



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1983

Appeal MA-050019-1

City of Waterloo



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The City of Waterloo (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to “myself and my property” as well as “any neighbour complaints or comments”. The City located records responsive to the request and provided the requester with access to some of them, in whole or in part. The remaining records or portions of records were not disclosed on the basis that they qualify for exemption under sections 8(2)(a) (law enforcement), 12 (solicitor-client privilege) and 14(1) (invasion of privacy) of the *Act*.

The requester, now the appellant, appealed the City’s decision. During mediation, the City was referred by the Mediator to the possible application of sections 38(a) and (b) of the *Act*, as the records appear to contain the personal information of the appellant. Further mediation was not possible and the matter was moved to the adjudication stage of the appeals process.

I initially sought and received the representations of the City. In its representations, the City agreed to disclose Records 88 and 89 to the appellant. At the same time that the City provided me with its representations, it issued a further decision letter to the appellant with respect to 53 additional pages of records which it located. These records have been numbered 91 to 144. Access to the majority of the information contained in each of Records 91 to 144, consisting of various notes, facsimile communications, computer printouts, correspondence, witness summonses, “will-say” statements, email communications and a photograph, was denied under the discretionary exemptions in sections 8(1)(d) and (e) (law enforcement), 12 and 14(1).

The City’s representations were shared, in their entirety, with the appellant who also provided me with representations. I then shared the appellant’s submissions with the City and received additional representations from it by way of reply.

RECORDS:

The records initially identified as responsive consist of documents designated by the City as Records 17, 20, 27, 42, 43, 54 to 87 and 90 that were maintained by the City’s Building and Fire Departments. The information at issue includes the undisclosed portions of these records, which comprise various correspondence, notes and summaries involving the property owned by the appellant. The second group of responsive records located in the inquiry stage of the appeal process are numbered 91 to 144 and are comprised of the undisclosed portions of various notes, facsimile communications, computer printouts, correspondence, witness summonses, “will-say” statements, email communications and a photograph.

DISCUSSION:

PERSONAL INFORMATION

General principles

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

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

- (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,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual’s name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

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 [Order 11].

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 [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. 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 [Orders P-1409, R-980015, PO-2225].

Further, to qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Representations of the parties

The City argues that Records 17, 20, 27(c), 42, 43 and 139 contain the personal information of several individuals whose identities have not been disclosed to the appellant. It further indicates that these individuals are identified as complainants or other persons with some connection to the complaints made against the appellant for non-compliance with the City's zoning bylaws. The City also suggests that Record 42 relates to the individual identified therein in a personal, rather than a professional, capacity.

Findings with respect to "personal information"

I have reviewed the contents of Records 17, 20, 27(c), 42, 43 and 139 and find that the undisclosed portions of Records 17, 27(c), 43 and 139 consist of the personal information of the individuals identified therein. In each of these records, an individual is identified, along with other personal information including their addresses and, in the case of Record 27(c), their dates of birth or social insurance number and home telephone numbers. I find that this information qualifies as the personal information of these individuals within the meaning of section 2(1)(a), (c), (d) and (h).

Records 17, 27(c) and 43 also contain the personal information of the appellant, including his name, address and other information pertaining to him and his property. As a result, I find that this information qualifies as his personal information under sections 2(1)(d) and (h).

However, the undisclosed information contained in Records 20, 42 and 108 does not qualify as "personal information" within the meaning of section 2(1). Rather, the individuals referred to in Records 20, 42 and 108 are identified in their professional capacities and the information only relates to them in that manner; and not in any personal way. I specifically find that the undisclosed information in Records 20, 42 and 108 does not contain any information that could be said to be "about" the named individuals' personal lives. Because only information that qualifies as "personal information" can be subject to the section 14(1) invasion of privacy exemption and no other exemptions have been claimed for the undisclosed portions of Records 20, 42 and 108 I will order that they be disclosed, in their entirety, to the appellant.

I have also independently reviewed the contents of Records 54 to 90 and find that, because they relate directly to the prosecution of the appellant by the City for a violation of its zoning bylaw, these records also contain the appellant's personal information. I find that the records pertain to

that prosecution and other related matters involving the appellant, and that they contain information that qualifies as his personal information under section 2(1)(h).

In addition, I also conducted an examination of the “second batch” of records numbered 91 through 144 to determine whether or not they contain “personal information” within the meaning of the definition of that term in section 2(1). Records 87, 90 (comprising two pages that are the same as Records 94 and 96) 91, 94, 96, 98, 102, 104, 110, 111, 112, 113, 116, 117, 118, 119, 121, 122, 128, 129, 130, 131, 132, 133, 134, 134, 135, 137 and 138 (which is the same as Record 43) all contain the personal information of both the appellant and other identifiable individuals. These records relate to the internal responses of the City to certain actions of the appellant and include the views and opinions of other individuals about the appellant (section 2(1)(g)) and the names of certain individuals appearing with other personal information about them (section 2(1)(h)).

INVASION OF PRIVACY

The City has only claimed the application of section 14(1) to Records 17, 27(c), 43 and 139. I have found above that Records 17, 27(c) and 43 contain the personal information of both the appellant and other identifiable individuals. I also found that Record 139 contains only the personal information of another identifiable individual. Because Records 17, 27(c) and 43 contain personal information relating to the appellant, I must determine whether they qualify under the discretionary exemption in section 38(b) of the *Act*. I will evaluate the application of section 14(1) to the personal information in Record 139.

General principles

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right. Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester’s right of access to his or her own personal information against the other individual’s right to protection of their privacy. Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 38(b) is met. If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). The only exception which may have any application in the present circumstances is section 14(1)(f).

If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed

to be an unjustified invasion of personal privacy under section 38(b). Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the “public interest override” at section 16 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In the circumstances, it appears that the presumption at paragraph (b) could apply. This section states:

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;

Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Order P-242]. Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2) [*John Doe*, cited above]. If no section 14(3) presumption applies, 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 under section 38(b). [Order P-239]. 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) [Order P-99].

Representations of the parties

The City argues that the undisclosed information in Records 17, 27(c) and 43 are exempt under section 38(b) and that the presumption in section 14(3)(b) applies because the information was compiled and is identifiable as part of its investigation of the activities of the appellant in relation to the violation of section 33.1 of its Bylaw 1108. The City goes on to argue that the factors listed which favour the non-disclosure of personal information in sections 14(2)(e), (f), (h) and (i) are also applicable.

The appellant submits that because complete copies of the records were made available to his counsel at the time of his trial, as attested to by the City’s Solicitor before the Justice of the Peace hearing the case, disclosure of complete copies of the records would not result in an unjustified invasion of personal privacy under section 38(b).

In my discussion of “personal information” above, I found that Records 87, 90 (comprising two pages that are the same as Records 94 and 96) 91, 94, 96, 98, 102, 104, 110, 111, 112, 113, 116, 117, 118, 119, 121, 122, 128, 129, 130, 131, 132, 133, 134, 135, 137 and 138 (which is the same as Record 43) all contain the personal information of both the appellant and other identifiable individuals. Because one of the primary purposes of the *Act*, as set out in section 1(b) is “to protect the privacy of individuals with respect to personal information about themselves”, I will

also address the possible application of the invasion of privacy exemption in section 38(b) to these records and parts of records. Despite the fact that the City only applied section 38(b) to a small number of the responsive records, I will apply this exemption to all of the records that contain the personal information of the appellant, along with other identifiable individuals.

Findings under sections 14(1) and 38(b)

Record 139 contains the personal information of an identifiable individual other than the appellant. It was compiled and forms part of the City's investigation of a possible violation of its zoning bylaw by the appellant, thereby falling within the ambit of the presumption in section 14(3)(b). In the absence of any arguments in favour of the application of any of the exceptions in section 14(4) or the "public interest override" provision in section 16, I find that the disclosure of Record 139 is presumed to constitute an unjustified invasion of the personal privacy of the individual whose personal information is contained therein. As a result, I find that the personal information in Record 139 is exempt under section 14(1).

Based on my review of the contents of the undisclosed portions of Records 17, 27(c) and 43 (which is the same as Record 138), I am satisfied that they were compiled and form part of the City's investigation of a possible violation of its Bylaw 1108 by the appellant. As such, I find that it falls within the ambit of the presumption in section 14(3)(b) and its disclosure is also presumed to constitute an unjustified invasion of the personal privacy of the individuals referred to therein.

The personal information contained in the undisclosed information in Records 87, 90 (comprising two pages that are the same as Records 94 and 96), 91, 94, 96, 98, 102, 104, 110, 111, 112, 113, 119, 121 and 137 relates to and includes the identities of various individuals who have provided information to the City about the matters under investigation. In addition, the records contain information about certain personal matters that have arisen in the course of the prosecution of the appellant that concern not only the appellant but also several other identifiable individuals. These issues relate directly to the appellant and to several other identifiable individuals.

In my view, several of the factors in section 14(2) that favour the disclosure of the information in these records are present, along with other factors favouring the non-disclosure of this personal information. Specifically, I find that sections 14(2)(a), (d), (e), (f), (g) and (h) may have some application to the circumstances of this appeal. These sections 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;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

From the appellant's perspective, the factors favouring disclosure in sections 14(2)(a) and (d) apply to the personal information in the undisclosed portions of these records. The appellant is of the opinion that he is being treated unfairly by the City and believes that the information contained in the records will assist him in "clearing his name" and exposing the City's behaviour towards him. I agree that the factor favouring disclosure in section 14(2)(a) has some relevance to the weighing of the appellant's right of access against the other individuals' right of privacy. However, I cannot agree that the consideration listed in section 14(2)(d) has any application. 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 which the appellant is seeking access to has some bearing on or 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

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

Based on my examination of the records and the representations of the appellant, I am unable to agree that the appellant has provided sufficient evidence to establish that he has a legal right based on the common law or statute that is linked to a proceeding that exists or is contemplated.

His trial on the bylaw violation charge was completed some time ago and I have not been provided with any evidence of any other proceeding involving the appellant and the City, either on-going or contemplated. As a result, I find that the consideration in section 14(2)(d) has no application in the circumstances of this appeal.

I further find that, based on the evidence contained in the records themselves, the factors in sections 14(2)(e), (f), (g) and (h) are relevant to a determination of whether the disclosure of the information in the undisclosed portions of Records 87, 91, 94, 96 (which are identical to the contents of Record 90), 98, 102, 104, 110, 111, 112, 113, 119, 121 and 137 would constitute an unjustified invasion of personal privacy under section 38(b). Examining the circumstances surrounding the creation of the records and the provision of the information contained in them by the individuals who are identified therein, I am of the view that the disclosure of this information will unfairly expose them to pecuniary or other harm (section 14(2)(e)), is highly sensitive since it deals with personal matters relative to these persons (section 14(2)(f)), is unlikely to be accurate or reliable owing to the nature of the records themselves (section 14(2)(g)) and was provided to the City with an expectation of confidentiality (section 14(2)(h)).

In my view, each of these considerations under section 14(2) are relevant and ought to be afforded some weight when balancing the appellant's right of access against the privacy interests of the individuals whose personal information appears in the undisclosed portions of Records 87, 91, 94, 96 (which are identical to the contents of Record 90), 98, 102, 104, 110, 111, 112, 113, 119, 121 and 137. Based on these considerations, I find that the privacy interests of the identified individuals outweigh the appellant's right of access to this information. As a result, I find that the disclosure of the information contained in these records would give rise to an unjustified invasion of personal privacy under section 38(b). The information in the records is, accordingly, exempt under that section.

I find that none of the exceptions in section 14(4) are applicable and the appellant has not referred to the possible application of the "public interest override" provision in section 16. While the City may have disclosed some or all of the records to the appellant's counsel as part of its disclosure obligations in the bylaw enforcement proceedings, this does not constitute an acknowledgement by the City that the exemption in section 38(b) does not apply to this information. The disclosure of information pursuant to the requirements of criminal and quasi-criminal proceedings does not lead to the conclusion that the same information cannot be subject to the exemptions contained in the *Act*. The two access regimes operate for different purposes and different policy considerations are present in each. I cannot agree with the contention by the appellant that because his counsel was granted access to complete copies of the records by the City pursuant to its disclosure obligations that access pursuant to the *Act* ought to follow accordingly.

I find that the undisclosed portions of Records 17, 27(c), 43 (which is the same as Record 138), 87, 91, 94, 96 (which are identical to the contents of Record 90), 98, 102, 104, 110, 111, 112, 113, 119, 121 and 137 are exempt from disclosure under section 38(b) and Record 139, in its entirety, is exempt under section 14(1).

LAW ENFORCEMENT

The City claims the application of the law enforcement exemption in section 8(2)(a) to Records 87 and 90 (which is the same as Records 94 and 96) and section 8(1)(c) to the undisclosed portions of Records 98 and 104. It also claims that the undisclosed portions of Records 91, 94, 96 (which are identical to the contents of Record 90), 98, 102, 104, 110, 111, 112, 113, 119, 121 and 137 are exempt under sections 8(1)(d) and (e). Because I have found that section 38(b) applies to exempt from disclosure the information in Records 87, 91, 94, 96, 98, 102, 104, 110, 111, 112, 113, 119, 121 and 137, it is unnecessary for me to consider whether they, as well as Record 90, also qualify for exemption under section 38(a), in conjunction with sections 8(1)(c), (d) and (e) or 8(2)(a).

SOLICITOR-CLIENT PRIVILEGE

The City submits that Records 54 to 86, 96, 115, 116, 117, 118, 119, 122 and 127 to 135 qualify under the solicitor-client privilege exemption in section 12 of the *Act*, which reads:

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.

Because the records also contain the personal information of the appellant, as they relate to the bylaw prosecution and other similar matters involving him, I will consider whether the records qualify for exemption under section 38(a), taken together with the section 12 exemption.

Section 12 contains two branches as described below. The City must establish that one or the other (or both) branches apply.

Branch 1: common law privileges

This branch applies to a record that is subject to “solicitor-client privilege” at common law. The term “solicitor-client privilege” encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to “a continuum of communications” between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

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.*].

The purpose of this privilege is to protect the adversarial process by ensuring that counsel for a party has a “zone of privacy” in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co.*].

Courts have described the “dominant purpose” test as follows:

A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co.*; see also Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.)].

To meet the “dominant purpose” test, there must be more than a vague or general apprehension of litigation [Order MO-1337-I].

Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief [Order MO-1337-I; *General Accident Assurance Co.; Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

Branch 2: statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of institution counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was “prepared by or for counsel employed or retained by an institution for use in giving legal advice.”

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for counsel employed or retained by an institution “in contemplation of or for use in litigation.”

Loss of privilege

Termination of litigation

Under Branch 1, at common law, litigation privilege may be lost through termination of litigation or the absence of reasonably contemplated litigation [Order P-1551; see also *Ontario (Attorney General) v. Big Canoe* (2002), 62 O.R. (3d) 167 (C.A.); *Boulianne v. Flynn*, [1970] 3 O.R. 84 at 90 (Co. Ct.); *Meaney v. Busby* (1977), 15 O.R. (2d) 71 (H.C.)].

Termination of litigation may not end the privilege where the policy reasons underlying the privilege remain, despite the end of the litigation. Privilege may be sustained where, for example

- there is 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.)]

- the information constitutes “opinion work product” as opposed to “ordinary work product” [Order P-1551]

Termination of litigation does not negate the application of the Branch 2 statutory litigation privilege [*Ontario (Attorney General) v. Big Canoe* (2002), 62 O.R. (3d) 167 (C.A.)].

Representations of the parties

The City simply asserts that the records are:

. . . subject to common law solicitor-client communication privilege and that they contain information passed between the City’s solicitor and City staff ‘as part of the continuum aimed at keeping both informed so that advice may be sought and given as required’.

The records are also subject to common law litigation privilege, having been used ‘in order to obtain legal advice or to conduct or aid in the conduct of litigation’.

The City also claims the application of the statutory solicitor-client privileges described above and argues that despite the termination of the litigation with the appellant (the bylaw prosecution), there remains a significant risk of legal action being taken by the appellant against the City. As a result, it argues that the litigation privilege in the records continues regardless of the completion of the prosecution.

The appellant submits that because his prosecution has been completed for some time, any privilege that may have existed in the records has now lapsed.

Findings under section 12 and 38(a)

The City has applied the discretionary exemption in section 12 to Records 54 to 86 inclusive, 92, 96, 115, 116, 117, 118, 119, 122 and 135 inclusive. Since these records relate to the City’s prosecution of the appellant and the resulting actions by him, I found above that they contain his personal information and I must determine whether the records are exempt under section 38(a), taken in conjunction with section 12.

Record 54

This document is a one-page letter from the City’s counsel addressed to its Fire Prevention Office. The letter contains legal advice about certain procedural issues and falls within the ambit of common law (Branch 1) solicitor-client communication privilege under section 12. Accordingly, I find that it qualifies for exemption under section 38(a).

Record 55

Record 55 is a two-page letter dated April 26, 2002 that was addressed to the appellant from the City's counsel. Clearly, no privilege can exist in a communication between opposing parties, in this case the City and the appellant. I find that Record 55 does not qualify for exemption and, as no mandatory exemptions apply to it, I will order that it be disclosed to the appellant.

Record 56

Record 56 is a reporting letter from the City's counsel addressed to the Fire Chief reporting on certain actions he had taken on behalf of the City. I find that Record 56 qualifies for exemption under Branch 1 of section 12 as it represents a confidential communication between a solicitor and his client relating directly to the giving of legal advice.

Record 57

Record 57 is a letter from the City's counsel to one of its employees instructing the City to take a particular action. I find that this letter qualifies under Branch 1 of section 12 as it is a confidential communication between a solicitor and her client that addresses the provision of legal advice about a legal matter.

Records 58, 59, 60, 63, 64, 65, 66 and 67

Records 58, 59, 60, 63, 64, 65, 66 and 67 are letters to the appellant's counsel from the City's solicitors. Again, no privilege can exist in correspondence passing between opposing parties to litigation. I find that section 12 has no application to these records.

Records 61 (which is identical to Record 115) and 62

These documents are letters from the City's counsel to an official with its Fire Prevention Office relating directly to the provision of legal advice. I find that they qualify for exemption under section 38(a), taken in conjunction with section 12.

Records 68, 69, 70 and 71

Each of these documents represents confidential communications passing between the City's counsel and various officials about the outcome of certain attendances made in court by the solicitor on the City's behalf. I find that these records qualify for exemption under sections 12 and 38(a) as they fall within the ambit of the solicitor-client communications aspect of Branch 1 of section 12.

Records 72, 73, 74, 75 and 76

These records are letters addressed to officials with the City from its solicitors that speak to

certain logistical arrangements to be attended to prior to the appellant's trial. Again, I find that these represent confidential communications passing between a solicitor and client that relate directly to the provision of legal advice. They are, accordingly, exempt under sections 12 and 38(a).

Records 77, 78, 79, 80, 81, 82, 83, 85 and 86

Again, each of these documents are letters sent by the City's solicitors to various officials with the City addressing a number of legal issues relating to the appellant's prosecution and the City's approach to events which transpired following his conviction.

I find that each of them qualify from exemption under the solicitor-client communication aspect of Branch 1 of section 12. They are confidential communications between a solicitor and a client relating directly to the giving of legal advice by the solicitor. These records are, therefore, exempt from disclosure under section 38(a).

Record 84

Record 84 is a letter dated September 30, 2004 to the appellant from the City's counsel. As described above, no privilege can exist in a record which is provided to an opposite party in litigation. I will order that Record 84 be disclosed to the appellant as no other or mandatory exemptions apply to it.

Record 92

This document is a FAX cover page dated August 18, 2004 from an official with the City's Fire Prevention Office to its counsel. This communication served as a cover page of the Reasons for Judgment delivered by the court following the conviction of the appellant. I find that this document represents part of the "continuum of communications" passing between the solicitor and his client and therefore qualifies for exemption under Branch 1 of section 12 as a document covered by common law solicitor-client communication privilege. This record is exempt from disclosure under section 38(a).

Records 96 and 119

I have upheld the application of section 38(b) to the undisclosed portions of Records 96 and 119 above. Accordingly, it is not necessary for me to consider whether this information is also exempt under section 12.

Records 116 and 117

Records 116 and 117 are records prepared by counsel for the City setting out certain strategies and approaches to be taken in the course of the appellant's trial. In my view, these records fall squarely within the ambit of the solicitor-client communication aspect of Branch 1 of section 12

as they are the legal advisor's working papers directly related to seeking, formulating or giving legal advice. Records 116 and 117 qualify for exemption under section 12 and are exempt under section 38(a).

Record 118

Record 118 is an email message from one of the City's outside counsel to another outlining certain instructions she had received from the City with respect to the approach to be taken on the appellant's prosecution. Again, I find that this record qualifies as part of the legal advisor's working papers and is exempt under solicitor-client communication privilege, Part 1 of the section 12 exemption.

Record 122

Record 122 is a series of notes made by an inspector with the City's Fire Prevention office describing his involvement in "issuing a search warrant" at the premises owned by the appellant on February 13, 2002. I have not been provided with any evidence to indicate how this document might qualify for exemption under section 12, nor is there anything on its face to lead me to that conclusion. As a result, I find that Record 122 is not exempt under sections 12 or 38(a).

Records 127 to 135

These documents are a series of email communications passing between officials with the City and its in-house and outside solicitors. Each of the communications represent a part of a "continuum" discussion about the correct course of action to be followed by the City in relation to the appellant. I find that these records fall within the ambit of the common law solicitor-client communication privilege under Branch 1 of section 12. They qualify, accordingly, for exemption under section 38(a).

By way of summary, I find that:

- the undisclosed portions of Records 17, 27(c), 43 (which is the same as Record 138), 87, 90 (comprising two pages that are the same as Records 94 and 96), 91, 94, 96, 98, 102, 104, 108, 110, 111, 112, 113, 119, 121, 122 and 137 are exempt from disclosure under section 38(b) and Record 139, in its entirety, is exempt under section 14(1); and
- Records 54, 56, 57, 61 (which is identical to Record 115), 62, 68 to 83 inclusive, 85, 86, 92, 116, 117, 118 and 127 to 135 inclusive are exempt from disclosure under section 38(a), taken in conjunction with section 12.

and that the following records, or parts of records, must be disclosed to the appellant:

- Records 20, 42, 55, 58, 59, 60, 63, 64, 65, 66, 67, 84, 108, 122 and 143.

The City provided me with representations on the manner in which it exercised its discretion to deny access to the records that are subject to the discretionary exemptions in sections 38(a) and (b). Based on those submissions, and taking into account all of the circumstances surrounding this appeal, I find nothing improper in the way in which the city exercised its discretion and will not, accordingly, disturb it on appeal.

ORDER:

1. I order the City to disclose to the appellant copies of Records 20, 42, 55, 58, 59, 60, 63, 64, 65, 66, 67, 84, 108, 122 and 143 by providing him with copies by **November 29, 2005** but not before **November 24, 2005**.
2. I uphold the City's decision to deny access to the remaining records or parts of records.
3. In order to verify compliance with Order Provision 1, I reserve the right to require the City to provide me with copies of the records that are disclosed to the appellant.

Original signed by: _____
Donald Hale
Adjudicator

_____ October 24, 2005