Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2739

Appeal MA11-165-2

Toronto Community Housing Corporation

May 25, 2012

Summary: The appellant submitted a multi-part request for records pertaining to rents calculated by the TCHC, including her own rent. The TCHC granted access to many records, but denied access to some of the records or portions of them on the basis of sections 7(1), 12 and 38(a). The appellant appealed the denial of access and also took the position that additional responsive records should exist. The TCHC is ordered to disclose portions of one withheld record, and its decision to withhold the remaining records is upheld. In addition, the TCHC's search for responsive records is upheld.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1), 2(2.1) (definition of personal information), 7(1), 7(2)(a), 12, 17, 38(a).

OVERVIEW:

[1] The Toronto Community Housing Corporation (TCHC) received a multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for records relating to the manner in which rent (including the appellant's rent) is calculated by the TCHC, including internal and external regulations, legislation, guidelines, internal documents, policies, correspondence, meeting minutes, rent review schedules, a group survey, lease, and instructions.

[2] The TCHC issued a decision letter on March 16, 2011 in which it responded to a number of the items in the request. It issued a second decision dated April 4, 2011 which responded to some of the remaining items.

[3] In its letter of April 4, 2011, the TCHC stated that it was still searching for certain additional records, and that it would issue a third decision within two weeks. When two weeks had passed and the appellant had not received the third decision, she filed a "deemed refusal" appeal with this office, and file MA11-165 was opened. The TCHC then issued a third decision on May 3, 2011 in which it granted access to a number of responsive records, and denied access to some records or portions of records on the basis of the exemptions in section 7(1) (advice or recommendations), 12 (solicitor-client privilege) and 38(b) and 14(1) (personal privacy).

[4] As a result of the May 3, 2011 decision, appeal file MA11-165 was closed; however, the appellant appealed the May 3, 2011 decision, and the current appeal (MA11-165-2) was opened.

[5] During mediation, the appellant confirmed that the severances made to the documents under sections 14(1) and 38(b) could be removed from the scope of the appeal. As a result, the application of those exemptions to the records severed on that basis are no longer at issue in this appeal.

[6] Also during mediation, the appellant confirmed that the severances under sections 7(1) and section 12 are still at issue in this appeal. Because the information may also contain the personal information of the appellant, section 38(a) (discretion to refuse requester's own information) was also raised as an issue in this appeal. In addition, the appellant maintained that certain specific records ought to exist, and the issue of whether the search for responsive records was reasonable was added as an issue in this appeal.

[7] Mediation did not resolve this appeal, and it was transferred to the adjudication stage of the process where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the TCHC, initially, and received representations in response. I then sent the Notice of Inquiry, along with a copy of the non-confidential portions of the TCHC's representations, to the appellant, who also provided representations in response.

[8] In the Notice of Inquiry sent to the parties, I also noted that, during mediation, the appellant specifically identified the records she believed ought to exist, and the search issue was confined to those specific records in this appeal, as identified in more detail under the search issue, set out below.

Preliminary note

[9] Two earlier decisions issued by the TCHC (on March 16, 2011 and April 4, 2011) have also been appealed by the appellant. Both of those decision letters indicated that access was provided to certain records, and access was denied to some other records on the basis of the exemptions in sections 14(1) and 38(b). The appeal of those decisions is also before me in a separate appeal (MA11-169).

[10] Because the records at issue, the exemptions claimed, and the search issues are different for that file and the current file (MA11-165-2), I processed these two files separately. As a result, this order, which deals with Appeal MA11-165-2, only addresses issues raised in the May 3, 2011 decision letter, as well as the specific reasonable search issues identified by the appellant in this appeal (concerning parts D3, D9 and D12 of her request). In that regard, the May 3, 2011 decision addresses records responsive to parts D1 and D2 of the initial request, as well as additional requests addressed in that letter, which are numbered C8, C12, C13, C14, C15, E3, E4, E5 and E6.

Preliminary Issues

Appellant's request that the file return to mediation

[11] In her representations, the appellant argues that this appeal ought to be returned to the mediation stage of the process, and refers to various actions of the TCHC and the mediator, as well as to what she believes are discrepancies in the information provided, in support of her position that this matter ought to be returned to mediation.

[12] I have considered the appellant's request that the file be returned to mediation. I note that this file, and the companion file MA11-169, have both involved significant mediation efforts, as these files have resulted from requests with multiple parts, which have been amended and supplemented during the time that they were being processed. I also note that the TCHC has provided hundreds of pages of responsive records to many parts of the requests.

[13] In my view, no useful purpose would be served in returning this file for further mediation. Many issues were addressed in mediation, and the remaining issues are addressed by the parties in their representations. Furthermore, I note that the *Act* does not mandate that the mediation stage of the inquiry take any particular form, involve any specified level of contact with the parties, be of a certain duration or necessarily enjoy a particular level of success.[1] In the circumstances, I will not return this file to mediation.

[1] See Order PO-2187.

Other issues raised by the appellant concerning the TCHC's May 3, 2011 decision

[14] In her representations the appellant also raises a number of additional issues regarding the TCHC's response dated May 3, 2011, specifically, the responses to items C8, C14, E4 and E6.

Request C8

[15] With respect to request C8, the appellant refers to concerns she has about the copies of certain records she has received as a result of this request (specifically, pages 2-18 and 2-22). I note, however, that the response in the May 3, 2011 decision letter by the TCHC specifically states that the appellant has received these records as a result of previous requests (including the responses in the March 16, 2011 and April 4, 2011 decisions). Furthermore, these two specific pages (2-18 and 2-22) are records at issue in Appeal MA11-169. As a result, I will review these issues raised by the appellant in the context of Appeal MA11-169, and not the current appeal.

Request E6

[16] With respect to request E6, this request is for the job description of a named Operating Unit Manager (for an identified unit). The TCHC's response to this request in its May 3, 2011 letter indicates that this specific item was already requested by the appellant in another request to the TCHC, and the TCHC refers to its earlier request number. I note that this earlier request was also appealed by the appellant, and issues regarding the responsive record, including search issues, are addressed in the appeal arising from that earlier decision (Appeal MA11-16). Because that issue is being addressed in the context of Appeal MA11-16 by another adjudicator, I will not review this issue in the current appeal.

Request C14

[17] With respect to request C14, this request is for "External Regulations (City Guidelines, RGI Guide, MAH on-line Postings or notices, etc.) about transferring the tenant from one address to another. The procedure, what documents should be collected, who signs the transfer, etc." In response to this request, the TCHC stated that there are no responsive records. It also referred the appellant to legislation (the *Social Housing Reform Act, 2000*) and certain standards (City of Toronto Occupancy Standards and City of Toronto Property Standards By-law) which apply to the Toronto Community Housing Tenant Transfer Policy. I also note that, in the course of this appeal, the appellant provided this office with the portions of that transfer policy that refer to the "Applicable Legislation and Reference Documents" which include the legislation and standards referred to by the TCHC.

[18] The appellant takes the position that, in responding to her request, the TCHC ought to provide the exact page of the listed documents which contain the requested information – specifically, the page of the *Social Housing Reform Act, 2000*; the number of the Occupancy Standard with the exact page; and the year, number and page of the Property Standards By-law. She also states that the TCHC ought to print out the specific pages of these documents and provide them to her. She also takes the position that the TCHC's response to this request is contradictory, indicating that no records exist but also referring to the legislation, occupancy standards and by-laws that contain the requested information.

[19] I do not accept the appellant's position. With respect to her argument that the TCHC is obliged to research the specific sections of the legislation referenced in the TCHC Tenant Transfer Policy, I do not accept that a request for access to records under the *Act* requires an institution to conduct research of that nature in the circumstances of this appeal. Regarding her concern that the TCHC's response is contradictory, in light of the wording of the request and the material provided by the appellant, I find that the TCHC's response is not contradictory. It's response to the specific request clearly states that there are no responsive records. It then refers the appellant to other types of material which it believes may be of assistance to her.

Request E4

[20] With respect to Request E4, this request is for regulations which set the limits on earnings of TCHC tenants. The TCHC's response to this request is that there are no responsive records. I note that this request follows request E3 which is for regulations which set the limits on earnings of tenants in social housing. The appellant did not indicate that she was appealing either of these decisions earlier in this appeal, but has identified her concerns about the TCHC's response to request E4 for the first time in her representations. She states:

> In social housing there should be a top limits for annual income. Thousands of low income people are waiting for subsidized apartments. It is against common sense to give apartments in subsidized building to … people with stable income. TCHC denies that such limits exist, but search certificate was not provided.

[21] There appears to be some discrepancy in the material provided by the appellant. The TCHC has stated that there are no records responsive to the appellant's request for limits on earnings of TCHC tenants. The appellant states that limits ought to exist, but also refers to the limits that should exist for subsidized housing. However, the appellant clearly indicated that she was not appealing the TCHC's decision on E3 (relating to tenants in social housing), which was also that no responsive records exist.

[22] I also note that, in the material provided by the appellant in the course of this appeal, she had provided information relating to circumstances where rent-geared–to–income (RGI) households have an increase in income, and the fact that certain increases would result in a rent increase to the market rate. The material also references the fact that, if the household needs RGI assistance after 12 months of paying market rent, they must reapply for RGI status.

[23] Because of the discrepancies set out above, and in light of the information provided by the appellant, I will not review the TCHC's decision in response to request E4 in this order. If the appellant's position is that the TCHC's search for records responsive to request E4 was not reasonable, she has not provided sufficient evidence to support that position. If her concern is that the TCHC misinterpreted her request, and should have interpreted the request to be for the upper limit of subsidized tenants (notwithstanding her similar request made in E3), the appellant is invited to submit a new request for this information.

RECORDS:

[24] The records remaining at issue are pages D-1-4 to D-1-8, D-1-17 to D-1-24, D-1-86, D-1-120 to D-1-125, D-1-225 to D-1-226 and D-1-276 in full, and the severed portions of D-1-80 and D-1-115. All of the records consist of emails or email strings, some with attachments.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1)?
B. Are the records exempt under section 38(a) in conjunction with section 12?
C. Are the records exempt under section 38(a) in conjunction with section 7(1)?
D. If the discretionary exemption at section 38(a) applies, did the TCHC properly exercise its discretion?
E. Did the TCHC conduct a reasonable search?

DISCUSSION:

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

[25] 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.

[26] 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].

[27] In its representations, the TCHC states that the responsive records remaining at issue relate to issues in dispute between the appellant and the TCHC. Based on my review of the records remaining at issue, which address issues regarding the appellant's rent, I find that the records contain the personal information of the appellant. Many of the records refer to the appellant by name, and therefore constitute her personal information under paragraph 2(1)(h) of the definition. Although some records do not mention the appellant by name (for example, Record D-1-86), it is clear that these

records relate to the appellant and contain her personal information. As a result, I am satisfied that all of the records remaining at issue contain the personal information of the appellant.

[28] In addition, the TCHC has identified that Record D-1-115 contains the personal email address of a TCHC employee. I note, however, that this information was removed from the scope of this appeal during mediation, and is not at issue in this appeal.

[29] In summary, I find that the records or portions of records remaining at issue contain the personal information of the appellant, and do not contain the personal information of other identifiable individuals.

B. Are the records exempt under section 38(a) in conjunction with section 12?

[30] 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.

[31] Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information. Because section 38(a) is a discretionary exemption, even if the information falls within the scope of section 12, the TCHC must nevertheless consider whether to disclose the information to the appellant.

Solicitor-client privilege

[32] The TCHC claims that the solicitor-client privilege in section 12 applies to Records D-1-4 to D-1-8, D-1-17 to D-1-24, D-1-225, D-1-226 and D-1-276. These records consist of emails and email strings, including attached documents.

[33] 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.

[34] 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

[35] 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

[36] 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.[2]

[37] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[3]

[38] 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.[4]

[39] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[5]

[40] 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.[6]

Litigation privilege

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

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[2] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[3] Order P-1551.
[4] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[5] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[6] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

Branch 2: statutory privileges

[42] 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

[43] 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

[44] 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

[45] 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

[46] The TCHC takes the position that the records for which it claims solicitor-client privilege fall within Branch 1 of the section 12 exemption because the records 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 professional legal advice."

[47] The TCHC provides a brief review of the legal proceedings in which the appellant and the TCHC have been involved. It states:

> … In 2009 and early 2010 (at the time of the creation of some of the records), the appellant was in litigation with [TCHC] via applications at the Landlord and Tenant Board ("LTB") and appeal to the Divisional Court. There was also an inquiry to the City of Toronto Ombudsman's office. Following the closure of the litigation cases at the LTB and the Divisional Court, the appellant was still not satisfied with the outcomes and [TCHC] staff have expected further litigation with respect to the appellant's grievances. In fact, the appellant has since filed a Human Rights complaint against [TCHC] at the Ontario Human Rights Tribunal over the same issues.

[48] The TCHC then refers to the records at issue, and provides representations in support of its position these records qualify for exemption under section 12. It states:

> [The TCHC] employs in-house Legal Counsels, in this case, [two named individuals], to litigate and provide advice on certain matters on the corporations behalf. In this particular matter, the client is considered to be the Operating Unit that administers the appellant's building. … Legal Counsel must confer with the client on matters, and also advise the client on the progress of the proceeding. Legal Counsel must gather information in order to render an opinion or give advice on the matter, and these emails are a medium for this exercise.
>
> The information in the correspondence between [TCHC's] legal counsel and their client involve issues relating to the issues in dispute at litigation between [TCHC] and the appellant and the gathering of information in this regard.

[49] The TCHC acknowledges that not all of the information contained in the records is direct legal advice, but refers to court decisions which state that the privilege can also extend to the passing of information between legal counsel and the client to ensure that counsel has all of the relevant information. The TCHC also acknowledges that not every email is between a lawyer and a client, but states:

> Most, if not all, of the correspondence between staff members of [TCHC] relate to issues in dispute via litigation (existing and contemplated) involving the appellant. The disclosure of the records remaining at issue will directly or indirectly reveal communications protected by the privilege.

[50] The TCHC also states that all of the communications at issue involve discussions regarding existing or contemplated litigation involving the appellant, and that TCHC employees should be able to "communicate the facts of the case to legal counsel." It states:

> The fact that almost all of these emails were generated solely for the purposes responding to the appellant's questions regarding her rent calculations - the key issue at litigation between the parties - supports this portion of the test. …
>
> … the litigation between the parties commenced in 2009, and litigation with respect to the same issues, albeit at a different forum, is still ongoing. … 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, CA.)]. The emails that

> aren't directly seeking advice or gathering facts for the case fall under this test.
>
> … Each of these emails passing between counsel and client relate directly or indirectly to the conduct of the litigation.

[51] The appellant's representations focus on her position that the TCHC improperly claimed the section 12 exemption for the records. The appellant submits that much of the information provided in the TCHC's representations is irrelevant. In addition, she argues that the TCHC improperly exercised its discretion to apply this exemption, which I address later in this order.

Analysis and findings

[52] On my review of the records which the TCHC claims qualify for exemption under section 12 of the *Act*, I am satisfied that these records constitute direct communications of a confidential nature between a solicitor (in-house legal counsel) and his client (the TCHC, through its employees), or between two in-house solicitors, made for the purpose of giving professional legal advice. More specifically, I make the following findings:

> *Records D-1-4 to D-1-6, D-1-17 to D-1-24, D-1-225, D-1-226 and D-1-276* all constitute emails or strings of emails between two in-house solicitors which address issues concerning the TCHC's proposed response to certain questions. I note that some of these records are duplicates, as some of the email strings include copies of the earlier emails. On my review of these records, I find that they are direct communications of a confidential nature between two in-house counsel relating to a matter in which counsel is providing legal advice, and that there records qualify for exemption under the solicitor-client communication privilege in Branch 1 of section 12 of the *Act*.
>
> *Records D-1-7 to D-1-8* is an email sent from in-house counsel to his client, identifying and summarizing certain matters addressed by the legal department. I am satisfied that this email is a direct communication of a confidential nature between in-house counsel and his client (TCHC staff), and that it qualifies for exemption under the solicitor-client communication privilege in Branch 1 of section 12 of the *Act*.

[53] Accordingly, I find that Records D-1-4 to D-1-8, D-1-17 to D-1-24, D-1-225, D-1-226 and D-1-276 are subject to solicitor-client communication privilege under Branch 1 of section 12 of the *Act*. Because these records contain the personal information of the appellant, they are, therefore, exempt from disclosure under section 38(a) of the *Act*, subject to any finding I may make below on the exercise of discretion.

C. Are the records exempt under section 38(a) in conjunction with section 7(1)?

[54] 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.

[55] Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information. Because section 38(a) is a discretionary exemption, even if the information falls within the scope of section 7, the TCHC must nevertheless consider whether to disclose the information to the appellant.

Advice and recommendations

[56] The TCHC takes the position that the discretionary exemption in section 7(1) applies to all of Records D-1-86 and D-1-120 to D-1-125, and to portions of Records D-1-80 and D-1-115.

[57] Section 7(1) states:

> A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[58] The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.[7]

[59] Previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information.[8]

[60] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised.[9]

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[7] Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.).
[8] See Order PO-2681.
[9] Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993,

[61] Advice or recommendations may be revealed in two ways[10]:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[62] It is implicit in the various meanings of "advice" or "recommendations" considered in *Ministry of Transportation* and *Ministry of Northern Development and Mines* (cited above) that section 7(1) seeks to protect a decision-making process. If the document actually suggests the preferred course of action it may be accurately described as a recommendation. However, advice is also protected, and advice may be no more than material that permits the drawing of inferences with respect to a suggested course of action but does not recommend a specific course of action.[11]

[63] There is no requirement under section 7(1) that the institution be able to demonstrate that the document went to the ultimate decision maker. What section 7(1) protects is the deliberative process.[12]

Representations

[64] In support of its position that the identified records qualify for exemption under section 7(1), the TCHC states:

> The advice and recommendations at issue are clearly set out in the above correspondence and suggest a course of action to be followed. The disclosure of this information could reasonably be expected to inhibit the free flow of advice or recommendations of staff members in future correspondence. Staff members need to be able to make recommendations freely and frankly without unfair pressure.
>
> In Order P-484, records containing recommendations regarding a suggested course of action in relation to a civil action commenced by the appellant were exempt as advice and recommendations under [the *Act*]. Section 7 clearly was intended to supplement the principle of solicitor and client privilege in order to have the same sorts of protections apply to those circumstances where the person giving advice was not legal

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upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

[10] Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above).

[11] *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125 (C.A.).

[12] *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, (cited above).

> counsel, or where it was not certain that the person receiving the advice was the client.
>
> Any advice given in the records at issue is for the benefit of [TCHC] as a government agency. The advice addresses how to respond to a tenant with whom [TCHC] is at, or is expecting to be in litigation with. Therefore, [TCHC] staff are receiving advice in its role as a government agency and as a party to the litigation in its own right.

[65] The appellant's representations on the issue of the possible application of section 7(1) focus on her concerns about the manner in which the TCHC exercised its discretion (which I review below), as well as the reasons why she is requesting the documents. The appellant also argues that the TCHC's arguments in support of a section 7(1) claim are wrong, and the information ought to be disclosed to her. In addition, she states that the exceptions to the section 7(1) exemption, found in sections 7(2)(a) and (k), apply to some of the records. These sections read:

> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains:
>
> > (a) factual material;
> >
> > (k) the reasons for a final decision, order or ruling of an officer or an employee of the institution made during or at the conclusion of an exercise of discretionary power conferred by or under an enactment or scheme administered by the institution.

[66] I will review each of the records for which the section 7(1) exemption claim is made to determine whether these records qualify for exemption under that section.

Analysis and findings

Withheld portion of Record D-1-80

[67] This record consists of an email chain between TCHC staff. The only portion of this email chain that was withheld from the appellant is a two-line email in which a staff person (who is also counsel for the TCHC) provides information about a matter referred to in the other emails in the chain. On my review of this withheld information, I am satisfied that the staff person is providing his advice on a recommended course of action to take regarding a particular matter. In the circumstances, I am satisfied that disclosure of this withheld information would reveal the staff person's advice and would permit the drawing of inferences with respect to a suggested course of action for the

purpose of section 7(1). As a result, this withheld portion qualifies for exemption under the *Act*.

Record D-1-86

[68] This document consists of three very brief emails in an email string between the same staff involved in the email string in Record D-1-80 (above). The middle email contains information similar to that contained in Record D-1-80, from the same staff person. Similar to my finding above, I am satisfied that disclosure of this withheld information would reveal the staff person's advice and would permit the drawing of inferences with respect to a suggested course of action for the purpose of section 7(1). I also find that, given the nature of the information in the other two emails, and their brevity, there is no purpose served in severing theses emails and providing them, as disclosure of these emails without the middle email would reveal only "disconnected snippets."[13]

Withheld portion of Record D-1-115

[69] This record consists of an email chain between TCHC staff. The only portion of this email chain remaining at issue is a fairly lengthy email from a staff person (who is also counsel for the TCHC). In this email, the staff person provides what can be described as background information about certain issues to another staff person.

[70] On my review of this withheld email, I am not satisfied that it qualifies for exemption under section 7(1). This email contains information about certain dealings and interactions the TCHC has had with the appellant. In my view this information is essentially factual, background information about these dealings, and does not contain "advice or recommendations" for the purpose of section 7(1), nor could any such information be inferred from the disclosure of this information. In that regard, this information can also be described as "factual material," and the exception found in section 7(2)(a) could also apply to this information. As a result, I find that the withheld portion of Record D-1-115 remaining at issue does not qualify for exemption under section 7(1), and I will order that it be disclosed.

Records D-1-120 to D-1-125

[71] Pages D-1-120 to D-1-121 consist of a lengthy email from a TCHC staff person to other TCHC staff attaching a draft copy of a letter to be sent to the appellant. The draft letter is contained on pages and D-1-122 to D-1-123. Pages D-1-124 to D-1-125 include a duplicate copy of the lengthy email in D-1-120 and D-1-121, but also include two brief emails as part of a chain.

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[13] See Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, (1997), 10 OAC 71 (Div. Ct.).

[72] On my review of these records, I am satisfied that they qualify for exemption under section 7(1) of the *Act*.

[73] The draft letter that comprises a large part of pages D-1-122 to D-1-123 is an early draft of a letter to be sent in response to certain issues raised by the appellant. It is clearly a draft copy of a final letter which was sent to the appellant. From the draft of the letter, it is clear that it was intended to be sent by the individual responsible for responding to the appellant's issues, and not by the person who drafted this version of the letter. In addition, the emails on pages D-1-120 to D-1-121 and D-1-124 to D-1-125, including the brief emails on D-1-124, provide comments and background on the draft, or consist of questions to specific individuals asking about aspects of the draft letter. I find that the disclosure of these records, which are drafts of a different, final letter which was sent, would reveal a recommended course of action, and that these records qualify under section 7(1) of the *Act*.

Summary

[74] In summary, I have found that the withheld portion of Record D-1-115 remaining at issue does not qualify for exemption, but that the other records or portions of records do qualify for exemption under section 7(1). Because these records also contain the personal information of the appellant, they are also, therefore, 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

[75] As noted, sections 7, 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.

[76] 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

[77] 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)].

[78] The TCHC states that it properly exercised its discretion to deny access to the records remaining at issue. It refers to the fact that it has disclosed many records to the appellant, and that it has also severed certain records, withholding only portions of them. It also refers to the litigation between it and the appellant as a factor it considered, and states that it attempted to balance the appellant's interest in the records with the TCHC's right to claim "limited and specific" exemptions to certain portions of the records.

[79] The appellant takes the position that the TCHC did not exercise its discretion, and that it should not have withheld records. She also states that, because sections 7(1) and 12 are discretionary, the TCHC ought to explain and provide proof of how the disclosure of the information on each page can harm the TCHC.

[80] The appellant also states that the TCHC erred in exercising its discretion because it used the exemptions to "cover up their wrongdoings," and the appellant refers to certain allegations she makes about the actions of the TCHC. The appellant also states that the TCHC failed to take into account relevant considerations. She refers to her medical condition, which she states the TCHC was aware of, and identifies why she believes this ought to have been taken into account in the TCHC's decision-making.

[81] The appellant states that she wants the information in the records because she takes the position that the TCHC improperly calculated her rent, and that she needs to know "who and when the wrong decision was made."

[82] After considering the representations provided to me from both parties regarding the TCHC's exercise of discretion, I am satisfied that the TCHC has properly exercised its discretion to apply the exemptions to the withheld records or portions of records. I note that the TCHC has identified many pages of responsive records, and that access was granted to many of them. Furthermore, although the appellant is clearly unhappy with the actions of the TCHC relating to her specific concerns and believes the TCHC ought to have considered additional factors, I have not been provided with sufficient evidence to satisfy me that these additional factors ought to have been considered by the TCHC, particularly in light of the information that has been disclosed to the appellant.

[83] As a result, on my review of all the circumstances in this appeal, I am satisfied that the TCHC has not erred in exercising its discretion to deny access to the portions of the records at issue. It has not done so in bad faith or for an improper purpose, nor has it taken into account irrelevant considerations or failed to take into account relevant ones. Accordingly, I find that the TCHC properly exercised its discretion to deny access to the records or portions of records which I find qualify for exemption under section 7(1), 12 and 38(a).

E. Did the TCHC conduct a reasonable search for records?

[84] In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether the TCHC has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the TCHC will be upheld. If I am not satisfied, further searches may be ordered.

[85] A number of previous orders have identified the requirements in reasonable search appeals (see, for example, Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, acting-Adjudicator Mumtaz Jiwan made the following statements with respect to the requirements of reasonable search appeals:

> … the *Act* does not require the [institution] to prove with absolute certainty that records do not exist. The [institution] must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

[86] I agree with acting-Adjudicator Jiwan's statements.

[87] Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

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

[89] As identified above and clearly set out in the Notice of Inquiry sent to the parties, in the course of processing this appeal the appellant specifically identified the records she believed ought to exist, and stated that the search issues in this appeal were confined to three specific categories or types of records. These records are: 1) records relating to meetings where the appellant's rent was discussed [D3]; 2) records relating to the annual rent review schedule for April 2009 [D9]; and 3) records relating to the Introduction to [a named company] research [D12].

Representations and findings

[90] The TCHC takes the position that it has taken all reasonable efforts to obtain the documents requested by the appellant. It states:

> For each of the requested records, TCHC assigned one of its paralegals, [a named paralegal], to coordinate the search efforts. [The named paralegal] is experienced with the appellant's request and claims, having handled all of the appellant's previous *MFIPPA* requests. She is also knowledgeable about TCHC's responsibilities under *MFIPPA* and is responsible for a number of *MFIPPA* files and duties. As such, she is cognizant of the duty to conduct a reasonable search for records.
>
> In response to the appellant's request, [the named paralegal] contacted all relevant staff to request all documents related to the appellant (not just the document requested by the appellant with respect to the FOI request). She went through these documents, as well as the appellant's tenant file and litigation files to respond to the appellant's request.
>
> A testament to [the named paralegal's] considerable efforts is the hundreds of pages of records that have been provided to the appellant as part of this and other FOI requests.

[91] The TCHC also provides the following position on the appellant's concerns about the possible existence of additional records:

> It should also be stated that the appellant's main argument is that certain records *should* exist, but has not provided a reasonable basis for concluding that the records *do* exist. The onus is on the appellant to provide a reasonable basis for concluding that the records do exist, and we respectfully submit that the appellant has not provided the requisite proof to show that there is a reasonable basis to conclude the records exist.

[92] The TCHC then provides specific representations on the three search issues identified in the Notice of Inquiry. The appellant also provides representations on these issues. I will review each of these requests.

Request D3: records relating to meetings where the appellant's rent was discussed

[93] The TCHC states:

> With respect to the records relating to meetings where the appellant's rent was discussed [D3]… [the named paralegal] reviewed all the

> documents related to the appellant that were sent to her, and only one document related to a meeting was found and, hence, provided to the appellant. The fact that there was only one responsive record is not surprising as it is unlikely that many meetings took place to determine the calculation of the appellant's rent. Rent calculation is a routine matter at Toronto Community Housing and usually does not require meetings.
>
> As can be [seen] in the records at issue, and through the records provided to the appellant, the appellant's rent was calculated by various staff, including [the author of the representations], individually, and shared via email. Email is the usual method of correspondence in an organization such as [TCHC] as staff are dispersed throughout the city.

[94] The appellant acknowledges that she received one responsive record relating to a meeting, but takes the position that other records ought to exist. She refers to her position that her RGI was calculated in violation of the RGI Guide, and states that her lease was discontinued, and asks why this was never discussed at TCHC staff meetings. She also states:

> … It is highly unlikely that my situation was not discussed on TCHC meetings. From November 1, 2009 to February, 2011 my market rent was increased by 30% (May 2010)….

[95] On my review of the representations of the parties, I am satisfied that the search conducted by the TCHC for records responsive to request D3 was reasonable. The TCHC identifies the searches conducted, and the results of those searches. The TCHC also indicates that it is not surprising that additional records do not exist, and states that decisions regarding rent calculations do not usually require meetings. Although the appellant finds it difficult to believe that no additional records relating to meetings exist, I am satisfied that the TCHC's search for records responsive to this request was reasonable.

Request D9: records relating to the rent review schedule for April 2009

[96] In its representations on the search for records responsive to this request, the TCHC states:

> With respect to the records related to the rent review schedule for April 2009 [D9], [the named paralegal] was not able to find the 2009 rent review schedule. These logs were used by the third-party property management company hired by [TCHC] to manage the building that the appellant lives in. [TCHC] would not be in possession of these logs, so [the named paralegal] contacted the staff of the third-party company for

> all documents, and the 2009 rent review schedule was not part of the documentation received.

[97] In the material provided by the appellant earlier in this appeal, the appellant took the position that her rent review was done in April of 2009 and that there should be a schedule. The appellant does not provide any additional representations relating to request D9. In the circumstances and based on the representations of the TCHC, I find that the TCHC's search for records responsive to request D9 was reasonable.

Request D12: records relating to the Introduction to [a named company] research

[98] The initial request under D12 was for: "The Introduction to [the named company] research of 2009 or 2010: the purpose of the research, the methodises and strategies to collect data." In response, the TCHC stated that there were no records responsive to this request, and also stated that the named company is not affiliated with the TCHC, and that the appellant's question ought to be directed to the named company.

[99] In the material provided by the appellant earlier in this appeal, the appellant took the position that the TCHC has a copy of the named company's research, that the TCHC relied on this research to support its decision to increase her rent, and that pages of this research were provided to her.

[100] In its representations on the search for records responsive to this request, the TCHC states:

> With respect to the records relating to the Introduction of the [named company] research, [the named paralegal] spoke to the staff involved with using [the named company] for their market rent calculations. [The named paralegal] was advised that the decision to use [the named company] was made by them and no reports had been generated to formally introduce the use of the research. As staff have broad discretion to use any tools necessary to assist them in their day-to-day work, it is not surprising that there would be no report on the introduction of the use of [the named company] research for market rent calculations.

[101] In her representations in response to the above, the appellant states that the TCHC's statement is not supported with additional documentation certifying the nature of the searches. She also states that the TCHC did not provide the names or positions of the TCHC staff involved in the search, or who provided comments about the named company survey.

[102] As a preliminary point, I note that the request is for records relating to the introduction of the named company's research. The appellant's earlier arguments

(which she does not repeat in her representations) seem to focus on the named company's research itself. The TCHC's search was for the introduction of the named company's research, and its representations focus on that. The appellant does not address this is her representations. In the circumstances, I find that request D12 is for the introduction to the named company research. If the appellant meant to request other information relating to the named company and its research, she is invited to submit a new request for that information.

[103] As set out above, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request, and it is not necessary that every individual involved in the matter provide statements. (See Orders M-909, MO-2143-F)

[104] In the circumstances and based on the representations of the TCHC, including their explanation of why responsive records would not exist, I find that the TCHC's search for records responsive to request D12 was reasonable.

ORDER:

1. I order the TCHC to disclose the withheld portion of Record D-1-115 to the appellant by sending the appellant a copy of the information by **June 29, 2012** but not before **June 25, 2012**. I have provided the TCHC with a severed copy of Record D-1-115, highlighting in yellow the portion which should be disclosed, and identifying in green the portion that contains personal information and is not to be disclosed.

2. I uphold the TCHC's decision that the other responsive records qualify for exemption under sections 7(1), 12 and 38(a) of the *Act*.

3. I uphold the TCHC's search for responsive records, and find that it was reasonable.

4. In order to verify compliance with the terms of Order provision 1, I reserve the right to require the TCHC to provide me with a copy of the material which it discloses to the appellant.

Original Signed by: May 25, 2012
Frank DeVries
Adjudicator