

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2666

Appeal MA11-142

City of Ottawa

October 31, 2011

Summary: The appellant sought access to all city records in which his name was mentioned. The city provided access to many records but denied access to portions of certain bylaw occurrence reports under sections 11(c) and (d) (economic and other interests) of the *Act*. It also denied access to some records under section 12 (solicitor-client privilege). This order finds that the section 12 exemption applies to certain records, but that the exemptions in sections 11(c) and (d) do not apply to the withheld portions of two bylaw occurrence reports.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 11(c), 11(d), 12, 38(a).

Orders and Investigation Reports Considered: MO-2030, MO-2248

OVERVIEW:

[1] Over the past number of years the appellant has been involved in bringing what he describes as a "significant social benefits issue" to the attention of the City of Ottawa (the city). Because a number of city officials and staff have been involved in these matters, the appellant made a request to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of the requester's "personal history file." He then identified certain city officials and staff by name and stated that he was interested in all information from their files in which his name is cited.

[2] In response to the request, the city issued a decision in which it granted access to numerous responsive records, but denied access to certain identified records or portions of records on the basis of the exemptions in sections 11(c) and (d) (economic and other interests), 12 (solicitor-client privilege) and 14(1) (personal privacy). The city also provided an index of the withheld records or portions of records, and indicated that portions of some of the records were denied as they were not responsive to the request. The appellant appealed the city's decision.

[3] During mediation, the appellant confirmed that he was neither seeking access to the information identified as non-responsive, nor to the personal information of other identifiable individuals. As a result, the portions of the records withheld as either non-responsive or as personal information under section 14(1) are no longer at issue in this appeal.

[4] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. During the inquiry into the appeal, I sought and received representations from the city and from the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[5] In addition, I noted that the records remaining at issue may contain the personal information of the appellant, as they either contain his name or refer to him. As a result, I also invited the parties to address the issue of whether the records contain personal information, along with whether section 38(a) (discretion to refuse requester's own information) applies in this appeal.

[6] In the city's representations, it identifies that one of the severed portions of the records (the severance on page 24) may contain another individual's personal information, and would be exempt under section 14(1) of the *Act*. The appellant does not address this issue in his representations. As the appellant has earlier indicated that he is not pursuing access to the personal information of identifiable individuals, I find that the withheld portion of page 24 of the records is no longer at issue in this appeal.

[7] In the discussion that follows, I reach the following conclusions:

- the records contain the personal information of the appellant;
- the withheld portions of some records do not qualify for exemption under section 38(a), in conjunction with section 11; and
- the withheld portions of some records qualify for exemption under section 38(a), in conjunction with section 12.

RECORDS:

[8] The records remaining at issue consist of the withheld portions of two Bylaw Services occurrence reports (portions of pages 23 and 25) and certain identified e-mails and attachments (a portion of page 6 and all of pages 64-71).

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Does the discretionary exemption at section 38(a) in conjunction with sections 11(c) and/or (d) apply to the withheld information on pages 23 and 25?
- C. Does the discretionary exemption at section 38(a) in conjunction with section 12 apply to the information on pages 6 and 64-71?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1)?

[9] 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;

[10] The city takes the position that the records contain the personal information of the appellant. It states:

As the access to information request was for records that contain the name of [the appellant], all records ... relate in some manner to interactions [the appellant] had in his personal capacity with various City of Ottawa employees. ... The City therefore submits that records contain information that would meet the definition of personal information in section 2(1) of the *Act* because the records contain recorded information about [the requester].

[11] On my review of the records, I find that all of the records contain the personal information of the appellant, as they include information relating to the incidents involving him, as well as other personal information about him (paragraph (h) of the definition). The withheld portions of pages 23 and 25 contain property information about commercial properties, and do not contain the personal information of any other identifiable individual.

B. Does the discretionary exemption at section 38(a) in conjunction with sections 11(c) and/or (d) apply to the withheld information on pages 23 and 25?

[12] Section 36(1) 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.

[13] Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where the exemption in section 11 would apply to the disclosure of that information. The city relies on section 38(a) in conjunction with sections 11(c) and (d) to deny access to the withheld portions of pages 23 and 25.

[14] Sections 11(c) and (d) of the *Act* read:

A head may refuse to disclose a record that contains,

(c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

[15] The purpose of section 11 is to protect certain economic interests of institutions. The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Orders P-1190 and MO-2233].

[16] For sections 11(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

[17] The city takes the position that the withheld portions of pages 23 and 25 qualify for exemption, and states:

Each page is a record of a complaint that the requester made to the City. The withheld information is about properties within the City of Ottawa that are not owned by the requester but relate to each respective complaint. The severed information consists of the property owner information, address, roll number, address pin, and legal description. The exempted municipal addresses on page 23 and 25 are addresses used for carrying out a business/official function ...

The City acknowledges that withheld information on [pages 23 and 25] are available to the public through one or more means including through viewing documents at the local Land Registry Office or viewing the assessment roll at a City of Ottawa Client Service Centre. The City has applied sections 11(c) and (d) of the *Act* to this information because the information was populated from data that the Municipal Property

Assessment Corporation (MPAC) provides to the City under a license agreement. MPAC business operations and license agreements in respect of assessment roll data are described ... in Order MO-2030 dated March 10, 2006 and Order MO-2248 dated November 29, 2007. In summary, the MPAC license restricts City disclosure of assessment roll information to the City allowing it to be viewed by members of the public at City of Ottawa Client Service Centre locations.

The City submits that failure of the City to comply with the release of assessment roll data requirements above will necessarily result in a City breach of the license agreement which may in turn result in MPAC ceasing to provide the City with access to assessment roll data. The City submits that as it requires access to this data for internal planning and municipal taxation purposes, any interruption or discontinuation of City access to this information could reasonably be expected to prejudice the economic and financial interests of the City.

[18] The appellant does not address this issue.

Analysis and findings

[19] I have reviewed the city's representations in support of its position that disclosure of the information severed from pages 23 and 25 will result in the harms set out in sections 11(c) and (d). As I understand the city's argument, it states that the information contained in the brief severances to pages 23 and 25, which relate to two different commercial properties, was obtained by the city from assessment roll information. The city is able to access the assessment roll information because of a licensing agreement it has with MPAC. This licensing agreement restricts the city from sharing the assessment roll data with other parties, and the city states that if it discloses the withheld information on pages 23 and 25 to the appellant, it will be in breach of its licensing agreement with MPAC. It then states that such a breach "may ... result in MPAC ceasing to provide the city with access to assessment roll data." If MPAC ceased to provide the city with assessment roll information, this would result in the harms in sections 11(c) and (d) to the city.

[20] The city also refers to orders MO-2030 and MO-2248 in support of its position that disclosure will result in the harms in sections 11(c) and (d).

[21] I have considered the city's representations on this issue, and have also reviewed orders MO-2030 and MO-2248. On my review of the records and the representations of the city, I am not satisfied that I have been provided with sufficiently detailed evidence to establish that the withheld portions of pages 23 and 25 qualify for exemption under sections 11(c) or (d).

[22] To begin, I note that in MO-2030 the request was for the names, addresses and property data of all of the residents of the City of Toronto, either in CD form or via direct access to an identified MPAC database. The record at issue in MO-2248 was an electronic copy of the 2004 assessment roll for all properties in the Cities of Hamilton and Burlington, and the Town of Grimsby.

[23] In both MO-2030 and MO-2248 Assistant Commissioner Brian Beamish carefully reviewed the requirements of sections 11(c) and (d) and the information at issue, and determined that disclosure of the requested database information in bulk in electronic format for free would result in the harms to MPAC under sections 11(c) and (d). In Order MO-2030 Assistant Commissioner Beamish stated:

If MPAC is required to disclose information from the OASYS database or through Municipal Connect to the appellant under the *Act*, it would be deprived of the significant amount of fees that a request of this size would generate. Moreover, it would be required to release the same information to anyone else who asked, which could reasonably be expected to jeopardize MPAC's ability to earn money in the marketplace. The OASYS database allows MPAC to generate reports and products that it routinely sells to mortgage brokers, financial institutions, and planners, which generates millions of dollars in revenues. *I find that if OASYS data must be disclosed in bulk for free in response to access requests under the Act, MPAC will be deprived of this revenue stream, which could reasonably be expected to prejudice its economic interests and be injurious to its financial interests.* [emphasis added]

[24] Similarly, in MO-2248, the Assistant Commissioner stated:

I ... am of the view that if MPAC is required to disclose the requested electronic assessment rolls to the appellant under the *Act*, it would be deprived of the significant amount of fees that a request of this size would generate. ... Accordingly, I find that disclosure of property assessment information at issue in this appeal, in bulk and for free, in response to access requests under the *Act*, would deprive MPAC of this revenue stream, which could reasonably be expected to prejudice its economic interests and be injurious to its financial interests.

[25] In this appeal, the city is asking that I apply the reasoning in Orders MO-2030 and MO-2248, which dealt with the bulk, electronic disclosure of property details for hundreds of thousands of properties, to the withheld portions of pages 23 and 25 at issue in this appeal, which are paper copies of five data fields for two properties. I find that the circumstances in Orders MO-2030 and MO-2248 are distinguishable from those in the current appeal and conclude that the reasoning and findings in those orders are not applicable to the information in this appeal for the reasons that follow.

[26] In the first place, as already identified, the information at issue is significantly different than the information at issue in Orders MO-2030 and MO-2248. The decisions in those orders concerned electronic access in bulk to database information of many properties. That is not the situation in this appeal, where some information relating to two properties is at issue.

[27] Secondly, the decisions in MO-2030 and MO-2248 dealt with the harms resulting from the possible loss of significant revenue streams to MPAC, as MPAC is able to regularly sell the database information to other parties. The city in this appeal has not taken the position that disclosure would result in harms to MPAC, rather, the city takes the position that disclosure will harm its own economic interest as a result of possible actions by MPAC.

[28] In addition, the representations provided by the city concerning the possible harms to it are neither detailed nor convincing. The city states that disclosure of the withheld portions of the two hardcopy reports which have some property information in them will "necessarily result in a City breach of the license agreement." However, the city has not provided me with a copy of the licensing agreement or the specific terms under which it can use the data it obtains from the assessment roll database. It is not credible to argue that any and all data extracted from the assessment roll database and used by the city for its own purposes can never be disclosed or revealed in any format due to the licensing agreement with MPAC. I do not have sufficient evidence to make that finding in this appeal.

[29] Furthermore, the city states that this breach of the licensing agreement "may in turn result in MPAC ceasing to provide the City with access to assessment roll data." This statement by the city is, in my view, speculative at best and does not qualify as "detailed and convincing evidence" that the harms in sections 11(c) and (d) would result from the disclosure of the information.

[30] For all of these reasons, I find that I have not been provided with sufficiently convincing evidence to establish that the disclosure of the limited information in the severed portions of pages 23 and 25 would result in the harms set out in sections 11(c) or (d). As a result, I find that the information is not exempt under sections 11 or 38(a), and I will order that it be disclosed.

[31] Having found that the severed information on pages 23 and 25 does not qualify for exemption under section 11, it is not necessary for me to consider the city's exercise of discretion to apply these exemptions to the property information at issue, which the city acknowledges is readily available to the appellant in other formats, and I decline to do so.

C. Does the discretionary exemption at section 38(a) in conjunction with section 12 apply to the information on pages 6 and 64-71?

[32] Section 36(1) 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.

[33] Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where the exemption in section 12 would apply to the disclosure of that information. The city relies on section 38(a) in conjunction with section 12 to deny access to the withheld portion of page 6 and all of pages 64-71.

[34] Section 12 of the *Act* 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.

[35] Section 12 contains two branches, a common law privilege and a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privileges

[36] 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

[37] 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.)].

[38] 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].

[39] 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.)].

[40] 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].

[41] 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

[42] Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co.*].

Branch 2: statutory privileges

[43] 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

[44] 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

[45] 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

[46] 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."

Representations

[47] The city states that certain records are exempt under section 12 of the *Act* as they constitute solicitor-client communications. With respect to the withheld portion of page 6, the city states:

The portion of page 6 ... that has been released to the requester is a legal question that the requester posed directly to a City lawyer. The withheld portion may be related to this question but is not the response of the lawyer to the requester. The withheld portion in this context is an internal communication involving legal counsel that involves the solicitation of legal advice and/or provision of legal advice/analysis. As such it constitutes direct communications of a confidential nature involving solicitors that are made for the purpose of providing a response to legal issue that affects the City as a client. The entire exchange is related to seeking and formulating legal advice and was implicitly confidential as the requester was not included in the communication.

[48] With respect to pages 64 to 70 of the records, which have been withheld in full, the city states:

...pages 65 to 70 are the attachment to the one-page email that is page 64 and the one-page email that is page 70. Pages 64 to 70 were only circulated internally between legal counsel and City staff and never shared with the requester. The communications in this particular context were about legal issues and are part of the confidential continuum of communications between City staff and its legal counsel. In respect of this particular record in particular, the City relies on precedent that solicitor-client 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).

[49] With respect to page 71, which consists of an email, the city states:

... the context of the email is a communication from a City lawyer that relates directly to a legal issue affecting staff. The City submits that the entire record is a solicitor client exchange that is implicitly confidential and

made in the context of legal advice concerning the legal issue affecting staff.

[50] The city also states that these records have not been disclosed or communicated to an outside party, and that the privilege has not been waived.

[51] The appellant does not directly address this issue in his representations.

Analysis and findings

[52] I have carefully reviewed the records that the city claims fall within the exemption in section 12 of the *Act*, and find that these records do qualify for exemption under that section.

[53] The withheld portion of page 6 is an internal email chain between city staff and legal counsel, made for the purpose of seeking, formulating and/or giving legal advice with respect to the matter discussed in the emails. As a result, I find that the withheld portions contain direct communications of a confidential nature between a solicitor and client (or their agents or employees), made for the purpose of obtaining or giving legal advice, and that it qualifies for exemption under the solicitor-client communication privilege aspect of branch 1 of section 12.

[54] Pages 64 and 71 also consist of email communications between city staff and legal counsel (or their agents or employees), also made for the purpose of seeking, formulating and/or giving legal advice with respect to the matters discussed in the emails. Page 70 is a duplicate of a portion of the email chain on page 64. Pages 65-69 consist of a document prepared by the city's legal counsel, and contain legal advice. It is an attachment to the email communication between legal counsel and city staff on page 64. On my review of these records, I am satisfied that these pages of records also contain direct communications of a confidential nature between a solicitor and client (or their agents or employees), made for the purpose of obtaining or giving legal advice, and that they also qualify for exemption under the solicitor-client communication privilege in branch one of section 12.

[55] Accordingly, I find that the withheld portion of page 6, and pages 64-71 in their entirety, are subject to solicitor-client communication privilege under Branch 1 of section 12 of the *Act*. Because these records also contain the personal information of the appellant, they are exempt from disclosure under section 38(a) of the *Act*, subject to any finding I may make below on the exercise of discretion.

Exercise of discretion

[56] As noted, sections 12 and 38(a) are discretionary exemptions. When a discretionary exemption has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the records. On appeal, the Commissioner may determine whether the institution failed to do so.

[57] The Commissioner may find that the institution erred in exercising its discretion where, for example,

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

[58] In such a case this office may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

[59] In response to the issue of whether the city properly exercised its discretion in the circumstances of this appeal, the city provided representations identifying why it chose to exercise this discretion to apply the exemptions.

[60] With respect to its application of section 12 to the records, the city submits that it applied the exemption in accordance with the purposes of the *Act* and for no improper/irrelevant purposes and considered all relevant circumstances. The city also submits that it disclosed as much of the responsive records as can be reasonably severed without disclosing material which was exempt. It then states:

... the City submits that the requester has received a significant number of records that included communications with legal counsel at [the city]. The City in applying [section 12] focused on exempting only internal correspondence involving legal counsel that contained consideration of legal issues that affect the City including City staff. The City submits that this approach is in accordance with protection of solicitor-client privilege at common law and is consistent with the purpose of section 12 of the *Act* that a client may confide in his or her lawyer on a legal matter without reservation.

[61] The appellant does not directly address the issue of the exercise of discretion by the city.

[62] On my review of all of the circumstances surrounding this appeal, particularly the records withheld on the basis of sections 38(a) and 12, the records which have been disclosed to the appellant, and the city's representations on the manner in which it exercised its discretion to apply the exemptions in sections 12 and 38(a), I am satisfied that the city has not erred in the exercise of its discretion to apply those exemptions to the identified records. Accordingly, I uphold the city's exercise of discretion.

ORDER:

1. I order the city to disclose the withheld portions of pages 23 and 25 to the appellant by sending the appellant a copy of the information by **November 22, 2011**.
2. I uphold the city's decision that pages 64-71 and the withheld portion of page 6 qualify for exemption under sections 12 and 38(a) of the *Act*.

Original Signed by: _____
Frank DeVries
Adjudicator

_____ October 31, 2011