguing against disclosure must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1 of the section 10(1) test: type of information

Representations on part 1

[22] The city states that the following records have been withheld under section 10(1) in their entirety:

- A Stormwater Management Report;
- Five architectural drawings/plans submitted for a preliminary zoning application for 3 new accessory structures in the rear yard; and
- Four architectural drawings/plans submitted for a preliminary development application for an inground pool, landscaping, and 3 structures.

[23] The city states that the Stormwater Management Report reveals scientific and technical information and was prepared by professional engineers. It states that this information is used to propose and design a stormwater management system for the property. It states that this record includes:

... run-off calculations, system requirements and designs, water capacity, flow velocity, and classification & materials of pipes, all of which display and reflect various branches of applied science and engineering that include geotechnical analysis, hydrology, hydraulic analysis, as well as stormwater and sanitary analysis. Furthermore, the report also includes plans/drawings with details of the design of the stormwater system.

[24] The city states that the remaining records, the nine architectural drawings/plans, are plans and drawings prepared by professional engineers and reveal technical information which includes, for example, architectural and structural dimensions, landscaping details, calculations and measurements of the design of the structures.

Findings on part 1

[25] Based on my review of the Stormwater Management Report and architectural drawings/plans, I agree that these records contain technical information within the meaning of part 1 of the test for section 10(1) to apply.

[26] The IPC has described technical information protected under section 10(1) as follows:

Technical information is information belonging to an organized field of knowledge in the applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. Technical information usually involves information prepared by a professional in the field, and describes the construction, operation or maintenance of a structure, process, equipment or thing.⁴

[27] The Stormwater Management Report provides stormwater management construction measures that will be undertaken to deal with stormwater for the property.

[28] The architectural drawings/plans describe the structure of items for which they were prepared related to the design of the property and the structures thereon.

[29] The records at issue were prepared by a professional in the field, either an engineer, in the case of the Stormwater Management Report, or an architect, in the case of the remaining records for which section 10(1) has been claimed, the architectural drawings/plans. All of them contain information that describes the construction, operation or maintenance of a structure, process, equipment or thing.

[30] Therefore, I find that part 1 of the test has been met as the records reveal technical information. As I have found that part 1 of the test has been met, it is unnecessary for me to also consider whether the Stormwater Management Report contains scientific

⁴ Order PO-2010.

information as claimed by the city.

Part 2: supplied in confidence

Supplied

[31] The requirement that the information have been “supplied” to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.⁵

[32] Information may qualify as “supplied” if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.⁶

In confidence

[33] The party arguing against disclosure must show that both the individual supplying the information expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an objective basis.⁷

[34] Relevant considerations in deciding whether an expectation of confidentiality is based on reasonable and objective grounds include whether the information:

- was communicated to the institution on the basis that it was confidential and that it was to be kept confidential,
- was treated consistently by the third party in a manner that indicates a concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and
- was prepared for a purpose that would not entail disclosure.⁸

Representations on part 2

[35] Regarding the Stormwater Management Report, the city states that although this record may relate to a Committee of Adjustment (COA) application, which is a public process, its entirety was, however, not included in the relevant COA file. As such, the city submits that there is reasonable ground to believe that the affected third parties expected

⁵ Order MO-1706.

⁶ Orders PO-2020 and PO-2043.

⁷ Order PO-2020.

⁸ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

their submission was confidential and that it would be kept confidential by the city.

[36] Regarding the architectural drawings/plans, the city states that it accepts and processes building and development applications via ePlans, an online system by which it allows city staff to accept and process online applications and submissions. As such, it submits these drawings/plans were supplied (uploaded) by the affected third parties, or their representative, in support of the two applications, namely, the preliminary zoning application and the development application, via their secured ePlans account.

[37] The city states that the applications and any associated submissions, including the Stormwater Management Report and any architectural drawings/plans, would only be accessible to the affected third parties and the relevant city staff; they are not released publicly. There is, therefore, a reasonable basis to conclude that the affected third parties would expect the information that they provided in support of their application including the report and the drawings/plans be maintained confidentially and be accessed only by staff responsible for reviewing and processing the applications.

Findings on part 2

[38] Based on my review of the records for which section 10(1) was claimed and the city's representations, I find that the Stormwater Management Report and architectural drawings/plans were supplied to the city in confidence by the affected third parties to whom that information relates.

[39] I am satisfied, based on my review of the records and the city's representations that the affected third parties supplied the information at issue to the city on the basis that it was confidential and was to be kept confidential. Given the nature of the information in these records, I accept the city's submission that it was treated consistently by both the city and the affected third parties in a manner that indicates a concern for confidentiality.

[40] Furthermore, I have no evidence before me to suggest that the information at issue has otherwise been disclosed or is available from sources to which the public has access. I also have no evidence that the records were prepared for a purpose that would entail disclosure.

[41] As I find that the Stormwater Management Report and the architectural drawings/plans were supplied to the city with a reasonable expectation of confidentiality, I find part 2 of the section 10(1) test has been met.

Part 3: harms

[42] Parties resisting disclosure of a record cannot simply assert that the harms under section 10(1) are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not

assume that the harms under section 10(1) are self-evident and can be proven simply by repeating the description of harms in the *Act*.⁹

[43] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.¹⁰ However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.¹¹

[44] In applying section 10(1) to government contracts, the need for accountability in how public funds are spent is an important reason behind the need for detailed evidence to support the harms outlined in section 10(1).¹²

Representations on part 3

[45] The city states that it has withheld the Stormwater Management Report and the architectural drawings/plans as there are still unresolved issues relating to the applications to which these records are concerned, namely, the COA, the preliminary zoning application, and the development application.

[46] It also states that the Stormwater Management Report and the architectural drawings/plans relate to an ongoing dispute regarding the property which involves the appellant and the affected third parties. The city submits that consequently, as it has reason to believe that there is a likelihood of harms, it has decided not to disclose the records.

[47] The city further states that under section 21(1)(b) of the *Act*, before granting access to a record, it is required to give notice to the person to whom the information related if they have a reason to believe that it might contain information subject to section 10(1). However, due to the fact that the appellant explicitly requested that the city not notify the affected third parties of the request, it was unable to fulfill the mandatory requirement of notifying these affected parties to seek their representations on the disclosure of the information or obtain their consent to disclose.

[48] The city states that in the absence of the affected third parties' representations or consent, it cannot establish with absolute certainty that harms would not result from the disclosure of the records. As a result, the city is of the view that disclosure of the Stormwater Management Report and the architectural drawings/plans would result in the harms set out in sections 10(1)(a) and/or (c).

⁹ Orders MO-2363 and PO-2435.

¹⁰ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

¹¹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

¹² Order PO-2435.

[49] As indicated above, the appellant did not make any representations on whether section 10(1) applies to the records and made it clear to the city during the processing of the request and the IPC during this appeal that he did not want the affected parties notified of either his request or this appeal.

Findings on part 3

[50] Sections 10(1)(a) and (c) seek to protect information that could be exploited in the marketplace.¹³ Specifically, these sections prohibit the disclosure of information of the type listed in the section, if it would “prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization” (paragraph (a)) and/or “result in undue loss or gain to any person, group, committee or financial institution or agency” (paragraph (c)).

[51] The Stormwater Management Report contains plans and drawings showing the details of the design of the stormwater system and includes water run-off calculations, system requirements and designs, water capacity, flow velocity, and classification and materials of pipes. The architectural drawings/plans contain architectural and structural dimensions, landscaping details, calculations and measurements of the design of the structures.

[52] Section 10(1) is a mandatory exemption that requires an institution to withhold information if it falls within the exemption. The affected third parties include the engineers and architects who prepared these records for which section 10(1) has been claimed but due to the appellant’s request that they not be notified, were not given an opportunity express their views on whether any of the harms set out in that section would occur were the information that they contain disclosed.

[53] These records contain highly detailed technical information, and it is not unreasonable to assume that their disclosure, without notice to the affected third parties, could result in these third parties suffering either prejudice to their competitive position or undue loss as a result of the disclosure of information not normally made available to the public and that could be exploited in the marketplace by these parties’ competitors.

[54] Based on my review of the Stormwater Management Report and the architectural drawings/plans and the city’s representations, and considering that these records contain the technical information of affected third parties who have not had the opportunity to make submissions on whether the mandatory exemption at section 10(1) applies, I have sufficient evidence to conclude that the harms in sections 10(1)(a) and (c) might reasonably be expected to occur. Specifically, I accept that disclosure would prejudice significantly the competitive position of or result in undue loss to the affected parties to whom the information relates.

¹³ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[55] Therefore, I find part 3 of the test under section 10(1) has been met.

[56] As I have found that all three parts of the test have been met, I find that the Stormwater Management Report and the architectural drawings are exempt under the mandatory exemption at section 10(1).

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

[57] The city submits that the mandatory personal privacy exemption at section 14(1) applies to some of the withheld information because its disclosure would be an unjustified invasion of personal privacy of the individuals to whom that information relates. In order to decide whether section 14(1) applies, the IPC must first decide whether the record contains “personal information,” and if so, to whom the personal information relates.

[58] Section 2(1) of the *Act* defines “personal information” as “recorded information about an identifiable individual.”

[59] “Recorded information” is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.¹⁴

[60] Information is “about” the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be “about” the individual.¹⁵

[61] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be “personal information” if it reveals something of a personal nature about the individual.¹⁶

[62] Information is about an “identifiable individual” if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.¹⁷

[63] Section 2(1) of the *Act* gives a list of examples of personal information. Those that are relevant to this appeal, according to the city, are the following:

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

¹⁴ See the definition of “record” in section 2(1).

¹⁵ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

¹⁶ Orders P-1409, R-980015, PO-2225 and MO-2344.

¹⁷ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

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

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

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

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

(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.

[64] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."¹⁸

[65] It is important to know whose personal information is in the record. If the record contains the requester's own personal information, their access rights are greater than if it does not.¹⁹ Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.²⁰

Representations

[66] The city submits that the following types of information found in the records at issue constitutes the personal information of identifiable individuals under section 2(1) of the *Act*:

- the address and telephone number of the affected parties and individuals (paragraph (d) of the definition of personal information in section 2(1));

¹⁸ Order 11.

¹⁹ Under sections 36(1) and 38 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

²⁰ See sections 14(1) and 38(b).

- information about financial transactions involving the affected parties (paragraph (b));
- the views or opinions of other individuals about the affected parties (paragraph (g));
- the individuals' names as they appear with other personal information relating to the individuals or where the disclosure of their names would reveal other personal information about the individuals and the affected parties (paragraph (h));
- correspondence sent to the city by the individuals and the affected parties that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence (paragraph (f)); and
- identifying numbers or other particulars assigned to the individuals, including employee login identification numbers (paragraph (c)).

[67] The city notes that it has withheld employee login identification numbers assigned to city staff and submits that this information is personal information within the meaning of paragraph (c) of the definition of personal information, not professional information. It submits that while staff carry out their duties in their professional capacity their unique login identification numbers relate to the staffs' employment, payroll, access and/or security in their personal capacity revealing something personal in nature about these individuals.

Findings

[68] Based on my review of the records for which section 14(1) has been claimed, I find that they contain the personal information of identifiable individuals other than the appellant. The personal information includes names, addresses, phone numbers, employee identification numbers, personal opinions or views, and information relating to financial transactions including bank account numbers. The records also include photographs with identifiable individuals in them. I find that this information qualifies as personal information within the meaning of the definition of "personal information" in section 2(1), specifically, under paragraphs (b), (c), (d), (g) and (h) of the definition of "personal information" in the *Act*.

[69] Of particular note, I find that the employee login identification numbers consist of the personal information of the employees within the meaning of paragraph (c) of the definition of personal information. Even though the employee login is information about city employees in their business capacity, in my view it reveals something of a personal nature about them.

[70] Previous orders issued by the IPC have found that "workplace identification numbers" (WIN) belonging to Ontario Provincial police qualified as information that can

serve as a link to other personal information about the employees. Specifically, in Order PO-3742, the adjudicator concluded that the disclosure of WIN numbers, particularly when accompanied by an employee's name, "reveals something of a personal nature about the employee."

[71] I agree with this reasoning applied in Order PO-3742 and adopt it for the purposes of this appeal. I accept that the employee login identification numbers before me are similar to the WIN numbers considered in Order PO-3742 because they can serve as a link to other personal information about the employees. Accordingly, I find that the employee login information of the city employees in the records is the employees' personal information within the meaning of paragraph (c) of the definition of personal information in section 2(1) of the *Act*.

[72] I have also considered whether certain records contain the appellant's personal information. If the records contain the appellant's personal information the appellant has a greater right of access to them as they are considered under the discretionary personal privacy exemption in section 38(b) rather than the mandatory personal privacy exemption at section 14(1).

[73] The city has claimed both sections 14(1) and 38(b) to the undisclosed information in two mailing lists that contain names, email addresses and street addresses. The disclosed information in the two mailing lists are the names and contact information of certain individuals and a corporate entity

[74] The request that resulted in this appeal was submitted by a lawyer. Despite being asked in the Notice of Inquiry to address whose personal information is contained in the records, the appellant did not specifically comment on whether the records contain the personal information of the lawyer as the appellant or other identifiable individuals.

[75] On my review, the records do not appear to contain the personal information of the lawyer. However, if the request was made by the lawyer on behalf of a client, without the identity of that client I cannot discern whether the records contain the requester's personal information. As indicated, the lawyer has not identified to me whether he has made the request on behalf of a client or in his own capacity.

[76] As a result, I have no evidence before me to conclude that the records contain the personal information of the appellant. Therefore, I will not consider whether section 38(b) applies in this appeal and I will consider whether section 14(1) applies to the undisclosed information in the two mailing lists.

[77] In conclusion, as I have found that the records contain the personal information of identifiable individuals other than the appellant, I will consider whether the mandatory personal privacy exemption at section 14(1) applies to the information that the city has withheld under that exemption.

Issue C: Does the mandatory personal privacy exemption at section 14(1) apply to the information at issue?

[78] One of the purposes of the *Act* is to protect the privacy of individuals with respect to personal information about themselves held by institutions.

[79] Section 14(1) of the *Act* creates a general rule that an institution cannot disclose personal information about another individual to a requester. This general rule is subject to a number of exceptions.

[80] The section 14(1)(a) to (e) exceptions are relatively straightforward. If any of the five exceptions covered in sections 14(1)(a) to (e) exist, the institution must disclose the information. In this appeal, none of these exceptions apply.

[81] The section 14(1)(f) exception is more complicated. It permits an institution to disclose another individual's personal information to a requester only if this would not be an "unjustified invasion of personal privacy."

[82] Sections 14(2), (3) and (4) help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy.

[83] Sections 14(3)(a) to (h) should generally be considered first.²¹ These sections outline several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy.

[84] Section 14(2) lists several factors that may be relevant to determining whether disclosure of personal information would be an unjustified invasion of personal privacy. Some of the factors weigh in favour of disclosure, while others weigh against disclosure. If no factors favouring disclosure are present, the section 14(1) exemption - the general rule that personal information should not be disclosed - applies because the exception in section 14(1)(f) has not been proven.

[85] The list of factors under section 14(2) is not a complete list. The institution must also consider any other circumstances that are relevant, even if these circumstances are not listed under section 14(2).

[86] The factors outlined in section 14(2) cannot be used to rebut (disprove) a presumed unjustified invasion of personal privacy under section 14(3). In other words, if disclosure of the personal information is presumed to be an unjustified invasion of personal privacy under section 14(3), section 14(2) cannot change this presumption.

[87] The city states that the presumption against disclosure in section 14(3)(b) applies to some of the records as they contain personal information that was collected from

²¹ If any of the section 14(3) presumptions are found to apply, they cannot be rebutted by the factors in section 14(2) for the purposes of deciding whether the section 14(1) exemption has been established.

affected parties during the course of an investigation relating to a bylaw infraction complaint that the city received. This section reads:

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

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

[88] The presumption can apply to different types of investigations, including those relating to by-law enforcement,²² and enforcement of environmental laws,²³ occupational health and safety laws,²⁴ or violations of the Ontario *Human Rights Code*.²⁵

[89] I find that the presumption in section 14(3)(b) applies to the by-law complaint records for which section 14(1) has been claimed because they relate to the bylaw complaint investigation. I accept the city's position that the personal information was compiled and is it identifiable as part of an investigation into a possible violation of law.

[90] The presumption at section 14(3)(b) requires only that there be an investigation into a possible violation of law.²⁶ So, even if criminal proceedings were never started against the individual, section 14(3)(b) may still apply.²⁷

[91] As this presumption applies, the factors under section 14(2) need not be considered for this information, the personal information cannot be disclosed unless:

- there is a reason under section 14(4) that disclosure of the information would not be an "unjustified invasion of personal privacy," or
- there is a "compelling public interest" under section 16 that means the information should nonetheless be disclosed (the "public interest override").²⁸

[92] None of the parties have claimed that any of the situations set out in section 14(4) are relevant in the circumstances of this appeal and from my review, I agree. Additionally, neither party has claimed that the public interest override applies here and from my review, I find that there is no evidence that it does.

[93] I have found that the records that contain information about the by-law complaint

²² Order MO-2147.

²³ Order PO-1706.

²⁴ Order PO-2716.

²⁵ R.S.O. 1990, c. H.19; Orders PO-2201, PO-2419, PO-2480, PO-2572 and PO-2638.

²⁶ Orders P-242 and MO-2235.

²⁷ The presumption can also apply to records created as part of a law enforcement investigation where charges were laid but subsequently withdrawn (Orders MO-2213, PO-1849 and PO-2608).

²⁸ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

investigation are subject to the presumption against disclosure in section 14(3)(b), being the two complaint forms and the Notices of Contravention in the set 1 records. Therefore, the personal information that they contain cannot be disclosed and I find the personal information that the city has withheld from these records is exempt from disclosure under section 14(1).

[94] If the personal information being requested does not fit within any presumptions under section 14(3), one must next consider the factors set out in section 14(2) to determine whether or not disclosure would be an unjustified invasion of personal privacy. As neither section 14(3)(b) nor any of the of the other presumptions apply to the remaining information for which the city has claimed section 14(1), specifically the records not related to the by-law complaint investigation, I must consider whether any of the factors in section 14(2) apply to that information.

[95] For the remaining information the city relies on the factor favouring privacy protection in section 14(2)(h). It states that this factor applies to the emails and correspondence from identifiable individuals who sent these communications to the city in confidence. This section reads:

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 has been supplied by the individual to whom the information relates in confidence.

[96] This factor weighs against disclosure if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. This requires an objective assessment of whether the expectation of confidentiality is "reasonable."²⁹

[97] The city submits that affected parties specifically provided in their correspondence to the city that it was being provided in confidence. Having reviewed the emails and correspondence that were sent to the city, I accept that these records contain personal information that was supplied by the individual to whom the information relates in confidence and find that section 14(2)(h) applies.

[98] The factor at section 14(2)(h) weighs against disclosure. None of the parties have claimed that any of the factors weighing in favour of disclosure apply and from my review, none of them appear to be relevant. As a result, I find that disclosure of the remaining information for which section 14(1) has been claimed would be an unjustified invasion of personal privacy of the individuals to whom that information relates.

[99] I have found that disclosure of the personal information for which section 14(1)

²⁹ Order PO-1670.

has been claimed would be an unjustified invasion of personal privacy of the individuals to whom it pertains either because it is subject to the presumption against disclosure at section 14(3)(b) or the factor weighing against disclosure at section 14(2)(h) applies to it. Accordingly, I find that the mandatory personal privacy exemption at section 14(1) applies to exempt all the information for which it has been claimed and I uphold the city's decision to withhold it.

Issue D: Does the discretionary solicitor-client privilege exemption at section 12 of the Act apply to the records?

[100] 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.

[101] 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 and encompasses two types of privilege: (1) solicitor-client communication privilege and (2) litigation privilege. The second branch ("prepared by or for counsel employed or retained by an institution...") is a statutory privilege created by the *Act*. The institution must establish that at least one branch applies.

Representations

[102] The city submits that solicitor-client communication privilege applies to, the emails at pages 35-46, 65-70, and 72-81. It states that these records are communications between staff from various city departments and the city's legal counsel about the matter relating to the property identified in the request. The city states that these communications between staff and counsel were made in confidence for the purpose of obtaining or giving legal advice and are subject to solicitor client communication privilege under both branches of section 12, the common law solicitor- client privilege and the statutory solicitor-client privilege, as the legal counsel is an employee of the city. It points out that, in their communications, legal counsel explicitly states:

This email (including attachments) is confidential, is protected by solicitor/client privilege and is intended for the addressee(s) only.

[103] The city further submits that these records have not been disclosed to anyone except the recipients and except as necessary to respond to the within access request and appeal, and therefore, privilege in these records has not been waived.

Findings

[104] For the reasons set out below, I find that the common law solicitor-client communication privilege at branch 1 applies to the records for which it was claimed, as they are email communications between the city's lawyer and city staff exchanged for the purpose of seeking and receiving legal advice.

[105] 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.³⁰ 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.³¹ 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.³²

[106] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.³³ The privilege does not cover communications between a lawyer and a party on the other side of a transaction.³⁴

[107] The information for which section 12 has been claimed are emails exchanged between city staff and a city solicitor. I find that these emails are subject to solicitor-client communication privilege. From my review, these are direct communications of a confidential nature between a lawyer from the city and city staff, the client, made for the purpose of obtaining or giving legal advice.

[108] 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.³⁵

[109] There may also be an implied waiver of solicitor-client privilege where fairness requires it, and where some form of voluntary conduct by the client supports a finding of an implied or objective intention to waive it.³⁶

[110] Generally, disclosure to outsiders of privileged information is a waiver of privilege.³⁷ However, waiver may not apply where the record is disclosed to another party

³⁰ Orders PO-2441, MO-2166 and MO-1925.

³¹ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

³² *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.

³³ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

³⁴ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

³⁵ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

³⁶ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

³⁷ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

that has a common interest with the disclosing party.³⁸

[111] In this case, the appellant has not claimed and there is no evidence before me to suggest that the privilege over the emails for which section 12 has been waived. Therefore, subject to my exercise of discretion below, the information for which section 12 has been claimed is exempt from disclosure under that section by reason of it being solicitor-client privileged communications.

The city's exercise of discretion with respect to section 12

[112] Section 12 is a discretionary exemption 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.

[113] 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.

[114] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.³⁹ The IPC cannot, however, substitute its own discretion for that of the institution.⁴⁰

[115] The city submits that in exercising its discretion to withhold set 5 emails at pages 35-46, 65-70, and 72-81 under section 12 it considered the importance of solicitor-client privilege. Specifically, the city submits that:

Solicitor-client privilege and the interest in free, confidential communication between a lawyer and client(s) is an important foundation of legal system, and represents a necessary exemption to the right of access of information protected by the Act. A lawyer has a professional obligation to maintain the confidentiality of communications with clients made for the purpose of obtaining and/or giving legal advice, including communications made for the purpose of keeping all parties informed of ongoing developments and/or preparing and responding to legal inquiries.

[116] Based on my review of the city's representations, I find that in denying access to these privileged communications it exercised its discretion in a proper manner. I find that

³⁸ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

³⁹ Order MO-1573.

⁴⁰ Section 43(2).

it took into account relevant considerations, including the purpose of the section 12 exemption, the nature of the information and the appellant's need to receive this information. I also find that the city did not take into account irrelevant considerations in exercising its discretion under section 12.

[117] Therefore, I uphold its exercise of discretion under section 12 and find that the emails at issue are exempt by reason of section 12. I will uphold the city's decision not to disclose them.

[118] As I have found that the information for which section 12 has been claimed is exempt under branch 1 common law solicitor-client privilege, there is no need for me to also consider whether it is also exempt under the branch 2 statutory solicitor-client privilege exemption.

Conclusion

[119] For the reasons set out above, I have found that all of the information that the city has withheld in this appeal is properly exempt under the exemptions that were claimed. The information is either third party information withheld under section 10(1), solicitor-client privileged information withheld under section 12, or personal information where disclosure would result in an unjustified invasion of personal privacy under section 14(1). Accordingly, I uphold the city's decision not to disclose the information that it has withheld.

ORDER:

I uphold the city's decision and dismiss the appeal.

Original Signed by: _____
Diane Smith
Adjudicator

_____ November 29, 2024

APPENDIX A - INDICES OF RECORDS AT ISSUE

Records	Pages	General Description	Access Granted	Section	Exempted information
<i>1. Set 1 - Records at issue under decision issued on June 1, 2022:</i>					
Committee of Adjustment A [#]	1-9	Application For Minor Variance	In Part	14(1)	Employee's login ID (page 1)
	10	Receipt & Cheque	In Part	14(1)	Personal cheque - Address, bank account (p.10)
	11-14	Mailing list for Public Notice	In Part	14(1), 38(b)	Names, addresses (p.12)
	34-35	Survey plan	In Part	14(1)	Employee's login ID (p.35)
	45-66	Engineering Report/Comments	In Part	14(1)	Employee's login ID (p.45)
	77-82	Email Correspondence	In Part	14(1)	Names, addresses & other PI (pp.77-82)
	85	Survey plan	In Part	14(1)	Employee's login ID (p.85)
	93-98	Email Correspondence	In Part	14(1)	Names, addresses & other PI (pp.93-98)
	102-106	Application For Minor Variance	In Part	14(1)	Employee's login ID (p.102)
	109	Survey plan	In Part	14(1)	Employee's login ID (p.109)
	117-122	Email Correspondence	In Part	14(1)	Names, addresses & other PI (pp.117-122)

	126-130	Application For Minor Variance	In Part	14(1)	Employee's login ID (p.126)
	131-152	Engineering Report/Comments	In Part	14(1)	Employee's login ID (p.131)
	154-155	Mailing list	In Part	14(1), 38(b)	Names, addresses (pp.154-155)
	156-167	Email Correspondence	In Part	14(1)	Names, addresses & other PI (pp.154-167)
T&W Departmental Correspondence	174-208	Email Correspondence	In Part	14(1)	Personal opinions/comments (pp. 197, 198, 201, 203, 204)
2. Set 2: Records at issue under revised decision issued on August 12, 2022:					
Building Inspection records	1	List of Inspections	In part	14(1)	Employee's login ID
Transportation & Works Department (T&W)- Compliance & Licensing Records	2	Complaint Form [#]	In part	14(1), 14(3)(b)	Employee's numbers and login ID, and homeowner's personal information;
	3	Photograph	In part	14(1)	personal information
	7	Complaint Form [#]	In part	14(1), 14(3)(b)	personal information
	16-18	Notices of Contravention	In part	14(1), 14(3)(b)	personal information
3. Set 3: Records released under subsequent decision issued on October 25, 2022:					

Transportation & Works Department (T&W)- Development Construction	1-2	Email correspondence	In part	14(1)	Personal information opinion -
4. Set 4: Records released under subsequent decision issued on November 18, 2022:					
Transportation & Works Department (T&W)- Infrastructure Planning & Engineering Services	1-2	Email correspondence	In part	14(1)	Personal information including addresses, correspondence and replies to that correspondence
5. Set 5: Records released under subsequent decision issued on March 22, 2024:					
1. T&W Correspondence	1-10	RE: layout for the concrete pad	In Part	14(1)	Information, views and/or opinions relating to an identified individual
	11	RE: Water drainage evaluation [address]	In Part	14(1)	Information, views and/or opinions relating to an identified individual
	12-54	RE: Water drainage evaluation [address]- Attachments (Stormwater Management Report)	Denied in Full	10(1)	The report containing third party information
2. Pool Enclosure Permit [#]	1	Complaint Form [#]	In Part	14(1)	Employee's login ID; homeowner's

					personal information
	2	Application Status	In Part	14(1)	Web [Access] belongs to applicant ID the
	4-5	Email correspondence: RE: [address] pool application	In Part	14(1)	Applicant's personal information
	7	Official Receipt	In Part	14(1)	Applicant's personal information
	8	Swimming Pool Enclosure Inspection Request	In Part	14(1)	Applicant's personal information
	11, 14	Photographs	In Part	14(1)	Images of identifiable individuals
	16	Statutory Declaration	Denied in full	14(1)	Applicant's personal information
3. PREAPP [#]	1	Application for a Permit to Construct or Demolish	In Part	14(1)	Applicant's personal information
	2 – 6	Architectural drawings/plans	Denied in Full	10(1)	Withheld application's plans containing third party information
	8–11	Email FW: [address] (PREAPP [#])	In Part	14(1)	Homeowner's and other personal information

	26–30	Email: [address] - Compliance and Licensing Enforcement	In Part	14(1)	Homeowner's personal information including correspondence
	31–32	Email Re: Cancel Inspection - [address]	In Part	14(1)	Homeowner's personal information
	34	Email RE: [address]	In Part	14(1)	Homeowner's personal information
	35–46	Email RE: [address] - June 28, 2022	In Part	12	Solicitor-client privilege correspondence (pp.35-36)
	48–50	Email RE: [address]	In Part	14(1)	Homeowner's personal information (p.48)
	65–70	Email Correspondence between City Legal Counsel and Staff	Denied In Full	12	Solicitor-client privilege correspondence
	72–81	Email Correspondence between City Legal Counsel and Staff	Denied in Part	12	Solicitor-client privilege correspondence
4. PRE-75691	1–6	Email: RE: [address] - COA - deferred meeting	In Part	14(1)	Information, views and/or opinions relating to an identified individual
	16–19	Email RE: [# and address]	In Part	14(1)	Information, views and/or opinions relating to an identified individual

	31-42	Re: [address]	In Part	14(1)	Staff's personal information; homeowner's personal information (pp.31-32)
	43-46	Architectural drawings/plans	Denied in Full	10(1)	Withheld application's plans containing third party information