



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1496

Appeals MA-000249-2 and MA-000249-3

City of Toronto



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The request

This is an appeal from two decisions of the City of Toronto (the City) under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) in response to a request for access to information relating to a neighbourhood property dispute.

In her request, the appellant sought access to “copies of all records in the files of the City of Toronto (formerly the Borough of East York) concerning the boundaries, building structure and uses of [the two identified residential properties].”

The first decision and appeal (MA-000249-2)

The City granted the appellant partial access to the responsive records, and advised that it was relying on the exemptions at sections 12 (solicitor-client privilege) and 14 (personal privacy) of the Act to withhold records.

The appellant appealed the City’s decision to this office and Appeal Number MA-000249-2 was opened. The appellant described the specific records to which she was continuing to seek access, and also indicated that she believed more responsive records should exist than were identified by the City.

Mediation was not successful and this office sent a Notice of Inquiry setting out the issues in the appeal to the City, initially. The City returned representations, the non-confidential portions of which were shared with the appellant, together with the Notice. The appellant returned representations.

The second decision and appeal (MA-000249-3)

On the same day it submitted its representations in the first appeal, the City issued a supplementary decision to the appellant, in which it indicated that it had located several more responsive records, and was granting partial access to them. The City advised that it was withholding the remaining records on the basis of the same exemptions cited in its original decision, as well as section 38(b) (denial of access to one’s own personal information/unjustified invasion of another individual’s privacy). The appellant appealed the City’s supplementary decision, and this office opened Appeal Number MA-000249-3. The appellant asked this office to review both the decision to withhold records, and the reasonableness of the City’s search for responsive records.

This office sent a Notice of Inquiry setting out the issues in the second appeal initially to the City. The City returned representations, the non-confidential portions of which were shared with the appellant, together with the Notice. The appellant did not return representations.

RECORDS:

For the purpose of this order, I have renumbered the records as set out in Appendix A. There are 18 records at issue in these appeals, consisting of correspondence, investigation notes, a crown brief, memoranda, an e-mail message, and type-written notes.

DISCUSSION:

REASONABLENESS OF SEARCH

Introduction

Where a requester provides sufficient detail about the records s/he is seeking and the institution indicates that further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records responsive to the request. The *Act* does not require the City to prove with absolute certainty that further records do not exist. To properly discharge its obligations under the *Act*, the City must provide sufficient evidence to show that it has made a reasonable effort to identify and locate all responsive records (Orders M-282, P-458 and P-535). A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (Order M-909).

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

Representations

The City submits:

. . . [I]n the circumstances of this appeal, reasonable searches were conducted by experienced and knowledgeable staff to locate records responsive to the appellant's request as follows:

Upon the receipt of the appellant's request, in May, 2000, [first named employee], Senior Planner, Planning East District, Urban Development Services (UDS), located and forwarded archival records from Planning and Committee of Adjustment files to the Corporate Access and Privacy Office (CAP). These included all documents from the Committee's 1987 file regarding a minor variance application and six drawings. In addition, a copy of the Committee's decision regarding a 1981 application was also forwarded. [The first named employee] advised CAP that no other records were available because the 1981 file itself had been missing for several years.

Also in May, 2000, [second named employee], Field Office Manager, Buildings, East District, UDS, located and forwarded to CAP, over 400 building and zoning

records including 42 large and medium drawings. Subsequently, additional small drawings were also located and sent to CAP.

On August 9, 2000, the City issued a decision letter with a fee estimate, granting access in full to the drawings and to the majority of the responsive records.

On August 30, 2000, the appellant . . . attended the CAP's office to view some 60 drawings. At that time, she selected four drawings to be photocopied.

On November 21, 2000, the City issued a second decision letter with a revised fee including the cost for photocopying 4 large and 4 small drawings.

This decision was subsequently appealed by the appellant and as indicated in the background section of these representations, reasonable search was a part of that appeal.

Upon receipt of the IPC's Notice of Inquiry in March 2001, [the second named employee] conducted several additional searches in April of 2001. As a result, additional records were located and sent to CAP. At that time, [the second named employee] confirmed that all records in the possession of the Building Department had been forwarded.

The City then issued a decision letter with respect to the additional records. This decision resulted in the present appeal.

During mediation, the appellant raised the issue of reasonable search with respect to a foundation plan, drawings, and permit application. At that time, [the second named employee] conducted another search but found no other records.

However, following the receipt of the IPC's Notice of Inquiry, [the second named employee] conducted another search of his files on July 30, 2001. He also asked the following staff who have had access since December 1999 to the relevant building/zoning files to search their own records in case records has been misfiled.

[list of four named employees, consisting of senior field officer, systems clerk, clerk receptionist and plan examiner]

In addition, [the second named employee] also contacted the City's insurance adjusters/legal advisors.

On August 22, [the second named employee] advised CAP that no additional records had been located. [The second named employee] indicated that it was possible that the foundation plan never existed, since what it described as a floor plan may not actually be one. [The second named employee] also advised that it was also possible that the records at issue may have existed at one time but may have been inadvertently destroyed or misplaced over the years as various City

staff and outside legal advisors have been involved in what has been a long drawn out process.

In addition, it is possible that the drawings at issue or their duplicates were included amongst those drawings reviewed by the appellant's client in August 2000, but not selected by her to be photocopied. The City, however, is unable to verify this.

In summary, the City submits that in the circumstances of this appeal, experienced and knowledgeable staff have spent many hours in searches to locate all responsive records but no additional records have been located.

The appellant submits:

. . . [T]he City in its submission has neglected or refused to provide any information in response to the questions posed in the Notice of Inquiry. The City simply stated, "The City located the responsive records . . ."

. . . [T]he City failed to indicate how it defined the scope of the appellant's request, or to provide any particulars of how the searches were carried out, or to indicate whether any records that did exist were subsequently destroyed.

. . . [T]he City has not provided any information that would allow [the appellant] to determine whether the search was reasonable. Whether this omission was accidental or deliberate is unknown.

. . . [T]he reasonableness of the search remains in issue because the records identified by the City in its first, second and third decision letters do not include the following documents:

1. a BUILDING PERMIT for certain construction within [specified property], namely, a brick wall in the basement at the rear of [the property] along the boundary shared with [the next property].

This brick wall is referred to in an inter-office memorandum to file from [named employee] dated September 16, 1991 that has been identified by the City as document no. 275, and is described as a 4" solid brick masonry.

2. the APPLICATION for the building permit referred to in item 1 above.
3. a FOUNDATION PLAN for the dwellings known as [two specified properties].

This foundation plan is referred to in the said inter-office memorandum from [the named employee].

4. two DRAWINGS identified as drawing no. 1 and drawing no. 2 in an undated Examiner's Notice identified by the City as document no. 614.
5. a LETTER (4 pages) dated June 22, 2000 from [named individual] of the lawfirm Aird & Berlis to Douglas Walker of Toronto Urban Planning & Development Services.

This letter was sent by fax under a cover sheet that has been identified by the City as document no. 599.

The appellant acknowledges items (1), (2) and (3) have not been specifically raised as an issue until now, and that items (4) and (5) presumably form the subject-matter of the separate appeal that the adjudicator has decided to initiate.

The appellant submits that the documents requested in items (1), (2) and (3) are important to her because they related to two issues. First, whether a building permit was obtained for construction of the said brick wall and, secondly, whether the wall was build entirely on [specified property].

Contrary to the appellant's submission, the City has in fact provided some detail of the nature and extent of the searches it has performed to find responsive records, including detail on some of the specific records the appellant believes the City should be able to locate. In the circumstances, I am satisfied that knowledgeable employees of the City have undertaken several extensive searches for records in the locations these records, including building permits, applications for building permits, plans and drawings would likely be kept. The one exception to this is the appellant's item 5, the letter to the City dated June 22, 2000 related to document number 599 disclosed to the appellant. Although this correspondence was specifically identified in the Report of Mediator in the second appeal as being a document in question under the "reasonableness of search" issue, the City has not provided a satisfactory explanation as to why this letter it appears to have received fairly recently could not be located. In the circumstances, I will order the City to conduct an additional search for this record.

PERSONAL INFORMATION

The City claims that portions of the records are exempt under the section 14 personal privacy exemption, which can apply only to "personal information".

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the address or telephone number of the individual [paragraph (d)] and 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 [paragraph (h)].

The City submits that the information in the records or portions of records withheld under section 14 [Records 1, 2, 5, 6, 7, 8, 15, 16, 17 and 18] meets the definition of "personal information" since:

. . . it is either the name, address or telephone number of individuals who have complained to the City or would reveal information about individuals who have complained to the City or is correspondence sent to the City implicitly or explicitly in confidence.

The appellant submits:

. . . [T]he City has misinterpreted section 2(1) of the *Act* to mean that any reference to an individual's name can be withheld regardless of whether it appears with other "personal information" relating to the individual or whether disclosure of the name would reveal other "personal information". In so doing, the City is in error.

. . . [T]he documents that have been produced with names withheld:

1. Do not contain any information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual.
2. Do not contain any information relating to the education, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved.
3. Do not contain any information concerning the telephone number, fingerprints or blood type of the individual.

The City has withheld the address of the individual where it appears in certain documents. The appellant is opposed to this if the address is [specified address].

4. With one possible exception, the documents do not contain correspondence containing the personal opinions or views of the individual except if they relate to another individual.

The possible exception is a letter dated December 21, 1999 to the City and identified by the City as document no. 383 and 384 [Record 6]. The City has refused to disclose these documents in their entirety and the appellant objects to this.

[T]he said letter, to the extent that it asserted a right of ownership over the common wall between [two specified properties], a wall over which the appellant claims legal rights, was "about" the appellant.

5. With one possible exception, the documents do not contain correspondence sent to the City by the individual that is implicitly or explicitly of a private or confidential nature.

The possible exception is the said letter identified as document no.'s 383 and 384 [Record 6].

. . . [T]he said letter was sent to the City by the neighbour in part to assert rights over the common wall and, as such, it was not intended to be kept private or confidential.

The documents do not contain any replies to any correspondence from that individual.

The information withheld from Records 1, 2, 5 and 8 consists of the names of individuals other than the appellant, and in some cases their home addresses and/or telephone numbers. Disclosure of the names in these circumstances would reveal information about the involvement of these individuals in the property dispute, which makes the names "personal information" under paragraph (h) of the section 2(1) definition. In addition, the home addresses and telephone numbers of these individuals qualify as their personal information under paragraph (d) of the definition.

The City withheld all of Records 6, 7, 11, 12, 15, 16, 17 and 18. I am satisfied that these records also contain information about identifiable individuals and their involvement in the property dispute. Therefore, the information in these records falls within the scope of the definition of "personal information". In addition, Records 11, 15, 16 and 18 contain personal information of the appellant. The appellant takes the position that certain records are about the appellant only, and not other individuals. Although it is true that some of the records contain the appellant's personal information, my review of the records indicates that all of these records also contain personal information of individuals other than the appellant.

INVASION OF PRIVACY

Introduction

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(b) of the *Act*, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information. This section reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

However, where the record contains the personal information of other individuals only, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. In the circumstances, the only exception which could apply is section 14(1)(f) which reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

In both these situations, sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

In this case, the City has relied on the presumption against disclosure in section 14(3)(b), which reads:

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

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

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

Representations

The City submits that the information in Records 1, 2, 5, 6, 7, 8, 11, 12, 15, 16, 17 and 18 was:

. . . compiled by the City as part of its investigation into a possible violation of the Building Code and the City's zoning by-law, more specifically, the failure to obtain a proper permit and to comply with a stop work order.

The appellant submits:

. . . [Record 6], to the extent that it asserted a right of ownership over a common wall, was not part of an investigation into a possible violation of law as contemplated by section 14(3)(b) of the *Act*. The City did not have any

jurisdiction to investigate a dispute between two neighbours over ownership of a common wall and, therefore, a letter from one owner to the City in that regard should be disclosed.

.
. . . the mere disclosure of a name(s) in the circumstances of this case, or the disclosure of a letter asserting rights of ownership over a common wall, would not constitute an unjustified invasion of another individual's personal privacy as contemplated by section 38(b) of the *Act*.

Based on my review of the records and the surrounding circumstances, I am satisfied that the City obtained or compiled the personal information in the records as part of investigations into possible violations of law, namely the building code and zoning by-laws. This finding applies equally to Record 6, since it clearly was relevant to and compiled as part of the City's investigations into these potential violations. Therefore, the withheld personal information in Records 1, 2, 5, 6, 7, 8, 11, 12, 15, 16, 17 and 18 falls within the scope of section 14(3)(b), and thus qualifies for exemption under section 14 or 38(b).

The City withheld Records 11, 15, 16 and 18 in full under section 38(b), since these records contain personal information of both the appellant and other individuals. In the circumstances, I am satisfied that the City could not have disclosed portions of these records without revealing personal information relating to the affected parties. In addition, I am satisfied that the City appropriately exercised its discretion to withhold these records in full.

To conclude, the withheld portions of Records 1, 2, 5, 6, 7, 8, 11, 12, 15, 16, 17 and 18 qualify for exemption under section 14 or 38(b) of the *Act*.

SOLICITOR-CLIENT PRIVILEGE

Introduction

The City takes the position that Records 3, 4, 9, 10, 13, and 14 are exempt from disclosure based on the discretionary exemption in section 12, which reads:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

I will first consider the application of litigation privilege to these records.

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

In Order MO-1337-I, Assistant Commissioner Tom Mitchinson found that even where records were not created for the dominant purpose of litigation, copies of those records may become

privileged if they have “found their way” into the lawyer’s brief [see *General Accident; Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.); *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (B.C. C.A.)]. The court in *Nickmar* stated the following with respect to this aspect of litigation privilege:

. . . the result in any such case depends on the manner in which the copy or extract is made or obtained. If it involves a selective copying or results from research or the exercise of skill and knowledge on the part of the solicitor, then I consider privilege should apply.

The City submits:

. . . [T]he City took the appellant . . . to court on charges of failing to obtain a permit and to comply with a work order. In turn, the appellant . . . filed a claim against the City for negligence.

Records [3 and 4] are an internal memorandum from one of the City’s Court Administrators, together with a “Crown brief” and Appendix B – “documentary evidence”.

. . . [T]he records were prepared by or for counsel employed or retained by the City for use in contemplation of litigation . . .

.

. . . [T]he records at issue were specifically generated by City staff for the purpose of litigation. Not only do the records relate to the proceedings on the charges against the appellant . . . for Building Code and City by-law infraction but also to the current proceedings relating to her subsequent claim of negligence against the City which has arisen as a result of the charges laid against her. Moreover, the claim was filed prior to her being convicted and fined.

. . . [T]he records were compiled in contemplation of the City’s defence of the appellant’s claim and are relevant to current litigation proceedings. Therefore, they remain subject to litigation privilege because they form part of the brief of the solicitor acting for the City in defence of the claim.

.

. . . [T]he dominant purpose for the creation or compilation of the records at issue is for its solicitor’s brief for existing or contemplated litigation.

The appellant submits:

. . . [S]olicitor-client privilege applies to a request for advice and the advice given but does not include facts which might be identified in the document.

Accordingly, . . . the City should black out the request for advice and the advice given and disclose the remaining portions of the said documents to the extent that they contain factual material.

The appellant's representations are directed at solicitor-client communication privilege, and do not assist me in determining whether litigation privilege applies to the records at issue.

In my view, Records 3, 4 and 14 were created by the City for the dominant purpose of its building code and by-law prosecution of the appellant. This litigation is now at an end. While litigation privilege normally ends with the termination of the litigation, as stated by former Adjudicator Holly Big Canoe in Order P-1551:

. . . [Litigation] privilege may be sustained in related litigation involving the same subject matter in which the party asserting the privilege has an interest [*Carleton Condominium Corp. v. Shenkman Corp.* (1977), 3 C.P.C. 211 (Ont. H.C.)].

I accept the City's submission that the related, civil litigation commenced by the appellant against the City arises from the same subject matter as the earlier building code and by-law prosecution and, therefore, based on the above, litigation privilege is sustained in Records 3, 4 and 14, documents prepared originally for the dominant purpose of the prosecution.

Records 9, 10 and 13 were prepared for the dominant purpose of the City's defence of the appellant's civil claim against the City, which has not reached a conclusion. Therefore, these records qualify for litigation privilege.

Because of my findings, it is not necessary for me to consider whether the records qualify for exemption based on solicitor-client communication privilege.

ORDER:

1. I order the City to conduct an additional search for the letter referred to in the appellant's "item 5" as set out above, and to provide the appellant with a decision letter detailing the results of its search no later than **January 24, 2002**.
2. I uphold the remaining aspects of the City's decisions.

Original signed by:
David Goodis
Senior Adjudicator

December 27, 2001

Appendix "A"

Record	Page #'s	Description	Exemption claimed
1	275	Memorandum re: minutes of meeting between third party and the City	Section 14 (severed)
2	363, 366	Enforcement log	Section 14 (severed)
3	374	2-page letter	Section 12 (withheld)
4	378-380	3-page Crown brief	Section 12 (withheld)
5	381	1-page letter to a third party from the City	Section 14 (severed)
6	383 (384)	1-page letter (and duplicate)	Section 14 (withheld)
7	403-404	2- page letter from a third party to the City	Section 14 (withheld)
8	410	1-page letter from the City to a third party	Section 14 (severed)
9	531	1-page letter to the City from Adjusters and Surveyors	Section 12 (withheld)
10	532	Fax cover sheet to the City from Adjusters and Surveyors	Section 12 (withheld)
11	583	1-page of letter from the City to a third party legal counsel	Sections 14(1), 38(b) (withheld)
12	585	1-page letter from the City to a third party	Section 14(1) (withheld)
13	586	1-page letter from the City to a third party legal counsel	Section 12 (withheld)
14	590	1-page e-mail between City staff	Section 12 (withheld)
15	602	1-page letter from the City to a third party	Sections 14, 38(b) (withheld)
16	607	1-page letter from the City to a third party	Sections 14, 38(b) (withheld)
17	608	1-page letter from the City to a third party	Section 14 (withheld)
18	611	Typewritten notes	Sections 14, 38(b) (withheld)