Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4635

Appeal MA21-00418

City of Ottawa

March 24, 2025

Summary: The City of Ottawa received a request for emails relating to two specific properties from its Planning department and Building Code and Bylaw Services, including complaints. The city located records and withheld some information claiming it should not be disclosed because it contained other individual's personal information (sections 14(1) and 38(b)) and other information either because it contained advice and recommendations (section 7(1)) or solicitor-client privileged information (section 12). The requester appealed the city's exemption claims and also claimed that further responsive records exist.

In this order, the adjudicator upholds the city's decision but finds that some of the information it claimed was personal is actually professional information and orders the city to disclose that information. The adjudicator also finds that the city's search for responsive records was reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO, 1990, c. M.56, sections 2(1), 17, 7(1), 12, 38(a), 38(b).

Orders and Investigation Reports Considered: Order MO-2804-I.

Cases Considered: *Ontario* (*Attorney General*) *v. Ontario* (*Information & Privacy Commissioner*), [2002] O.J. No. 4596, *Ontario* (*Finance*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 36.

OVERVIEW:

[1] The City of Ottawa (the city) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act)*:

> Provide all emails, including complaints, from the Planning department, Building Code Services and Bylaw Services related to the following addresses [two specified addresses], which may reference the [requester's name], a portion thereof, initials or the owners. [for a specific timeframe]

[2] The city issued a decision, granting partial access to the records. The remaining portions were withheld under sections 7(1) (advice or recommendations), 8(1) (law enforcement), 12 (solicitor-client privilege) and 14(1) (personal privacy) of the *Act*. As a result of informal discussions between the parties, the city conducted an additional search for responsive records. Additional responsive records were identified, and the city issued a supplementary decision, granting partial access to the additional records. The remaining portions were withheld under sections 7(1), 8(1), 12, 14(1) and 15 (information soon to be published) of the *Act*.

[3] The requester, now the appellant, appealed the city's decisions to the Office of the Information and Privacy Commissioner of Ontario (the IPC).

[4] During mediation, the mediator had discussions with the appellant and the city. The appellant believed that further responsive records relating to the request should exist. The city agreed to conduct another search, and additional responsive records were located. The city issued another supplementary decision, granting partial access to the records. The remaining portions were withheld under sections 7(1), 11(a) (economic or other interests), 12 and 14(1) of the *Act.*

[5] As a result of further discussions, the city reviewed its three previous decisions and disclosed a package of records consisting of all records previously disclosed to date. The city issued a revised decision, granting partial access to the records, stating that it had "re-exercised its discretion to reassess the application of discretionary section of the Act in previous records…" The remaining records were withheld under sections 7(1), 8(1), 11(a), 12, 14(1) and 15 of the Act. The city also indicated that more additional records had been identified, and once reviewed, it would provide its final decision letter.

[6] The appellant reviewed the records and indicated that further additional records should exist, specifically, email correspondence to/from specific individuals. Through the mediator, the city agreed to include those individuals in its final search.

[7] During its final search, the city identified further responsive records and issued a supplementary decision letter, granting partial access to those records. The remaining portions were withheld under section 7(1), 11, 12 and 14(1) of the Act. The city also included an index of records with the records.

[8] Upon review of all records received to date, the appellant continued to maintain that further responsive records should exist. Additionally, the appellant informed the mediator that she took issue with the exemptions claimed by the city. The city informed the mediator that it had conducted an exhaustive search for records and maintained that no further records exist.

[9] As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process in which an adjudicator may conduct an inquiry under the Act. Representations were sought and received from all the parties. Representations were received and shared in accordance with the IPC's Code of Procedure.[1]

[10] Prior to seeking the representations of the city, it contacted the IPC indicating that it was no longer relying on section 15 to withhold information. The city referenced its revised decision letter where it disclosed information that was previously withheld under section 15. As a result, section 15 is no longer at issue in this appeal.

[11] After reviewing the city's representations, I confirmed that it is no longer claiming the exemption at section 11(a) of the Act which it applied to pages 1368, 1597, 1598 and 1609. As a result, this exemption has been removed from the scope of this appeal.

[12] Also, after reviewing the appellant's representations, it is evident that she is not seeking the information that is redacted on the basis of section 8(1)(d) and this exemption, and the information relating to it, have been removed from the scope of this appeal. The appellant also indicated that if information redacted as personal was found to be personal information of other individuals other than herself, she was not interested in pursuing that information.

[13] In this order, I do not uphold the city's position that certain information is personal information, and I order it to provide that information to the appellant. I uphold the remainder of the city's decision. I also find that the city's search was reasonable.

RECORDS:

[14] The records consist of emails and attachments to same totalling 1749 pages, partially withheld.

[1] Upon being assigned to this appeal, I invited representations from affected parties and sought submissions from the city and the appellant concerning whether sections 38(a) and 38(b) were relevant exemptions to consider where the records contained the personal information of the appellant, whether disclosed or not.

ISSUES:

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

B. Does the discretionary exemption at section 38(a), allowing an institution to refuse access to a requester's own personal information, read with the section 12 exemption for solicitor-client privilege, apply to the information at issue?

C. Does the discretionary exemption at section 7(1) or the discretionary exemption at section 38(a), allowing an institution to refuse access to a requester's own personal information, read with the section 7(1) exemption for advice or recommendations, apply to the information at issue?

D. Did the institution exercise its discretion under sections 38(a), 7(1) and 12? If so, should the IPC uphold the exercise of discretion?

E. Did the institution conduct a reasonable search for records?

DISCUSSION:

Issue A: Does the record contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[15] Under the *Act,* different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester. [2]Where the records contain the requester's own personal information, access to the records is addressed under Part II of the *Act* and the discretionary exemptions at sections 38(a) or 38(b) may apply.

[16] In her representations, the appellant explains that she does not seek information that is found to be the personal information of affected individuals and only seeks her own personal information.

[17] Accordingly, in order to determine which sections of the *Act* apply and the scope of the information at issue, it is necessary to decide whether the records contain "personal information" and, if so, whose. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,

[2] Order M-352.

> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
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> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
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> (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
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> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[18] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[3]

[19] Section 2(2) also relates to the definition of personal information. These sections state:

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their

[3] Order 11.

> dwelling and the contact information for the individual relates to that dwelling.

[20] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[4]

[21] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[5]

[22] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[6]

Representations

[23] The city submits that the withheld information includes names, addresses, telephone numbers, municipal addresses, and other identifying information that meets the definition of personal information under the *Act*. The city notes that it exempted personal identifiers such as personal phone numbers, as opposed to business numbers, of city employees. The city also provides confidential representations addressing its decision and the content of the records specifically; I have considered these submissions but will not set them out here.

[24] The appellant agrees that the names, addresses, telephone numbers, municipal addresses of individuals who contacted the city consists of personal information that she does not seek. She also notes that she does not take issue with the city withholding personal phone numbers of city employees. The appellant refers to "other identifying information that meets the definition of personal information" and refers to one example in the records (an email at page 1659 and 1660), where she questions whether the information redacted is actually personal information.

[25] The appellant also refers to the city's redaction of emails of a business nature that do not involve complainants' names or names of individuals who expressed their personal opinions. She refers to one example at page 315 which did not involve a complaint or opinion of the site plan, but the receiver of the email is redacted by the city. The appellant refers to the Notice of Inquiry and notes that personal information does not include information that identifies the individual in a business, professional or official capacity. The appellant submits that information in emails/documents of a business or professional

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[4] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[5] Orders P-1409, R-980015, PO-2225 and MO-2344.
[6] Order PO-1880, upheld on judicial review in *Ontario* (*Attorney General*) *v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

nature should not be exempt as personal information.

Analysis and findings

[26] I have reviewed all the information the city claims is personal information under the *Act*. Much of the information contains the appellant's personal information which has been disclosed to her, while some of the information does not contain the appellant's personal information. For records that contain the appellant's personal information, I will consider the city's exemption claims under section 12 and 7 in conjunction with section 38(a). For records that do not contain the appellant's personal information, I will consider the section 7 and 12 exemptions alone.

[27] I agree that much of the withheld information consists of personal information, of individuals other than the appellant, as defined under paragraphs (a), (b), (d), (e), (g) and (h) of the definition of that term in section 2(1) of the *Act*. This includes the sort of information at page 1659 and 1660 of the records, referenced by the appellant in her representations, which I find consists of personal information as defined under paragraphs (a), (b), (e) and (h) of section 2(1). Also, with regard to the redacted information at page 315 specifically referenced by the appellant, after reviewing the information I find that it consists of personal information because although it appears in a business context it would reveal something personal about the individual who sent the email.

[28] However, I find that information that is severed on pages 4, 99, 112, 119, 129, 146, 157, 159, 212, 214, 219, 246, 300, 309, 311, 364, 509-516, 523, 524, 536, 621, 622-630, 667, 669, 844-848, 913, 914, 918, 919, 921, 932, 940, 954, 955, 1017, 1146, 1227-29, 1231, 1233, 1235-1236, 1240, 1245 and 1249-1252 is not personal information because it is information that is used or appears in a business context. Some of this information includes individuals' names and e-mail addresses that are solely of a professional nature and disclosure of this information would not reveal information of a personal nature about the individuals. There is also information on these pages that is of a business nature and is not personal information. As described in more detail below, I provided the relevant affected parties with notice of this appeal and an opportunity to provide representations.

[29] The following list explains the reasons for my findings in the context of the records:

- At pages 4, 99, 112, 119, 129, 146, 157, 212, 214, 219, 246, 300, 309, 311, 1017 and 1146 after reviewing the city's confidential representations addressing some of this information and reviewing the information itself, I find that this information is not personal information and is information of a professional nature disclosure of which would not reveal something of a personal nature.

- On page 159, the information redacted under section 14(1) (not information redacted under section 8(1)) is also addressed in the confidential representations.

In my view, after reviewing this information, this is not personal information and consists of business information disclosure of which would not reveal something of a personal nature.

- On page 364, other than the first redaction at the start of the email, I find all of the remaining information appears in a business context. The affected party did not provide representations concerning this information though invited.

- On page 536, the city has redacted an entire email, along with an attached email, and claimed it was personal information. I note that the city provided the information in the attached email to the appellant, and it appears in the disclosed information at page 1231. I agree that the sender's email address in the first email is their personal information, however, I find that their name and the remainder of that email is professional information, not personal information.

- On page 621, there are two emails at issue, the city has redacted an entire email and some contact information on an email attaching the redacted email. After considering an affected party's representations, I find that only the email addresses constitute personal information, and all of the other information is information that appears in a professional context.

- In emails starting on pages 621-630 the city has redacted all of the information, claiming that it is personal information. I find that most of this information is not personal information as it is information that appears in a professional context. Further, I note that much of this information has already been disclosed to the appellant on other pages of the records.

- On page 515, 912, 932, 940, 954, 955, 1231, 1233, 1234, the withheld information are names that appear in a professional capacity. I note that many of these names have been disclosed by the city to the appellant throughout the records in many other instances and accordingly, find that disclosure of these names would not reveal information of a personal nature about the individuals.

- On page 913, the city has now disclosed the content of the email (in January 2023 disclosure and previously disclosed this same information on page 514) however it continues to rely on section 38(b) to deny access to some contact information. In my view, this contact information is not personal information but information that appears in a professional or business context, disclosure of which would not reveal something of a personal nature.

- On page 918 the city has redacted 2 emails. One email appears to be sent by an affected party in their personal capacity, however, after reviewing the redacted information, I find that only the affected party's name and email address is personal information and the remainder of the information, including the additional attached email (other than a personal email address), consists of information that

appears in a professional context, the disclosure of which would not reveal anything of a personal nature.

- On pages 1227, 1228, 1249 there is a first name, or nickname, that is redacted. The city did not provide an explanation about this information or identify contact information when requested. Given the context of the information, I find that it appears in a professional or business capacity and disclosure would not reveal something of a personal nature about the individual.

- The withheld email at page 1235 (duplicated at page 1240, 1245, 1252) was disclosed (as a duplicate) at page 1231. The city did not provide an explanation for this discrepancy, and I will be order it to disclose this same information, along with some names that were also redacted on these pages that clearly appear in a professional context, the disclosure of which would not reveal anything of a personal nature.

[30] As noted, I contacted affected parties where the information appeared to be in a professional context for their submissions, I received representations from some of the affected parties, but most did not respond. I was also unable to contact some affected parties because the city could not provide updated contact information. After reviewing the representations received, in some instances, I was given context of certain information, and I agree that this is personal information as mentioned above. However, for the remainder of the information, I find that it consists of professional information and is not personal or that an affected party can not be identified by disclosure of the information (as set out above).

[31] In summary, the withheld information on pages 4, 99, 112, 119, 129, 146, 157, 214, 219, 246, 309, 311, 524, 847, 848, 1017, 1146 and 1227 is not personal information; and portions of pages 159, 212, 300, 364, 509-516, 523, 536, 621-630, 667, 669, 844, 845, 846, 913, 914, 918, 919, 921, 932, 940, 954, 955, 1228, 1229, 1231, 1233, 1235, 1236, 1240, 1245, 1249, 1250, 1251 and 1252 are not personal information. (I will provide the city with a highlighted copy of the latter set of records with this order.) Because the personal privacy exemption only applies to personal information and because there are no alternative exemption claims for this information, I will order the city to disclose it to the appellant.

[32] I have found the remainder of the information to be personal information. As explained above, the appellant confirmed throughout her representations that she was not pursuing information that was deemed the personal information of affected parties and does not provide submission on that particular issue. Therefore, access to the affected parties' personal information is not at issue in this appeal. This information will not be disclosed, and I do not need to consider the application of section 38(b) to it.

Issue B: Does the discretionary exemption at section 38(a), allowing an institution to refuse access to a requester's own personal information, read

with the section 12 exemption for solicitor-client privilege, apply to the information at issue?

[33] The city has claimed that exemption at section 38(a) read with section 12 applies to all of the withheld information on pages 3, 98, 111, 210, 365, 373, 424, 434, 494, 497-499, 503-508, 562-565, 670, 682, 739-741, 748-749, 759, 760, 869-873, 877-881, 884-889, 1118-1120,1201, 1339-1343, 1360-1367, 1374, 1423, 1550-1551, 1615-1631, 1635-1637, 1640-1658, 1706-1716, 1719-1734 and 1746-1747.

[34] Section 38 provides exemptions from individuals' general right under section 36(1) of the *Act* to access their own personal information held by an institution. Section 38(a) of the *Act* reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, 8, 8.1, 8.2, 9, 9.1, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[35] Because the city claims that there are records that are solicitor-client privileged, I consider whether section 38(a), read with section 12, applies to them. Section 12 exempts from disclosure records that are subject to solicitor-client privilege or 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.

[36] 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*. The institution must establish that at least one branch applies.

[37] Branch 1, common law solicitor-client privilege encompasses two types of privilege:

- solicitor-client communication privilege, and
- litigation privilege.

[38] 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. [7]This privilege

[7] Orders PO-2441, MO-2166 and MO-1925.

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. [8]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.[9]

[39] The privilege may also apply to the lawyer's working papers directly related to seeking, formulating or giving legal advice.[10]

[40] 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.[11] The privilege does not cover communications between a lawyer and a party on the other side of a transaction. [12]

[41] Common law litigation privilege is based on the need to protect the adversarial process by ensuring that legal counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[13] The litigation must be ongoing or reasonably contemplated for the common law litigation privilege to apply.[14]

[42] Litigation privilege does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[15]

[43] 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.[16]

[44] 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.[17]

[45] Generally, disclosure to outsiders of privileged information is a waiver of

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[8] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[9] *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.
[10] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[11] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[12] *Kitchener* (*City*) *v. Ontario* (*Information and Privacy Commissioner*), 2012 ONSC 3496 (Div. Ct.)
[13] *Blank v. Canada* (*Minister of Justice*) (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[14] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada* (*Minister of Justice*), cited above.
[15] *Ontario* (*Ministry of Correctional Service*) *v. Goodis*, 2008 CanLII 2603 (ON SCDC).
[16] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[17] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

privilege.[18] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[19]

[46] The branch 2 exemption is a statutory privilege that applies where the records were "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." The statutory and common law privileges, although not identical, exist for similar reasons.

[47] Like the common law solicitor-client communication privilege, statutory solicitor-client communication privilege covers records prepared for use in giving legal advice.

[48] Statutory litigation privilege applies to records prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[20]

[49] The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.[21] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12. [22]

[50] In this appeal, the city claims that both branches 1 and 2 apply to the records at issue.

Representations

[51] The city submits that both branch 1, common law solicitor-client and litigation privilege, and branch 2, statutory privilege apply to the information withheld under section 12. The city provided an affidavit with its representations sworn by an analyst in its access and privacy office, a lawyer employed by the city in the Planning, Development and Real Estate Group, legal services.[23]

[52] The affiant reviewed the contents of all records claimed exempt under section 12 and notes that she was previously familiar with a dispute concerning the appellant and the city. The city submits that the affiant was in a position to identify where by-law and regulatory service staff sought and obtained legal advice from city lawyers with respect to their opinions on how to proceed on specific matters.

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[18] 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.).
[19] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.
[20] See *Ontario* (*Attorney General*) *v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.
[21] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.
[22] *Ontario* (*Attorney General*) *v. Ontario (Information and Privacy Commission, Inquiry Officer*), cited above.
[23] This is in keeping with the *IPC protocol for appeals involving solicitor-client privilege claims where the institution does not provide the records at issue to the IPC.*

[53] The affiant attests that after reviewing the records, she confirmed that they address a range of legal issues related to a tree located at two adjacent properties (the two specified addresses in the request), except for information on pages 1706-1716 that pertains to a separate property standards issue and related litigation for another municipal address.

[54] The affiant included an index in her affidavit, addressing all of the pages where the city is claiming solicitor-client privilege, noting whether it was solicitor-client privilege, litigation privilege or both. The city's confidential representations explain how the records were prepared by or for legal counsel for purpose of giving legal advice and includes information identifying the type of legal advice that was sought by city staff and given by city legal counsel.

[55] The affiant attests that the records at issue, where solicitor-client communication privilege applies, have only been shared amongst city staff and not shared with individuals or organizations outside of the city. The affiant attests that the records at issue that are subject to litigation privilege have only been shared amongst city staff and third parties for the dominant purpose of preparing for current or anticipated litigation with respect to the tree matter or the separate property standards.

[56] The appellant responds that the city is claiming the exemption for many external correspondences and refers to the city's affidavit where the affiant attests that the records "have been shared with 'third parties.'" The appellant suggests that this indicates that some records were created outside of the "zone of privacy" and/or were disclosed to outsiders and therefore no longer privileged.

[57] The appellant also notes that the city's litigation with a specified developer has ended.

[58] In reply, the city states that the reference to "third parties" and "external correspondence" in the index contained in the affidavit, reflects that in some instances city legal counsel work and communications expanded beyond a limited number of city staff, and also includes situations when its legal counsel communicates with experts or others in furtherance of litigation. The city submits that these records would ordinarily continue to be subject to litigation privilege. The city also notes that in some cases, city legal counsel shared privileged information with individuals in the city who do not usually receive privileged information but share a common interest. The city submits that the reference to third parties reflects the complexity of the records that were reviewed by its legal counsel.

[59] The appellant responds that the city's reference to information being shared outside of the city with those who share a common interest is conclusory and it is unclear how a common privilege, raised for the first time in its reply representations, applies to the redacted information at issue. Also, the appellant notes that the city provided no detail about the "experts or others" that the city's legal counsel needed to communicate

with "in furtherance of" "litigation" and wonders who are the "individuals outside the City" that the city shares "a common interest."

Analysis and finding

[60] For the reasons that follow, I find that under branch 2 both statutory communication privilege and litigation privilege apply to exempt the records under section 12 and therefore the exemption at section 38(a) applies to this information.

[61] Based on my review of the representations, it is clear that the records represent the contents of the file that was compiled by the city's legal counsel in response to the city's by-law and regulatory staff seeking, and obtaining, legal advice with respect to options on how to proceed with respect to two specific matters. I find that the exemption at section 38(a) read with section 12 would apply and therefore statutory communication privilege applies to the information the exemption is claimed for. After considering the city's submissions, I find that the type of legal advice that was sought by city staff and given by city legal counsel supports that the records were prepared by or for legal counsel for the purpose of giving legal advice and qualifies for statutory solicitor-client communication privilege. This would include any internal communications between the city's staff which would directly or indirectly reveal the content of solicitor-client communications, if they were disclosed. Previous orders of this office have found that the section 12 exemption can apply to internal communications of an institution, even if they do not contain direct communication to or from a lawyer.[24]

[62] In Order MO-2804-I, referenced by the city, the adjudicator found that records before him represented the contents of the city solicitor's file compiled in response to a threatened legal proceeding. The adjudicator noted that the records described "in great detail the strategies and 'game plan' formulated by the city solicitor, outside counsel and city staff with respect to the conduct of possible litigation and the steps to be taken to avert the action." The adjudicator found that all of the records were exempt from disclosure under the statutory branch 2 aspect of litigation privilege. The adjudicator also confirmed that records that would permit an understanding of the issues between the parties that forms the basis for a proceeding is information that qualifies for exemption under statutory litigation privilege. In that decision the adjudicator upheld the city's exemption claim under section 12 for 589 documents, including memoranda, reports, court documents, drawings, correspondence, leases, easements, easement transfers and option agreements in draft and final form, as well as email correspondence and attached documents. The adjudicator found that all of this information was exempt from disclosure under the Branch 2 solicitor-client litigation privilege.

[63] I adopt this analysis from Order MO-2804-I, for the records where litigation privilege has been claimed by the city. As noted, the city's confidential representations identify that the records where litigation privilege is claimed pertain to a claim and

[24] See for example, Order PO-2087-I and MO-3326.

actual/potential litigation. I find that statutory litigation privilege applies to the records the city claims the privilege for because they consist of legal counsel's documents, including external correspondence, in response to anticipated litigation or to respond to a claim that was submitted to the city's claims unit.

[64] The appellant points to the city's affidavit that mentions "third parties" suggesting that the records were created outside of the zone of privacy or that any privilege that existed has been waived. However, after considering the city's affidavit and confidential representations, somewhat elaborated on in its reply and shared with the appellant, I accept that the reference to "third parties" and "external correspondence" reflects that there were instances where its legal counsel communicated with third parties (being experts or others outside the city), for the dominant purpose of preparing for current or anticipated litigation with respect to two specified matters. Considering the city's submissions, I accept that the records at issue were created in a zone of privacy and are subject to statutory litigation privilege. Further, I find that this privilege has not been waived.

[65] Also, despite the appellant's suggestion that the city's litigation with a specified developer has ended, the statutory litigation privilege is not time limited as established in *Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner).*[25]

[66] In summary, I find that the information found on pages 3, 98, 111, 210, 365, 373, 424, 434, 494, 497-499, 503-508, 562-565, 670, 682, 739-741, 748-749, 759, 760, 869-873, 877-881, 884-889, 1118-1120,1201, 1339-1343, 1360-1367, 1374, 1423, 1550-1551, 1615-1631, 1635-1637, 1640-1658, 1706-1716, 1719-1734 and 1746-1747 is exempt under section 38(a), read with section 12.

[67] I will discuss the city's exercise of discretion below.

Issue C: Does the discretionary exemption at section 7(1) or the discretionary exemption at section 38(a), allowing an institution to refuse access to a requester's own personal information, read with the section 7(1) exemption for advice or recommendations, apply to the information at issue?

[68] The city claims that section 38(a), read with section 7(1), applies to information at pages 3, 98, 111, 210, 424, 494, 497, 607, 670, 682, 877, 1118, 1119, 1120, 1201, 1226, 1262, 1337, 1339, 1340, 1341, 1342, 1343, 1360, 1367, 1368, 1372-1373, 1375-1376, 1387, 1388, 1389, 1410, 1420, 1421, 1423, 1424, 1457-1458, 1550 and 1551. The city made overlapping claims that section 38(a), read with section 12, applies to some of this information. Because I have found some of this information to be exempt at Issue B, I will not discuss it further and the pages that remain at issue are pages 607, 1226, 1262, 1337, 1368, 1372-1373, 1375-1376, 1387, 1410, 1420, 1421 and 1424.

[25] [2002] O.J. No. 4596.

[69] As noted, section 38(a) of the *Act* reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, 8, 8.1, 9, 9.1, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[70] Section 7(1) of the *Act*, states:

> 7(1) A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution, or a consultant retained by an institution.

[71] Section 38(a) ("may" refuse to disclose) recognizes the special nature of requests for one's own personal information and the desire of the Legislature to give institutions the power to grant requesters access to their own personal information.[26]

[72] The purpose of section 7(1) is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[27] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised and can be express or inferred. "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made.

Representations

[73] The city submits that when it applied section 7(1) to information, it focused on protecting the ability of its staff to have frank discussions about the issues. The city submits that the discretionary exemption at section 38(a) read with section 7(1) applies to exempt this information.

[74] The city submits that the exempted information is not factual but rather is an analysis that incorporates corresponding actions and/or recommendations that staff may consider. It states that none of the portions exempted under section 7(1) fall into any of the mandatory exceptions to the exemption that are enumerated under section 7(2) of the *Act*.

[75] The appellant notes that the city applied section 7(1) to passages in many pages,

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[26] Order M-352.
[27] *John Doe v. Ontario* (*Finance*), 2014 SCC 36.

and that since she is unable to review the information she does not know if it is factual information or if one of the exceptions under section 7(2) might apply.

Analysis and finding

[76] For the reasons that follow, I find that the section 38(a) exemption read with section 7(1) applies to the withheld information.

[77] The Ontario Court of Appeal in *Ontario* (*Finance*) *v. Ontario* (*Information and Privacy Commissioner*)[28] held that the section 7(1) exemption aims to preserve a neutral public service by ensuring that people employed or retained by the institution are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. As noted, advice involves an evaluative analysis of information and is broader than recommendations which refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised and can be expressed or inferred. Neither "advice" nor "recommendations" include "objective information" or factual material.

[78] After reviewing the information that was severed on pages 607, 1262, 1337, 1368, 1372, 1373, 1375, 1376, 1387, 1388, 1389, 1410, 1420, 1421, 1424, 1457 and 1458 under section 38(a) read with section 7(1), I find that all of the withheld information contains a course of suggested action that can be either accepted or rejected and constitutes recommendations. Further, I noted that where the personal information of the appellant appears in these pages, the city has already disclosed this information. Therefore, I uphold the city's exemption claim for all of the withheld information.

[79] I have also considered whether any of the mandatory exceptions to the section 7(1) exemption in section 7(2) apply to the information I have found exempt. Based on my review, I find that none of the exceptions in section 7(2) apply to the information I have found to be exempt.

[80] I will now discuss the city's exercise of discretion.

Issue D: Did the institution exercise its discretion under section 38(a)? If so, should the IPC uphold the exercise of discretion?

[81] The section 38(a) exemption is discretionary, meaning that the city can decide to disclose information even if the information qualifies for exemption. The city must exercise its discretion taking relevant considerations into account. These include the purposes of the *Act*, including the principles that information should be available to the public, individuals should have a right of access to their own personal information, exemptions from the right of access should be limited and specific, and the privacy of individuals should be protected. Also relevant are:

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[28] 2012 ONCA 125.

- the words of the exemption and the interests it seeks to protect,
- whether the requester is seeking their own personal information,
- whether the requester has a sympathetic or compelling need to receive the information,
- whether the requester is an individual or an organization,
- the relationship between the requester and any affected persons,
- whether disclosure will increase public confidence in the operation of the institution,
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person,
- the age of the information, and
- the historic practice of the institution with respect to similar information.

Representations

[82] The city submits that it applied the discretionary exemptions in accordance with the *Act* and for no improper or irrelevant purposes and that it considered all relevant circumstances in so doing. It notes that the application of 38(a) read with sections 7(1) and 12 were consistent with the purpose of allowing staff to have frank discussions about how to approach the issue and respect a "zone of privacy" in working on litigation matters.

[83] The city notes that it also considered whether disclosure would increase public confidence in its operations and concluded that there was no public interest, or otherwise sympathetic or compelling interest in the release of solicitor-client privileged records.

[84] The appellant submits that with regard to section 38(a) read with section 7(1), the city did not exercise its discretion reasonably.[29]

Finding

[85] After reviewing the records and the representations of the parties, I uphold the city's exercise of discretion.

[86] The information that is exempt under section 38(a) read with section 7(1) and 12

[29] The appellant refers to a redaction at page 1226 of the records where information was redacted as exempt under section 7(1) and points to page 1247 where that same information was disclosed. However, I note that in the city's revised decision of January 6, 2023, it provided the previously redacted information on page 1226 to the appellant.

relates to an investigation regarding two specified zoning issues. Given the nature of the information, I find that the city took relevant factors into account when exercising its discretion in choosing to withhold this information. In particular, I am satisfied that when the city considered applying the section 38(a) read with section 7(1) and 12 exemptions to the records, it properly considered the purpose of the exemptions, and the interests sought to be protected. I note that the city provided the appellant with her own personal information that appeared in the records exempted by section 7(1). Considering the information in the records, I find that the city has not exercised its discretion in bad faith.

[87] I uphold its exercise of discretion.

Issue E: Did the institution conduct a reasonable search for records?

[88] The appellant challenges the city's search. If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.[30] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[89] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.[31]

[90] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[32] that is, records that are "reasonably related" to the request.[33]

[91] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[34]

Representations

[92] To support its position that it conducted a reasonable search, the city provided an affidavit sworn by an analyst in its access to information and privacy office. In the affidavit, the affiant explains how, based on the wording of the request, responsive records were retrieved from two city departments, by-law and regulatory services, and building code services and planning branch records.

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[30] Orders P-85, P-221 and PO-19544-I.
[31] Order MO-2246.
[32] Orders P-624 and PO-2559.
[33] Order PO-2554.
[34] Orders M-909, PO-2469 and PO-2592.

[93] The city acknowledges that there were shortcomings in the initial processing of the request and challenges with ensuring that certain staff provided all responsive email correspondence. However, the city submits that it ensured that all records were retrieved from relevant areas through the conduct of subsequent searches as described in the affidavit.

[94] The city notes that with information provided by the appellant and information in records themselves, its analyst ensured that further searches by staff members located any remaining responsive emails. It submits that all searches together retrieved all responsive records from the two departments and effectively addressed the challenges that staff had initially encountered in identifying responsive records.

[95] In her representations, the appellant refers to specific emails that refer to or attach documents and notes that many of these documents were not included in the packages provided to her.

[96] The appellant also states that some emails suggest that other emails should exist pointing to one email that indicated that the sender would like to be copied on a message and another email suggesting that a professional forestry opinion be provided regarding a specified property. The appellant indicates that she was not provided with the email to that sender nor was she provided with a forestry opinion. Also, she notes that she received an inspection report for one specified property but did not receive an inspection report for the other specified property.

[97] In its reply, the city notes that some records the appellant refers to in her representations appear to be non-responsive to the request as the request was for emails. It states that particularly with the city planning department, that there may be information that included one or more of the specified addresses but were not attached as part of email correspondence.

[98] The city notes that as stated in the affidavit, the appellant did not request building code service plans and drawings that would have required a consult with affected third party engineers and architects. It also notes that another category of records that was not within the scope of the request were publicly available records. The city notes that these were both documented in the decision letter which notes that the appellant narrowed the request to not include these items.

[99] The city submits that despite the narrowing of the request, after conducting further searches and issuing further decision letters, it provided records that were non-responsive to the request and suggests that this may have led to confusion. The city refers to the appellant's reference to emails at pages 261 to 262 of the records between its real estate lawyer and planning staff that includes three enclosures. It notes that the first document referenced is the "registered agreement" which refers to the site plan agreement and that this has already been disclosed to the appellant in full at pages 267 to 291. It further notes that there are two other agreements referenced in the email, a Maintenance and

Liability Agreement and a Municipal Covenant Agreement and that those two agreements (including the site plan agreement) are registered on title of the property and publicly available. However, the city notes that as a courtesy it provided access to these records despite being subject to section 15. The city notes that this information was disclosed in its January 2023 decision letter.

[100] The city notes that prior to its decision letter of January 2023, it reviewed the non-responsive records (marked as "non-relevant" in the index of records) with a view to assessing whether they could be disclosed regardless of whether or not they are responsive or publicly available. The city states that it decided to disclose other non-responsive information after determining that third party consultation was not required. The city provided a new index of records, which was shared with the appellant, highlighting some non-responsive information and information previously denied under section 14(1). The city confirmed that the appellant was provided with the full revised release package disclosing this information.

[101] The city refers to the "professional forestry opinion" referenced by the appellant and mentioned in an email at page 1369. The city states that its understanding is that the reference to a "professional forestry opinion" is for a specified tree conservation report and addendum that the city notes has been released to the appellant.[35]

[102] In her sur-reply representations, the appellant continues to submit that the three enclosures mentioned in an email are responsive and should be provided. She does not address the city's January 2023 disclosure where according to the city this information was disclosed, despite it not being responsive.

[103] The appellant submits that the forestry report provided by the city was prepared in August 2017 and notes that the mention of another forestry report in the records where the individual providing the service would have been hired in July 2018.

Analysis and finding

[104] As explained above, the *Act* does not require the institution to prove with certainty that further records do not exist. In my view, the city has provided enough evidence to show that it has made a reasonable effort to identify and locate responsive records. I find that the city's search was reasonable.

[105] I considered the appellant's specific arguments about why she believes that further records should exist. The appellant thinks that a "forestry opinion" should have been located. The appellant acknowledges that she received a forestry opinion, but she submits that emails refer to another forestry opinion that would post-date the one she received. After reviewing the emails that refer to another forestry opinion, it is my view that there is no reasonable basis to conclude that a second one was actually completed; however,

[35] The city notes that multiple copies of this reports appear in the provided records at pages 366 - 372, 778 - 784, 1066 - 1072 and 1190 – 1196.

it is clear that one was contemplated. In these circumstances and considering the comprehensive nature of the city's search efforts, there is no reasonable basis to conclude that the city would locate a second forestry report or opinion. To recap, the city has searched for records on four separate occasions and located only the one already identified report. In my view, it is not reasonable to order the city to conduct another search based on this information when a forestry opinion has not been located, and the emails do not confirm that one was actually completed.

[106] The appellant continues to refer to information that the city has located and deemed not within the scope of the request after it was narrowed to not include publicly available information or information that would require third party notification. Despite the appellant's position, it is apparent that the city has provided these records to the appellant. In her sur-reply representations, the appellant indicates that she has not received this information, although she does not refer to the subsequent disclosure where the city indicates that this information was provided (January 2023). However, given that the city has located this information, deemed it not responsive and then provided it, it is apparent that this information was located in the city's search. In my view, these arguments made by the appellant do not provide a reasonable basis to conclude that there are additional records that have not been identified by the city.

[107] I find the city's search was reasonable.

ORDER:

1. I uphold the city's decision with respect to section 38(b), in part, and order the city to disclose to the appellant the information it severed on pages 4, 99, 112, 119, 129, 146, 157, 214, 219, 246, 309, 311, 524, 847, 848, 1017, 1146 and 1227 and the information as highlighted on pages 159, 212, 300, 364, 509-516, 523, 536, 621-630, 667, 669, 844, 845, 846, 913, 914, 918, 919, 921, 932, 940, 954, 955, 1228, 1229, 1231, 1233, 1235, 1236, 1240, 1245, 1249, 1250, 1251 and 1252.

2. I order the city to disclose the information set out in provision 1 to the appellant by **April 29, 2025,** but not before **April 24, 2025**.

3. I uphold the remainder of the city's decision.

4. I find that the city's search for responsive records was reasonable.

5. In order to verify compliance with this order, I reserve the right to require the city to provide me with a copy of the records disclosed to the appellant.

Original Signed by: March 24, 2025

Alec Fadel
Adjudicator