

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4688

Appeal MA23-00250

City of Ottawa

August 26, 2025

Summary: An individual made a request to the City of Ottawa for records relating to allegations that they made threats to Ottawa City Hall staff. The city denied access to an email chain on the basis that it is excluded from the *Municipal Freedom of Information and Protection of Privacy Act* due to being labour relations or employment related matters (section 52(3)). The city also denied access to some information in another email chain, explaining that disclosure of the withheld information would be an unjustified invasion of another individual's personal privacy (section 38(b)). The city further denied access to some information in other emails and email chains, explaining that it is subject to solicitor-client privilege (section 38(a), read with section 12).

During mediation, the issue of reasonable search was added to the appeal as the requester believes that the city should have located additional responsive records.

In this order, the adjudicator finds that the email chain at issue is not excluded from the application of the *Act* and orders the city to issue an access decision. She upholds the city's decision not to disclose the personal information under section 38(b). The adjudicator also upholds the city's decision to withhold information as solicitor-client privileged information subject to the exemption under section 38(a), read with section 12. Finally, she upholds the city's search for records responsive to the request as reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) ("definition of personal information"), 12, 38(a), 38(b) and 52(3).

Orders Considered: Orders MO-2318.

OVERVIEW:

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

.... Any documentation concerning specific allegations that I made threats to anyone at Ottawa City Hall. Any verification that the issue I have raised preventable harm the City is causing to persons with undiagnosed sensitivities—has been responded to.

[2] After contacting the appellant and obtaining clarification from him about the records he was requesting, the city issued a decision granting partial access to the responsive records with severances pursuant to the exemptions at sections 7(1) (advice or recommendation),¹ 12 (solicitor-client privilege), and 14(1) (personal privacy) of the *Act*.² The city also relied on the exclusion at section 52(3)³ (employment or labour relations) of the *Act* to withhold some information in an email.

[3] Dissatisfied with the city's decision, the requester (now the appellant) appealed it to the Information and Privacy Commissioner of Ontario (IPC). A mediator was assigned to explore the possibility of resolution.

[4] During mediation, the appellant asserted that further records should exist. As such, the issue of reasonable search was added to the scope of the appeal.

[5] As a mediated resolution was not reached, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I commenced an inquiry in which I sought and received representations from the parties about the issues in the appeal.³

[6] During the inquiry, the appellant stated that he was no longer pursuing access to records dated after December 20, 2021. As a result, the city issued a revised decision.

[7] Also, during the inquiry, I added the possible application of sections 38(a) and (b) to the scope of the appeal as the records appear to contain the personal information of the appellant.

[8] In this order, I find that the email chain is not excluded from the application of the *Act* under section 52(3) and order the city to issue an access decision. Additionally, I uphold the city's decision not to disclose the personal information withheld under section

¹ Due to my finding that section 38(a), read with section 12, applies to the emails and email chains, I did not consider section 7(1).

² During mediation, the appellant confirmed that he was not interested in pursuing access to the records withheld under section 8(1)(i) (security). As such, I have removed this exemption from the scope of the appeal.

³ The parties' representations were shared in accordance with the confidentiality criteria in the IPC's *Practice Direction Number 7*.

38(b).

[9] I also uphold the city's decision to withhold information as solicitor-client privileged information subject to the exemption under section 38(a), read with section 12. Finally, I find that the city conducted a reasonable search for records responsive to the request.

RECORDS:

[10] The records at issue are emails and email chains. They are set out in the Appendix to this order.

[11] The city claims that the exclusion at section 52(3)3 applies to a small portion of the email chains at pages 628-629 and pages 630-632 of the records. I note that the withheld portion in these email chains is identical to one another.

[12] The city claims that the exemption at section 38(b) applies to the withheld information in the email chains on pages 646-648, pages 649-651, and pages 652-655. I note that the withheld information in these email chains is identical to one another.

[13] The city claims that 39 records are exempt under section 38(a), read with section 12.

ISSUES:

- A. Does the section 52(3)3 exclusion for records relating to labour relations or employment matters apply to the email chains at pages 628-629 and pages 630-632?
- B. Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- C. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue in the email chains on pages 646-648, pages 649-651, and pages 652-655?
- D. Does the discretionary exemption at section 38(a), allowing an institution to refuse access to an appellant's own personal information, read with the section 12 exemption, apply to the information in the 39 records?
- E. Did the city exercise its discretion under sections 38(a) and (b)? If so, should I uphold the exercise of discretion?
- F. Did the city conduct a reasonable search for records?

DISCUSSION:

Issue A: Does the section 52(3)3 exclusion for records relating to labour relations or employment matters apply to the email chains at pages 628-629 and pages 630-632?

[14] The city claims that section 52(3)3 applies to exclude the withheld information in the email chains at pages 628-629 and pages 630-632 from the application of the *Act*.

[15] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.⁴

[16] If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

[17] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not stop applying at a later date.⁵

[18] The type of records excluded from the *Act* by section 52(3) are those relating to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.⁶

[19] As noted above, the city relies on section 52(3)3, which states:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[20] For section 52(3)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or use was in relation to meetings, consultations, discussions or communications; and

⁴ *Ontario (Ministry of Community and Social Services) v. John Doe*, 2015 ONCA 107 (CanLII).

⁵ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 509.

⁶ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.). The CanLII citation is "2008 CanLII 2603 (ON SCDC)."

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Parties' representations on the third part of the test

[21] The city submits that it has applied the exclusion for labour relations and employment related information to withhold information in a sentence that appears twice at pages 628 and 630 of the records. It explains that the context for applying the exclusion to this sentence is that two senior city staff members are communicating human resources information in their role as managers of the specific employee mentioned in the sentence.

[22] The city submits that the withheld sentence meets the third part of the section 52(3)3 test as the communications and discussions revealed in this sentence relate to the employment of an individual. It submits that the city has an interest in the matter as an employer.

[23] Although the appellant provided representations, his representations did not address whether the exclusion at section 52(3)3 applies.

Findings and analysis

[24] For section 52(3)3 to apply, all three parts of the test set out above must be met. Based on my review of the email chains and the parties' representations, I find that the third part of the test for section 52(3)3 is not met. Accordingly, section 52(3)3 does not apply to exclude the email chains from the scope of the *Act*.

[25] Part three of the test requires that the email chains contains labour relations or employment-related matters in which the city has an interest.

[26] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to similar relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.⁷

[27] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.⁸

[28] The phrase "labour relations or employment-related matters" has been found to apply in the context of:

⁷ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.

⁸ Order PO-2157.

- an employee's dismissal;⁹
- a grievance under a collective agreement;¹⁰
- disciplinary proceedings under the *Police Services Act*;¹¹

[29] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern," and refers to matters involving the institution's own workforce.¹²

[30] The records are excluded **only** if the meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Matters related to the actions of employees, for which an institution may be responsible are not employment-related matters for the purpose of section 52(3).¹³

[31] I note that the city is relying on section 52(3)3 to exclude a portion of a sentence in two email chains. Previous orders of the IPC have established that the record-by-record approach is the appropriate approach to decide which part of the *Act* should apply.¹⁴ Accordingly, if section 52(3)3 applies, it would exclude the entire email chains.¹⁵

[32] The first email chain at issue consists of three emails. The originating email is sent by the appellant to several senior city hall staff members (including the mayor). The subject matter of the originating email is the appellant's complaint about the city's coordinator of accessibility initiatives and the lack of actions taken by the city to address concerns of persons disabled by sensitivities. The next email, which forwards the originating email, is from the city clerk to the manager of legislative services and another city staff member. The last email in the email chain is from the manager of legislative services to the city clerk. The information claimed to be excluded is contained in the third email, specifically the last portion of the second sentence. The first portion of the sentence, which has been disclosed to the appellant, is the manager of legislative services stating that he told the staff in the Accessibility Office to leave the matter to him. The second portion of the sentence is the views/opinions of some of the Accessibility Office staff members about the appellant.

[33] The second email chain is almost identical to the first email chain except that it consists of four emails. The last email is a reply from the city clerk to the manager of legislative services.

⁹ Order MO-1654-I.

¹⁰ Orders M-832 and PO-1769.

¹¹ Order MO-1433-F.

¹² *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

¹³ *Ministry of Correctional Services*, cited above.

¹⁴ See Orders M-352, MO-2054-I and MO-2046-I.

¹⁵ I note that the city has disclosed the entire email chain at issue except for the portion of that one specific sentence to the appellant.

[34] On my review, I do not find that the email chains at issue meet the third part of the section 52(3)3 test. The email chains (as a whole) demonstrate how the city dealt with the appellant's complaints. Although the last email of the first email chain mentions city employees, the information claimed to be excluded consists of city employees' views/opinions about the appellant. It is not a human resources matter. Accordingly, I find that the communications in the email chains are not about an employment-related matters for the purpose of section 52(3)3.

[35] As stated above, all three parts of the test set out above must be met for the exclusion in section 52(3)3 to apply. As I have found that part three of the test has not been met, I find that the email chains at issue are not excluded from the *Act* under section 52(3)3. Accordingly, I will order the city to issue an access decision for the email chains on pages 628-629 and pages 630-632.

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

[36] In order to determine which sections of the *Act* apply to the records, I must first decide whether the records at issue contain "personal information," and if so, to whom this personal information relates.

[37] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." Recorded information is information recorded in any format, including paper and electronic records.¹⁶

[38] Information is "about" the individual when it refers to them in their personal capacity, meaning that it reveals something of a personal nature about them. Generally, information about an individual in their professional, official, or business capacity is not considered to be "about" the individual if it does not reveal something of a personal nature about them.¹⁷

[39] 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.¹⁸

[40] Section 2(1) of the *Act* gives a list of examples of personal information. The examples that are relevant to this appeal are set out below:

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

¹⁶ The definition of "records" in section 2(1) includes paper records, electronic records, digital photographs, videos and maps. The record before me is a paper record located by searching a police database.

¹⁷ Orders P-1409, R-980015, PO-2225 and MO-2344.

¹⁸ 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,

...

(e) the personal opinions or views of the individual except if they relate to another individual

...

(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[.]

[41] 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."¹⁹

[42] It is important to know whose personal information is in the records. If the records contain the requester's own personal information, their access rights are greater than if it does not.²⁰ Also, if the records contain the personal information of other individuals, one of the personal privacy exemptions might apply.²¹

[43] The city submits that the email chains on pages 646-650 and pages 652-654 contain the personal information of an identifiable individual, an affected party. It submits that the withheld information falls under paragraph (b) of the definition of "personal information" in section 2(1) as it contains employment history of the affected party.

[44] Although the appellant provided representations, his representations did not address whether the records at issue contain personal information or whose personal information they might contain.

[45] Based on my review of the records at issue which are responsive to the appellant's request for all records relating to allegations made against him, I find that all of them contain the personal information of the appellant. Specifically, I find that the records contain personal information of the appellant within the meaning of paragraph (h) of the

¹⁹ Order 11.

²⁰ Under sections 47(1) and 49 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.

²¹ See sections 21(1) and 49(b).

definition of “personal information” in section 2(1) as well as the introductory wording of the definition.

[46] With respect to the email chains on pages 646-650 and pages 652-654, I find that in addition to the personal information of the appellant, it also contains the personal information of another identifiable individual, an affected party. I find that the personal information of the affected party falls under paragraph (b) as it relates to the affected party’s employment history.

[47] I acknowledge the city’s claims that the email chains only contain the affected party’s personal information. It appears that this claim is based on the city’s consideration of only the information being withheld rather than the record as a whole. As noted above, previous orders of the IPC have established that the record-by-record approach is the appropriate approach to decide which part of the *Act* should apply.²² As the email chains on pages 646-648, 649-651, and pages 652-655, considered as a whole, contains the personal information of the appellant and an affected party, the discretionary personal privacy exemption at section 38(b) in Part II of the *Act* applies.

[48] In sum, I have found that all of the records at issue (including the email chains on pages 646-648, 649-651, and pages 652-655) contain the personal information of the appellant. If a record contains the personal information of the appellant, the *Act* confers the appellant a greater right of access to the record than they would have had were the record solely a record of another person’s personal information. As a result, for the email chains on pages 646-648, 649-651, and pages 652-655 I will consider the appellant’s right of access to it under the discretionary personal privacy exemption at section 38(b) rather than considering whether the mandatory personal privacy exemption at section 14(1) applies, as claimed by the city. Similarly, for the records in which the city is claiming section 12 applies, I will consider whether the exemption at section 38(a), read with section 12 applies.

Issue C: Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue in the email chains on pages 646-648, 649-651, and 652-655?

[49] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[50] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. If the information fits within any of the exceptions in sections 14(1)(a) to (e), disclosure is not an unjustified invasion of personal

²² See Orders M-352, MO-2054-I and MO-2046-I.

privacy and the information is not exempt under section 38(b). Section 14(4) lists situations that would not be an unjustified invasion of personal privacy. If any of paragraphs (a) to (d) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[51] Sections 14(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). If any of sections 14(3)(a) to (h) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.²³ The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).²⁴

[52] In determining whether the disclosure of the personal information would be an unjustified invasion of personal privacy under section 38(b), I must consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.²⁵

Representations, analysis and findings

[53] For the reasons that follow, I find that the personal information that the city has withheld from the email chains is subject to the discretionary exemption at section 38(b) as disclosure would be an unjustified invasion of the personal privacy of an individual other than the appellant.

[54] None of the parties have claimed that any of the withheld personal information fits within either the exceptions set out in section 14(1)(a) to (e) or the situations in section 14(4) of the *Act*. From my review, I find that neither of these sections apply. Therefore, to determine whether disclosure would be an unjustified invasion of personal privacy under section 38(b), I must consider whether any of the factors or presumptions under sections 14(2) and (3) apply.

[55] None of the parties raised any of the presumptions under section 14(3). On my review, I do not find that any of the presumptions apply.

[56] The city raised the factor at section 14(2)(f) as a factor supporting non-disclosure of the withheld personal information.

[57] The appellant raises the factors at sections 14(2)(a), (d) and (e) as factors supporting disclosure of the withheld personal information. However, the factor at section 14(2)(e) is a factor favouring non-disclosure. As such, I will not be considering section

²³ Order P-239.

²⁴ Order P-99.

²⁵ Order MO-2954.

14(2)(e).

[58] Sections 14(2)(a), (d), and (f) state:

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,

(a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

...

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

...

(f) the personal information is highly sensitive;

...

Section 14(2)(a) factor: public scrutiny

[59] The purpose of section 14(2)(a) is to promote transparency of government actions. It contemplates disclosure of information where it is desirable for the purpose of subjecting the activities of the government (as opposed to the views or actions of private individuals) and its agencies to public scrutiny.²⁶ An institution should consider the broader interests of public accountability when considering whether disclosure is “desirable” or appropriate to allow for public scrutiny of its activities.²⁷

[60] The appellant submits that his request is to scrutinize the city’s failure to exercise due diligence and its practice of dismissing its responsibilities on the basis of *ad hominem* attacks – made without providing any evidence – that falsely characterize the manner, motives, goals and intentions of a resident who happens to have a conscience. He submits that the city’s use of defamatory characterizations – supported only by subjective denigrations from officials who are accused of negligence – warrants public scrutiny.

[61] In this case, the withheld personal information is about an affected party. I note that the appellant has applied this factor to his entire request and appeal. But this factor only applies to the withheld personal information at issue.

[62] On my review, I am not satisfied that disclosure of the withheld personal information will promote transparency of the city’s actions. Disclosure of the affected

²⁶ Order P-1134.

²⁷ Order P-256.

party's personal information would not provide scrutiny of the city's activities. As a result, I do not give this factor any weight.

Section 14(2)(d) factor: fair determination of rights

[63] The IPC has found that for section 14(2)(d) to apply, the appellant must establish that:

1. the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
3. the personal information to which the appellant seeks access has some bearing on is significant to the determination of the right in question; and
4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.²⁸

[64] The appellant submits that his right to freedom from arbitrary interference is violated if any restrictions or penalties of his person are not done through due process, procedural fairness, evidentiary reasons, and with an opportunity to respond to the evidence. He explains that if evidence cannot be provided or responded to, there can be no fair determination of his rights. The appellant submits that it is not fair to argue about his character without describing the actions behind the characterization.

[65] In order for section 14(2)(d) to apply, all four parts of the test must be established. I am not persuaded by the appellant's representations that section 14(2)(d) applies to the withheld personal information in this appeal. I understand that the appellant believes that the city wrongly penalized or limited his access to certain city services for his alleged actions or behaviors against city hall employees. However, the appellant has not stated what legal right is at issue. More importantly, he has not stated how this legal right is related to a proceeding, which is either existing or contemplated. The appellant's representations do not mention or provide evidence of any proceedings. Accordingly, I find that part 2 of the test has not been established.

[66] As the appellant has not established that all parts of the four-part test of section 14(2)(d) have been met, I find that the factor section 14(2)(d) weighing in favour of disclosure does not apply.

²⁸ Order PO-1764; see also Order P-312, upheld on judicial record in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

Section 14(2)(f) factor: highly sensitive

[67] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 14(2)(f) requires the city to consider whether the personal information is highly sensitive. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.²⁹

[68] The city claims that the factor at section 14(2)(f) applies without providing further details of why it believes this factor applies.

[69] In my view, the affected party would suffer personal distress if the withheld personal information is disclosed as it contains information about their employment history. Therefore, I find that there is a reasonable expectation of significant personal distress to the affected party if the withheld personal information is disclosed. As such, I find that the withheld personal information is highly sensitive. As a result, I give this factor some weight.

[70] I have also considered whether any of the other factors in section 14(2) or any unlisted factors might apply to weigh either in favour or against disclosure of the withheld personal information in this appeal. I find that none apply.

Balancing the factors

[71] Above I found that the factor at section 14(2)(f) applies and weighs against disclosure of the withheld personal information. I also found that no factors (listed or unlisted) weighing in favour of disclosure apply. In balancing the applicable factor against the interests of the parties, I find that disclosure of the withheld personal information would be an unjustified invasion of the affected party's personal privacy.

[72] Accordingly, I find that disclosure of the withheld personal information in the email chains would be an unjustified invasion of the personal privacy of the individual to whom that information relates. Subject to my findings below on the city's exercise of discretion, I find that it is exempt under section 38(b).

Issue D: Does the discretionary exemption at section 38(a), allowing an institution to refuse access to an appellant's own personal information, read with the section 12 exemption, apply to the information in the 39 records?

[73] As stated above, I find that the records at issue contain the appellant's personal information. Accordingly, the appropriate exemption for me to consider is section 38(a), read with section 12.

[74] Section 36(1) gives individuals a general right of access to their own personal

²⁹ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

information held by an institution. Section 38 provides a number of exemptions from this right. Section 38(a) 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, 10, 11, **12**, 13 or 15 would apply to the disclosure of that personal information. [emphasis added]

[75] In this case, the city relies on the common law solicitor-client communication privilege to withhold emails and email chains.

[76] 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.

[77] 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. It encompasses two types of privilege: solicitor-client communication privilege, and 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. Given the city’s claim as well as my finding in this order, I will only address solicitor-client communication privilege at common law.

Common law solicitor-client communication privilege

[78] 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

[79] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in

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.

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

Representations, analysis and findings

[80] The city did not provide the IPC with a copy of the thirty-nine records³⁵ in which it is claiming that sections 7(1) and 12 apply.³⁶ As a result, I requested that the city provide me with a detailed affidavit to support its claim that sections 7(1) and 12 apply to the records withheld under those exemptions.

[81] With its supplemental representations, the city provided an affidavit setting out information about each record including the exemption(s) claimed, type of record, a description of the content of the record and the senders and recipients of the emails/email chains for the records it was claiming that sections 7(1) and 12 apply.

[82] The city submits that the records at issue contain legal advice including strategic advice with respect to the application of the Public Conduct Policy from city legal counsel to city staff or they contain communication from non-legal city staff with another non-legal city staff member about the legal advice given by city legal counsel.

[83] Although the appellant provided representations, his representations did not address whether the records at issue are exempt under section 38(a), read with section 12.

[84] For the reasons below, I find that the city has established that the emails and email chains for which section 12 was claimed are subject to common law solicitor-client communication privilege in section 38(a), read with section 12 of the *Act*.

[85] Based on my review of the city's affidavit evidence and representations, I am satisfied that I have been provided with sufficient evidence to establish that the records contain legal advice either directly from the city legal counsel or were created to keep non-legal city staff informed of that legal advice provided by counsel so that legal advice may be sought and provided as required. In most cases, the recipients of the email chains were city staff while the sender was city legal counsel. Accordingly, I find that the emails and email chains at issue are confidential communications between the city legal counsel and their client regarding legal matters, and therefore fall within the ambit of the common law solicitor-client communication privilege in Branch 1.

[86] 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

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 See the Appendix for more details of these records.

³⁶ The records in which the city is claiming section 7(1) applies overlaps the records in which the city is claiming section 12 applies. See the Appendix.

voluntarily demonstrates an intention to waive the privilege.³⁷

[87] With respect to waiver, the city submits that it neither explicitly nor implicitly waived its solicitor-client privilege with respect to the legal advice provided in the email chains. As there is no evidence before me to suggest that waiver has occurred, I find that there has not been a waiver of solicitor-client privilege in relation to the records at issue.

[88] In conclusion, I find that the emails and email chains at issue contain confidential communications between the city's legal counsel and their client for the purpose of obtaining or giving legal advice, and therefore falls within the ambit of the solicitor-client communication privilege in Branch 1 of section 38(a), read with section 12 of the *Act*.

[89] Although the city claimed section 7(1) in addition to section 12, as I have found that all of the records are exempt under section 12, I do not need to consider the application of section 7(1).

Issue E: Did the city exercise its discretion under sections 38(a) and (b)? If so, should I uphold the exercise of discretion?

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

[91] In addition, the IPC may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations; or
- it fails to take into account relevant considerations.

[92] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.³⁸ The IPC cannot, however, substitute its own discretion for that of the institution.³⁹

Representations, analysis and findings

[93] The city submits that it properly exercised its discretion under sections 38(a) and (b). The city submits that in exercising its discretion not to disclose the withheld information it considered the following factors: (1) whether disclosure will increase public confidence in the operation of the institution; (2) whether the information pertains to the

³⁷ *S. & K. Processors Ltd. V. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

³⁸ Order MO-1573.

³⁹ Section 43(2).

appellant; and (3) whether the appellant has received access to records that reveal how the city clerk arrived at his decision to apply the City Public Conduct Policy in this instance, including what information was used to support the decision.

[94] The city submits that it also considered the purpose and importance of solicitor-client privilege to allow city staff to have free and frank discussions about the appellant's actions/behaviour with its legal counsel.

[95] Although the appellant submitted representations, his representations do not address the city's exercise of discretion.

[96] Having considered the parties' representations and the circumstances of this appeal, I find that the city properly exercised its discretion not to disclose the information that is exempt under sections 38(a) and (b) of the *Act*. I am satisfied that the city considered relevant factors and did not consider irrelevant factors in its exercise of discretion. In particular, I am satisfied that the city balanced the appellant's right to access his own information against the interests of another individual that are protected by the personal privacy exemption. I am also satisfied that the city considered the fundamental importance of solicitor-client privilege and weighed the importance of that privilege against the appellant's right of access to the specific information in the email chain. Moreover, I am satisfied that the city did not act in bad faith or for an improper purpose.

[97] Accordingly, I uphold the city's exercise of discretion in deciding to withhold the information at issue pursuant to sections 38(a) and (b).

Issue F: Did the city conduct a reasonable search for records?

[98] The appellant claims that further records responsive to his request exist.

[99] Where a requester claims additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.⁴⁰ If I am satisfied the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[100] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show it has made a reasonable effort to identify and locate responsive records.⁴¹ A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably

⁴⁰ Orders P-85, P-221 and PO-1954-I.

⁴¹ Orders P-624 and PO-2559.

related (responsive) to the request.⁴²

[101] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding such records exist.⁴³

Parties' representations

[102] The city submits that it conducted a reasonable search for records related to the request as required by section 17 of the *Act*.

[103] Along with its representations, the city submitted an affidavit sworn by a named employee. The named employee attests that he has personal knowledge of the facts set out in the affidavit.

[104] The affiant attests that he worked to clarify the request with the appellant as it was overly broad and would require all city staff to search for responsive records.

[105] The affiant attests that he sent an email to the designated access staff at the city Clerk's Office (access staff) to coordinate the search for responsive records to the clarified request. Subsequently, he attests that the access staff emailed him responsive records and informed him that the Manager of Legislative Services conducted a search of his records and the City Clerk's.

[106] The affiant attests that, during mediation, he was informed that reasonable search was an issue. He attests that he then followed up with city staff about their searches. The affiant attests that he was satisfied with their explanation and the reasonableness of their search and concluded that there was no need for a secondary search.

[107] The affiant attests that the Manager of Legislative Services, who is responsible for the city's information management branch, personally conducted a search through various folders in his Outlook to locate records (including a folder where he had saved emails pertaining to the appellant).

[108] The appellant submits that the city did not conduct a reasonable search for responsive records. He submits that the disclosed records do not provide evidentiary reasons for the city's characterization of him.

[109] The appellant submits that although the disclosure package contained certain articles or documents on a specified topic, it did not contain an acknowledgement by the city. He explains that these articles or documents are never acknowledged or acted on by the city.

⁴² Orders M-909, PO-2469 and PO-2592.

⁴³ Order MO-2246.

[110] The appellant also submits that the disclosure package did not contain any of the following records:

- Documentation of any lengthy phone calls he made.
- Instances where he expected immediate responses.
- Instances where he allegedly refused to accept any specific decision(s).
- Documentation of “hostile, abusive, or offensive language” he used.
- Documentation identifying the specific staff member he was accused of “unreasonably focusing on”, including who they are and how this focus was achieved.
- Documentation of his alleged “bullying, harassment, or coarse language”.
- Documentation of the source of the opinion that his concerns about ongoing abuse are “obsessive” rather than warranted, reasonable, or understandable.
- Instances of his alleged “unreasonable conduct”.

Findings and analysis

[111] For the following reasons, I find that the city conducted a reasonable search for records responsive to the appellant’s request.

[112] In its representations and affidavit, the city identified the individuals involved in the searches, explained where they searched, and described the results of their search. In my view, the city’s search was logical and comprehensive. I accept it was conducted by experienced employees knowledgeable in the subject matter who expended reasonable efforts to locate responsive records which are reasonably related to the request. I am satisfied that the city has provided sufficient evidence to establish that its search for responsive records was reasonable and in compliance with their obligations under section 17 of the *Act*.

[113] Moreover, I am not persuaded that the appellant has established a reasonable basis for concluding that further responsive records exist. The appellant submits that additional records should exist. However, he has not provided any explanation as to why, despite the city’s searches, the city should have located additional records.

[114] As noted above, although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding such records exist.⁴⁴ In this case, the appellant believes that additional records exist as his disclosure package did not contain all the records he

⁴⁴ Order MO-2246.

is looking for. In my view, the fact that the appellant's disclosure package does not contain all the records he believes exist does not mean that the city did not conduct a reasonable search. As stated above, thirty-nine records are withheld under solicitor-client privilege. It is quite possible that some of these records contain the information the appellant is seeking.

[115] As noted above, the *Act* does not require the institution to prove with absolute certainty that further records do not exist, however, it must provide enough evidence to show that it has made a reasonable effort to identify and locate records that are "reasonably related" to the request. In this case, I have found that the city has done so.

[116] For the reasons stated above, I find that the city has complied with its obligations under section 17 and has conducted a reasonable search for records responsive to the appellant's request. I dismiss the appeal.

ORDER:

1. I do not uphold the city's decision that section 52(3)3 excludes the email chains at pages 628-629 and pages 630-632 from the application of the *Act*.
2. I order the city to issue an access decision to the appellant treating the date of this order as the date of the request for procedural purposes.
3. In order to ensure compliance with order provision 2, I reserve the right to require the city to provide me with a copy of the access decision.
4. I uphold the city's decision to withhold the records for which it has claimed section 38(a), read with section 12.
5. I uphold the city's decision to withhold the information for which it claimed section 38(b).
6. I uphold the city's search as reasonable.

Original Signed by: _____

Lan An
Adjudicator

August 26, 2025

APPENDIX

| Record | Page(s) | Type of record | Exemption Claimed |
|--------|---------|----------------|----------------------|
| 1 | 1-2 | Email chain | Sections 7(1) and 12 |
| 2 | 4-8 | Email chain | Sections 7(1) and 12 |
| 3 | 236-246 | Email chain | Sections 7(1) and 12 |
| 4 | 247 | Email chain | Sections 7(1) and 12 |
| 5 | 251-274 | Email chain | Sections 7(1) and 12 |
| 6 | 404 | Email | Section 12 |
| 7 | 425-429 | Email chain | Section 12 |
| 8 | 433 | Email | Sections 7(1) and 12 |
| 9 | 435-449 | Email chain | Sections 7(1) and 12 |
| 10 | 450 | Email chain | Sections 7(1) and 12 |
| 11 | 451-519 | Email chain | Sections 7(1) and 12 |
| 12 | 525-533 | Email chain | Sections 7(1) and 12 |
| 13 | 534 | Email | Sections 7(1) and 12 |
| 14 | 538-571 | Email chain | Sections 7(1) and 12 |
| 15 | 588-597 | Email chain | Sections 7(1) and 12 |
| 16 | 628-629 | Email chain | Section 52(3)3 |
| 17 | 630-632 | Email chain | Section 52(3)3 |
| 18 | 646-650 | Email chain | Section 38(b) |
| 19 | 652-654 | Email chain | Section 38(b) |
| 20 | 676-685 | Email chain | Sections 7(1) and 12 |
| 21 | 688 | Email chain | Section 12 |

| | | | |
|----|-----------|-------------|----------------------|
| 22 | 690 | Email chain | Section 12 |
| 23 | 748-773 | Email chain | Sections 7(1) and 12 |
| 24 | 780-781 | Email chain | Section 12 |
| 25 | 788 | Email chain | Section 12 |
| 26 | 791 | Email chain | Section 12 |
| 27 | 795-801 | Email chain | Sections 7(1) and 12 |
| 28 | 802 | Email chain | Section 12 |
| 29 | 804 | Email chain | Section 12 |
| 30 | 806 | Email chain | Section 12 |
| 31 | 841 | Email chain | Section 12 |
| 32 | 844 | Email chain | Section 12 |
| 33 | 847 | Email chain | Section 12 |
| 34 | 850 | Email chain | Section 12 |
| 35 | 854 | Email chain | Section 12 |
| 36 | 869 | Email chain | Section 12 |
| 37 | 873-882 | Email chain | Sections 7(1) and 12 |
| 38 | 897 | Email chain | Section 12 |
| 39 | 928-933 | Email chain | Sections 7(1) and 12 |
| 40 | 972-976 | Email chain | Sections 7(1) and 12 |
| 41 | 983 | Email chain | Sections 7(1) and 12 |
| 42 | 988 | Email chain | Sections 7(1) and 12 |
| 43 | 1012-1014 | Email chain | Sections 7(1) and 12 |