Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

INTERIM ORDER MO-2241-I

Appeal MA06-347

Regional Municipality of Peel

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NATURE OF THE APPEAL:

The Regional Municipality of Peel (Peel) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a lawyer for a requester seeking access to:

> … any and all electronic and analogue recordings, written and electronic documents, and records that are in the possession of the Region of Peel, Peel Region and the Regional Municipality of Peel that pertains to [the requester].

For the reasons discussed in more detail below, Peel initially sent a decision letter to the requester indicating that there were no records responsive to the request. Ultimately, however, Peel did identify records responsive to the request and, as set out in a subsequent decision letter, granted partial access to them. Peel relied on the discretionary exemptions at sections 7(1) (advice or recommendations), 12 (solicitor–client privilege) and 38(b) (personal privacy) of the *Act* to deny access to the portions it withheld.

The requester (now the appellant) appealed Peel's decision.

At mediation the appellant advised she was no longer seeking access to two records that Peel had identified as responsive to the request. Accordingly, those records and the application of the section 38(b) exemption are no longer at issue in the appeal. Also, as confirmed in a further supplementary decision letter, Peel disclosed a severed version of a document entitled Service Manager Appeal File Review (one of the records at issue in this appeal) and conducted a further search for responsive records. This search did not locate any additional responsive records; however, the appellant asserted that other responsive records should exist, and the reasonableness of Peel's search for responsive records remained an issue in the appeal. Peel also took the position that the responsive records at issue in this appeal (described below) might contain the appellant's personal information. As a result, Peel further clarified that it was claiming the application of the section 38(a) exemption (discretion to refuse to disclose requester's own information), in conjunction with sections 7(1) and 12 of the *Act*, to deny access to the information it had withheld.

Mediation did not resolve the appeal and it moved to the adjudication stage of the process.

A Notice of Inquiry seeking representations on the issues in the appeal was sent to Peel, initially. Peel provided representations in response to the Notice. Along with its representations on the issues Peel referred to an email that it had not identified earlier. Peel subsequently disclosed this additional responsive record to the appellant. Peel asked that a portion of its representations be withheld due to confidentiality concerns. A Notice of Inquiry, as well as a copy of Peel's non-confidential representations, was then sent to the appellant. The appellant provided representations in response to the Notice. I determined that the appellant's representations raised matters to which Peel should be given an opportunity to reply. Accordingly, I sent a copy of the appellant's representations to Peel, along with a letter inviting their reply representations. Peel filed representations in reply.

RECORDS:

The records that are the subject of this appeal are a Service Manager Appeal File Review (which Peel marked as 123-06-86 (2)) and a two page email exchange (which Peel marked as 123-06-86 (4)). At issue are the withheld portions of the Service Manager Appeal File Review and the entirety of the two page email exchange.

DISCUSSION:

ADEQUACY OF THE SEARCH FOR RECORDS

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Section 18 of the *Act* states, in part:

> (2) The head of an institution that receives a request for access to a record that the institution does not have in its custody or under its control shall make reasonable inquiries to determine whether another institution has custody or control of the record, and, if the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,
>
> (a) forward the request to the other institution; and
>
> (b) give written notice to the person who made the request that it has been forwarded to the other institution.

> (3) If an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.
>
> (4) For the purpose of subsection (3), another institution has a greater interest in a record than the institution that receives the request for access if,
>
> (a) the record was originally produced in or for the other institution; or
>
> (b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy of it.

Where a requester claims that 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 of the *Act* [Orders P-85, P-221, PO-1954-I]. If I am satisfied that 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.

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 that it has made a reasonable effort to identify and locate responsive records [Order P-624].

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 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 that such records exist.

Peel's Representations

Peel submits that as a result of the misspelling of the appellant's name in the request, its initial search produced no responsive records. After the appellant's name was corrected, Peel transferred part of the request under section 18(2) of the *Act*, and also broadened the scope of the search to include a housing appeal database. That search yielded the responsive records detailed in Peel's subsequent decision letter. Another search during mediation produced the same result. To support its position that a reasonable search was conducted, Peel provides an affidavit sworn by the Document Services Co-ordinator for Peel's Housing and Property department. It details

the actions she took to locate responsive records, as well as identifies the individuals that she asked to conduct their own file search. One of the individuals she contacted was the Housing Administrator. She deposes that he searched his paper files concerning the appellant and an identified non-profit housing corporation.

Also accompanying Peel's representations is a copy of correspondence from Peel to the appellant's representative asking for any information that would assist Peel in its search for records the appellant asserts may be missing. After receiving his response, Peel conducted another search. It subsequently advised the appellant in writing that no additional documents were found.

The Appellant's Representations

The appellant takes issue with the adequacy of Peel's search for responsive records and questions whether the search was conducted in good faith. The appellant states that through a collateral Court proceeding, the appellant obtained a copy of a letter dated February 22, 2006 from Peel's Housing Administrator to the identified non-profit housing corporation, dealing with the withdrawal of the appellant's rental subsidy. The appellant submits that the existence of this letter puts in doubt Peel's assertion that it conducted a reasonable search, especially since the author of the letter was specifically asked to review his files for responsive records. The appellant submits that this supports an inference that the Housing Administrator "conducted a cursory search or purposely withheld certain documents from [this Office]".

Peel's Reply Representations

In its reply representations, Peel apologizes for the oversight and explains that its failure to identify the letter at issue was unintentional and a result of "human error". A letter from the Housing Administrator that Peel attaches to its reply representations explains in detail how the error occurred and that he was solely responsible for not locating the responsive record at the outset. In particular, he writes:

> At the time of the original request for any and all documents pertaining to [the appellant], I did a search on my computer using the search function. Document Services personnel conducted a search of Lotus Notes. We no longer have paper files; all our documents are either on our computers, or scanned into Lotus Notes. Therefore, any documents relating to this matter would be on my computer or in Lotus Notes. It should also be noted that the Housing Department does not keep individual tenant files, other than for Peel Living (our own) tenants. [A named building] is not one of our buildings.
>
> In the search function, under "Search All Files and Folders" you can search by (i) entering all or part of the file name or (ii) by entering a word or phrase in the body of the file. At the time of the original request, I searched for all documents pertaining to [the appellant] by entering "[the appellant]" using method (i), strictly

> out of habit. The document dated February 22, 2006 did not come up on this search. However, I have just used both methods of searching for documents in reviewing my search, and the document of February 22, 2006 came up when I entered "[the appellant]" as a word or phrase in the file i.e. method (ii). When I create new documents, I open up a previous document and make modifications. Unfortunately, in this instance, I neglected to rename the file. The document of February 22, 2006 was saved in Word under the original title "Letter to [individual] re: playgrounds." I also therefore overlooked it when documents were scanned. The document of February 22, 2006 was not located by Document Services because I inadvertently failed to submit the document for scanning.

Peel states that it has adopted new filing processes as a result of these events, "to ensure that such a situation does not occur in the future". Peel further asserts that the only document that was overlooked was the one identified by the appellant. Peel submits that "the searches made were otherwise reasonable".

Analysis and Finding

Notwithstanding Peel's assertion that the "searches made were otherwise reasonable" I find that I have not been provided with sufficient evidence to satisfy me that Peel has conducted a reasonable search for responsive records. Although I am satisfied with the explanation provided by the Housing Administrator regarding why the identified letter was not originally located, and that his subsequent search was reasonable, there is no evidence before me that the other individuals named in the affidavit performed the same type of searches ultimately conducted by the Housing Administrator. In addition, it does not appear that the Peel solicitor was ever asked to search her files for responsive records. Peel's failure to identify the February 22, 2006 letter initially, although inadvertent, coupled with the identification of an additional responsive record in the course of representations, no evidence being presented that the other individuals named in the affidavit performed the same type of searches ultimately conducted by the Housing Administrator and no evidence being presented of an effort being made to have the Peel solicitor search her files, leads me to conclude that Peel has not provided sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records under section 17 of the *Act*. I will therefore order that Peel conduct a further search for responsive records.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply to the information in the records, it is necessary to decide whether the record contains "personal information", and if so, to whom it relates.

Section 2(1) of the *Act* defines "personal information", in part, as follows:

> (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 if they relate to another individual,

(f) correspondence sent to an institution 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, 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.)].

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], but 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].

In my view, all of the records contain information about the appellant that meets the definition of "personal information" in paragraphs (b) (employment history), (c) (address), (g) (views of other individuals about the appellant) and/or (h) (the appellant's name along with other personal information relating to her).

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38(a) provides a number of exemptions from this right. It 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]

I will first address the application of the discretionary exemption under section 38(a), in conjunction with section 12.

SOLICITOR-CLIENT PRIVILEGE

Section 12 states as follows:

> 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.

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

Branch 1 – Common Law Privilege

Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for Branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)]

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.)].

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.) (*General Accident v. Chrusz)*].

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].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident v. Chrusz* (cited above); see also *Blank* (cited above)].

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] 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.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .

> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

There is a line of authority which holds that where the records at issue have not been prepared for the dominant purpose of litigation, copies of those records may become privileged if, through the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief. See *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129 at page 142 (B.C.C.A); *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (*Nickmar*) at pages 61-62 (S.C.).

Branch 2: Statutory Privileges

Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

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."

The Representations of Peel

Peel submits that the severed portions of the Service Manager Appeal File Review and the two page email exchange, in its entirety, are subject to solicitor-client privilege under section 12 of the *Act*.

Peel states that the two page email exchange at issue was forwarded to an identified Peel solicitor for the purpose of seeking her legal advice.

Peel states that the Service Manager Appeal File Review was an attachment to an email exchange between the Housing Administrator and the Peel solicitor and is a confidential communication between a solicitor and her client "formulating and giving direct legal advice regarding an appeal decision". This is the email that was identified as an additional responsive record in the course of representations. It consists of two portions. The bottom portion is an email from the Housing Administrator to the Peel solicitor requesting legal advice. The top portion is the Peel solicitor's response indicating that she is incorporating her comments into the copy of the Service Manager Appeal File Review that the Housing Administrator provided in his email.

The Representations of the Appellant

The appellant's representations do not address the application of section 12 of the *Act*. However, in the letter that commenced the appeal, the appellant's representative submits that Peel should not be permitted to rely on section 12 of the *Act* to withhold information pertaining to the appellant.

Analysis and Findings

Based on the evidence provided, I am satisfied that the two page email exchange, which deals with a legal issue, was forwarded to the Peel solicitor for the purpose of obtaining her legal advice. In addition, based on the evidence provided, I am satisfied that after receiving it from the Housing Administrator for the purpose of obtaining legal advice, the Peel solicitor incorporated her comments into the copy of the Service Manager Appeal File Review at issue in this appeal. Therefore, I am satisfied that both records at issue represent a continuum of confidential communications between a client and their solicitor made for the purpose of obtaining or giving professional legal advice. As a result, I find that the two page email exchange and the withheld portions of the Service Manager Appeal File Review fall within Branch 1 of section 12 of the *Act*. Therefore, subject to the discussion of Peel's exercise of discretion below, I find that the exemption in section 38(a) applies to them.

As I have found the two page email exchange and the withheld portions of the Service Manager Appeal File Review at issue to be exempt under section 38(a), in conjunction with section 12, it is not necessary for me to also consider whether the two page email exchange at issue or the withheld portions of the Service Manager Appeal File Review also fall within section 7(1) of the *Act*.

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. Because section 38(a) is a discretionary exemption, I must also review Peel's exercise of discretion in deciding to deny access to the withheld information. On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.

I may find that Peel erred in exercising its discretion where, for example:

- it did so in bad faith or for an improper purpose
- it took into account irrelevant considerations
- it failed to take into account relevant considerations

In these cases, I may send the matter back to Peel for an exercise of discretion based on proper considerations [Order MO-1573].

In the circumstances of this appeal, I conclude that the exercise of discretion by Peel to withhold the information that I have found to be exempt was appropriate, given the circumstances and nature of the information.

ORDER:

1. I uphold Peel's decision to deny access to the two page email exchange and the withheld portions of the Service Manager Appeal File Review.

2. I order Peel to conduct further searches for records responsive to the request. The scope of this search is to include documents residing with the Peel solicitor as well as the deponent of the affidavit and the individuals, other than the Housing Administrator (and of course, the appellant), named in her affidavit. I order Peel to provide me with an affidavit sworn by the individual(s) who conducted the search(es), confirming the nature and extent of the searches they conducted for responsive records within 30 days of this interim order. At a minimum the affidavit should include information relating to the following:

    (a) information about the employees swearing the affidavit describing his or her qualifications and responsibilities;

    (b) the date(s) the person conducted the search and the names and positions of any individuals who were consulted;

    (c) information about the type of files searched, the search terms used, the nature and location of the search and the steps taken in conducting the search; and,

    (d) the results of the search.

3. The affidavit referred to above should be sent to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavit provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in IPC Practice Direction 7.

4. If, as a result of the further searches, Peel identifies any additional records responsive to the request, I order Peel to provide a decision letter to the appellant regarding access to these records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.

5. I remain seized of this appeal in order to deal with any outstanding issues regarding the search for records arising from this appeal.

Original signed by: October 29, 2007
Steven Faughnan
Adjudicator