Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2664

Appeal MA09-406

Toronto Community Housing Corporation

October 28, 2011

Summary:

The appellants seek access to information they believe should exist in their tenant files or should be retained by Toronto Community Housing Corporation (TCHC). TCHC located responsive records and provided copies of the majority of them to the appellants. TCHC withheld access to some records under section 12, claiming that they contain solicitor-client privileged information. The appellants claim that the records do not qualify for exemption and that additional records should exist. TCHC's decision to withhold the records under section 12 is upheld and their search efforts are found to be reasonable. Appeal dismissed.

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

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23.

OVERVIEW:

[1] The appellants submitted a 14-part request to TCHC under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to

information relating to their tenant file. Shortly thereafter, the appellants submitted an additional 13-part request for similar information.

[2] TCHC combined the two requests and granted the appellants partial access to responsive records. TCHC withheld access to some records pursuant to sections 7(1) (advice or recommendations) and 12 (solicitor-client privilege) of the *Act*. TCHC also withheld some of the information contained in the records on the basis that this information was not responsive to the request.

[3] The appellants appealed TCHC's decision to this office and a mediator was assigned to the file. During mediation, the appellants advised that they believed that additional records responsive to their 27-part request should exist. The appellants also confirmed that they were not pursuing access to the information TCHC identified as not responsive or the information withheld under section 7(1) of the *Act*. The remaining records fall within two categories identified by TCHC as "Batch G" or "Batch H" records.

[4] As the records at issue appear to contain the appellants' personal information, the possible application of section 38(a) of the *Act* (refusal to disclose one's own personal information).

[5] The issues remaining in dispute at the end of mediation were transferred to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*. During the inquiry into this appeal, a notice of inquiry setting out the facts and issues in this appeal was sent to the parties. In response, both submitted written representations to this office. The representations were shared in accordance with section 7 of the IPC's Code of Procedure and Practice Direction 7. The appeal file was then transferred to me for a decision.

RECORDS:

[6] The records at issue consist of the withheld information contained in internal email correspondence exchanged between TCHC staff. The records at issue are described in the charts below:

Batch G Records: pages 8, 9, 10, 11, 17, 21, 23 and 26

Page Number	Description of Record
Page 8	Email from TCHC Counsel to TCHC staff
Pages 9 & 10	Email chain between TCHC Counsel, TCHC staff and/or staff of a TCHC subsidiary corporation, copied in one instance to a third party service provider.
Page 11	Email from TCHC Counsel to TCHC staff
Page 17	Email chain between TCHC Counsel and TCHC

	Staff
Page 21	Email chain between TCHC counsel and TCHC staff
Page 23	Email from TCHC Counsel to TCHC staff
Page 26	Email from TCHC Counsel to TCHC staff

Batch H Records: pages 1, 3, 4, 5, 7, 8, 9, 10, 13, 28, 38 and 39

Page Number	**Description of Record**
Page 1	Email from TCHC Counsel to TCHC staff
Pages 3, 4 & 5	Email exchange between TCHC Counsel and TCHC staff
Pages 7 & 8	Email from TCHC Counsel to TCHC staff
Pages 9 & 10	Email from TCHC Counsel to TCHC staff
Page 13	Email from TCHC Counsel to TCHC staff
Page 28	Email from TCHC Counsel to TCHC staff
Pages 38 & 39	Email from TCHC to TCHC staff

ISSUES:

A. Was TCHC's search for responsive records reasonable?
B. Does the information at issue contain "personal information" as defined in section 2(1) and, if so, does it relate to the appellants?
C. Does the solicitor-client privilege exemption in section 12 or 38(a) apply to the withheld information?
D. Was TCHC's exercise of discretion proper?

DISCUSSION:

A. Was TCHC's search for responsive records reasonable?

[7] The appellants submitted representations in support of their position that additional records responsive to parts 1, 2, 3, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 should exist. However, during the inquiry process, TCHC located the record responsive to part 8 of the request (physical "time ticket" for September 13, 2009) and advised that it will provide a copy of it, in its entirety to the appellants. Accordingly, part 8 of the request along with parts 4, 6, and 17 are not at issue.

[8] The appellants also submitted representations that responsive records consisting of emails between one of the appellants and a specified TCHC staff member should exist. During the inquiry process, TCHC conducted a further search for these emails, located additional records and issued a supplemental decision and fee estimate to the

appellants. TCHC released pages 1-45 and 47-56 (Batch F records), in their entirety, to the appellants. TCHC's supplemental decision also addressed the appellants' request for copies of emails deleted from this staff member's computer. TCHC's fee estimate indicated that it would cost at "a minimum, $6,700 US" in addition to taxes and shipping to recover deleted emails from the staff member's mailbox and that the same estimate applies to any other staff member's mailbox. The appellants appealed TCHC's supplemental decision and fee estimate to this office and Appeal MA09-406-2 was opened. Accordingly, the outstanding issues arising from the supplemental decision and fee estimate will be addressed in Appeal MA09-406-2.

[9] 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 [Orders P-85, P-221 and 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.

[10] 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 [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

[11] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

[12] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

[13] 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 [Order MO-2246].

[14] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable [Order MO-2213].

[15] TCHC was invited to provide a written summary of all steps taken in response to the request. In particular, it was asked to provide answers to the following questions:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

2. If the institution did not contact the requester to clarify the request, did it:

   (a) choose to respond literally to the request?

   (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

[16] TCHC's privacy coordinator, the individual who conducted the actual search for responsive records, provided an affidavit. TCHC's representations also contain further explanations about her efforts to locate responsive records. She advises that upon receipt of the request, she sent emails to relevant staff in the Operating Unit, Legal Unit (legal) and Community Safety Unit and Response Centre requesting that they conduct a search for responsive records. She also advises that she personally searched through the original tenancy file at the operating unit office and the records compiled by legal, in addition to conducting searches of the Housing Management System and EasyTrac databases.

[17] The main issue arising in the appellants' representations is their concern that TCHC employees have disregarded proper file management practices and have tampered with or destroyed the contents of their tenant file.

[18] For discussion purposes, I have grouped parts 1, 2, 3, 5, 7, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 of the combined requests under the following 8 categories:

a) *Request for the remainder of tenant file located at a local office, including an account inquiry with handwritten notes; Anything else that pertains to the tenant file that hasn't already been disclosed* (Parts 1 and 14 of the request)

[19] Throughout their representations, the appellants allege that the records they have requested should be located in the tenant file and their absence suggests that "… an employee with access removed them on their own initiative or was instructed to conceal its existence."

[20] The appellants also submit that TCHC failed to locate an account inquiry that was brought to their attention during a meeting with TCHC staff. A copy of the record was provided to the appellants outside the freedom of information process and the appellants provided a copy to this office. The record is a computer printout describing the transaction history of rent monies paid to TCHC for the period of August to November 2007.

[21] The appellants assert that given the date of the record, it should have been filed in TCHC's legal file. The appellants also argue that a portion of the original tenant file, which should have been transferred to legal was left behind in the operating unit office. In support of their position, the appellants refer to copies of internal emails they received through the freedom of information process. In these emails, TCHC's privacy coordinator asks legal to provide her with access to the tenant and legal files.

[22] TCHC states in its representations:

> The appellants must understand that while according to [the *Act*], there is a broad category of items that are classified as records, not every record created concerning every tenant is placed in the tenant file. Staff may deem an item inconsequential, and destroy the item.
>
> …
>
> Printouts with notes or jottings are not immediately placed on a tenant file, although many do end up there. Toronto Community Housing is under no statutory obligation to preserve every scrap of paper that may be generated by a tenancy.

[23] In my view, TCHC's failure to locate the account inquiry in question does not give rise to a finding that TCHC failed to conduct a reasonable search of its tenant and legal files for records responsive to parts 1 and 14 of the request. In making my decision, I took into account TCHC's evidence that it does not require its staff to file every record created concerning every tenant issue in the tenant's file. The record the appellants argue should exist in TCHC's record holding is computer print out with a handwritten note. It appears to be the type of document that TCHC describes as "[p]rintouts with notes or jottings".

[24] Throughout their representations, the appellants raise concerns about TCHC's file management processes. However, the issue I am to determine is whether TCHC conducted a reasonable search for records responsive to the request not whether TCHC ought to retain certain records and where such records should be filed.

[25] Having regard to TCHC's representations and its privacy coordinator's affidavit, I am satisfied that TCHC's physical search of its tenant and legal files was conducted and directed by an individual having knowledge about the subject-matter of this appeal and TCHC's record holdings. In making my decision, I also took into consideration the emails the appellants brought to my attention which, in my view, demonstrate that TCHC's privacy coordinator's made repeated requests to legal to obtain access to the tenant and legal files to locate responsive records.

b) Easytrac records, including copies of "pop-ups" or other notes that appear on the screen when the file is opened at the call centre (Parts 15, 26 and 27)

[26] The appellants do not appear to take issue with TCHC's submission that it has released complete and updated copies of the EasyTrac History. TCHC submits that the EasyTrac History shows all calls made to the call centre, all contacts with the operating unit staff, and any requests for maintenance that are made directly to the superintendant. It also shows if there was a resolution to the situation and if the contact is considered closed.

[27] However, the appellants submit that additional records capturing the "pop-ups" or other notes which appear on the call centre screen should exist. In support of their argument, the appellants refer to a meeting with a TCHC staff member who printed a note from the call centre screen. The appellants advise that when they asked for a copy of the note, the staff member told them to file a request under the *Act*.

[28] TCHC responded as follows:

> I conferred with [name of individual], and she has advised me that she believes the note to which the appellants refer was on the EasyTrac system. I thoroughly searched EasyTrac again, and previously instructed

> the manager of the Call Centre to provide screen shots of all "pop-ups" for the account, which have been released to the appellants without severance. [She] informed me that at one time there was a bulletin on the account, which is different from a "pop-up". On the 'service request' screen, there is a button, which alerts staff to the existence of a notice pertaining to the unit, or building, if it is flashing. Certain staff members can enter or remove a bulletin at will, as the situation in a unit may change. [She] advises me that during the course of her conversation with the appellants, she told them there was a bulletin on their unit. When this situation was resolved, the bulletin was removed from the system. [She] advises me that she did make a printout of the bulletin and showed the paper to the appellants. [She] has informed me that she did not file the printout on the appellants file, and that the paper was subsequently shredded. [She] cannot remember the date of the meeting, nor the date that the bulletin was removed.

[29] TCHC's privacy coordinator advises that she conducted a search for the bulletin on the EasyTrac system and "it is not on the system now, and that there was no printout of the bulletin in the remainder of the tenant file". In its supplemental representations, TCHC submits that its Information Technology and Housing Services department (IT) advised that once a bulletin is taken off the system, it is not saved, and cannot be recreated, except by retrieving the email that initiated the bulletin.

[30] In their response, the appellants made a general argument that TCHC failed to locate and disclose other bulletins or pop-ups. However, the appellants did not provide specific evidence in support of this argument. With respect to the bulletin TCHC advises was on its system before it was deleted, the appellants argue that the TCHC staff member who advised them about the existence of this bulletin should not have deleted it.

[31] As stated above, the appellants do not appear to dispute that they have received completed and updated copies of the EasyTrac History. Instead, the appellants take issue with the type of records TCHC retains. As stated above, the issue I am to determine is whether TCHC conducted a reasonable search of its record holdings for the responsive records not whether it should retain copies of certain records for its files.

[32] Having regard to the representations of the parties, I am satisfied that TCHC conducted a reasonable search for records responsive to parts 15, 26 and 27 of the request. In particular, I took into consideration TCHC's evidence and am satisfied that it set out in sufficient detail the nature of the search efforts conducted, which I find were directed by an individual having knowledge about the subject-matter of the request. I also accept TCHC's evidence that a copy of the bulletin in question no longer exists in its record holdings.

c) *Maintenance records, notices of entry, emails and correspondence created or sent to two named superintendants* (Parts 2, 3, 9, 10, 11, 18, 19 and 20 of the request)

[33] TCHC advises that:

> Normally all the maintenance files for the entire building are kept together, not on the individual tenant files. However, at the request of Legal, maintenance issues pertaining to [the appellants' unit] have been separated and sent to Legal, in order to prepare for the Landlord and Tenant Board applications.

[34] The appellants assert that additional maintenance records beyond those that were disclosed should exist. In particular, the appellants argue that copies of the maintenance request forms completed by them and work orders completed by TCHC staff should exist. The appellants submit that the superintendants who handled their maintenance requests advised them that they keep copies of these forms and file them in their office. In support of their position, the appellants refer to emails disclosed to them through the freedom of information process. These emails were exchanged between one of the superintendants and the privacy coordinator and relate to her requests for hard copy and electronic records. One of the emails in the chain refers to a phone message the privacy coordinator received from one of the appellants advising her that he believes that a file folder containing maintenance records for his unit is being kept by one of the superintendants. In response, the privacy coordinator sent an email to staff requesting a copy of the file folder.

[35] TCHC does not dispute that the superintendants created or retained responsive hard copy or electronic records. TCHC's position is that the superintendants forwarded whatever records they had to the privacy coordinator. In her affidavit, TCHC's privacy coordinator states:

> I have been advised by [the two superintendants and the operating unit manager] that when staff at the building receive a maintenance request, be it handwritten, or on Toronto Community Housing stationary, they generally destroy this paper, as the entry of information into EasyTrac is considered by the corporation to be the standard record of the matter.
>
> [The superintendants] have advised that all printouts from EasyTrac about the appellants' maintenance issues, that they were keeping, were sent to the Legal Unit. These consisted of printouts of the various maintenance issues. Unlike EasyTrac History, these printouts consist of one entry per page. However, they do not differ, other than formatting, from the items released to the appellants on the EasyTrac History.

> I am advised by Information Technology staff that maintenance and contact entries on the EasyTrac system cannot be deleted by staff, including [staff at the appellant's building].

[36] With respect to the appellants' request for emails and correspondence sent or received by the named superintendants, TCHC submits that the superintendants forwarded all emails on their computer system and have advised that they have "no other internal correspondence to produce on this matter."

[37] Having regard to the representations of the parties, I am satisfied that TCHC conducted a reasonable search for records responsive to parts 2, 3, 9, 10, 11, 18, 19 and 20 of the request.

[38] Though the emails relied upon by the appellants demonstrate that the superintendants at some point in time may have retained copies of records which relate to maintenance issues, I am not persuaded that these emails establish a reasonable basis for concluding that the superintendants failed to forward a complete set of these records to the privacy coordinator or legal. Having regard to the above, I find that the evidence demonstrates that the search for responsive records was conducted and directed by an individual having knowledge about the subject-matter of this appeal and TCHC's record holdings.

d) Senior Manager's meeting notes and phone conversations between one of the tenants and another individual referenced in a landlord tenant hearing (Part 12 of the request)

[39] The appellants' representations question the senior manager's testimony at a Landlord and Tenant Board hearing, her professionalism and allege that she destroyed documents.

[40] The appellants' also submit that additional records responsive to part 12 of the request should exist. In support of this position, the appellants state that some of the records disclosed to them date back to 2005. Accordingly, in their view more recent records should exist. The appellants also refer to an email disclosed to them through the freedom of information process. The email is from the senior manager in question to the privacy coordinator advising that she does not purge her emails.

[41] TCHC submits that the employee in question is aware of her duties under the *Act* and has "consistently been open and responsive" to the privacy coordinator's requests to access her emails or correspondence.

[42] I have reviewed the representations of the parties and am of the view that the appellants have failed to provide a reasonable basis to conclude that additional records should exist. My determination of whether TCHC conducted a reasonable search for

records responsive to part 12 of the request does not involve reviewing the senior manager's testimony before the Landlord and Tenant Board. In my view, the email between the senior manager and privacy coordinator supports the privacy coordinator's claim that this individual's response to her request for records has been open and responsive. Accordingly, I find that TCHC conducted a reasonable search for records responsive to part 12 of the request.

e) Records of telephone calls or notes recorded by the call centre (Parts 5, 7 and 16 of the request)

[43] The appellants take the position that records identifying the operator that answered their telephone calls to the call centre, along with their notes should exist. In support of this position, the appellants refer to the pre-recorded message callers hear when on hold, which advises that their phone conversation may be recorded. In response, TCHC submits that though its recording advises callers that their call may be recorded, the telephone calls are not routinely recorded. They are recorded for staff coaching exercises, but once these exercises are concluded, the recordings are destroyed and, as a result, no responsive records exist. Having regard to the explanation provided by TCHC, I find that the appellants have failed to establish a reasonable basis to conclude that records for every call they made to the call centre should exist.

[44] The appellants also advise that they received a compact disc which contains a recording of the telephone call one of them made to the Community Safety Unit (CSU). The appellants submit that additional recordings relating to the same incident should exist.

[45] TCHC conducted a secondary search for responsive records and located a recording of a call to a CSU officer to attend the rental building. TCHC advises that its initial search did not include a search for internal calls relating to the incident. In its representations, TCHC advises that this record will be released to the appellants.

[46] In response, the appellants made a general argument that further recordings should exist. However, the appellants representations only refer to one telephone call they believe should have been recorded – CSU's telephone call to the police. The appellants submit that a recording of this call must exist given the fact the police attended the building. TCHC responds that "there is no record of any calls that might have been placed by the CSU officer to the police."

[47] I have reviewed the representations of the parties and am satisfied that TCHC's secondary search for responsive records was reasonable. I note that TCHC's representations do not confirm that the CSU officer telephoned the police. In fact, it is not clear if this is what occurred. In my view, the presence of the police at the

building alone does not support a finding that a recording of an internal telephone call to the police must exist within TCHC's record holdings.

[48] In any event, even if the CSU officer telephoned the police, I am satisfied that TCHC conducted a reasonable search to locate this record. In particular, I am satisfied that an experienced employee knowledgeable in the subject matter of the request expended a reasonable effort to locate records which respond to this portion of the request.

f) Internal emails for four named TCHC staff members exchanged with other TCHC staff (Parts 21, 22, 23, 24 and 25 of the request)

[49] The appellants argue that the following emails should exist:

- Emails where a named male Community Housing Supervisor (CHS) corresponds with two named superintendants about the unit;
- All emails to and from a named female CHS about the appellants and the unit;
- All emails to and from a named female staff person concerning issues about the unit; and
- All emails between a named Operating Unit Manager and three named individuals.

[50] The appellants assert that additional emails should exist based on the above-noted individuals continuing involvement in issues relating to them and their tenancy.

[51] TCHC submits that it conducted a reasonable search for the requested emails and have located all responsive emails located on the named individuals' computer systems. TCHC advises that its staff is not obligated by policy or practice "to retain and file every single email [she or he] might have generated about a given individual or unit."

[52] The crux of the appellants' argument is that TCHC should have created or retained additional records other than what had been located, given the nature of issues arising from their tenancy. In my view, the appellants' concerns about the TCHC's file management procedures and practices do not establish a reasonable basis for concluding that additional records should exist.

[53] Having reviewed the representations of the parties, I am satisfied that TCHC conducted a reasonable search for responsive emails on its computer system. As noted above, TCHC advised the appellants that it is possible to recover deleted emails but that the cost would be at least $6,700 US in addition to taxes and shipping for each email mailbox. If the appellants wish to obtain copies of deleted emails for the four

individuals referred to above, the issue of the appropriateness of the fee will be addressed in the order disposing of Appeal MA09-406-2.

[54] Having regard to the above, I am satisfied that TCHC conducted a reasonable search for records responsive to parts 21, 22, 23, 24 and 25 of the request.

g) Notice to End a Tenancy for Non-Payment of Rent, dated February 20, 2007, October 9, 2007 and July 10, 2008 (Part 13 of the request)

[55] The appellants take issue with TCHC's advice to them that no other Notice to End a Tenancy for Non-Payment of Rent (N4's) exist other than those released to them. The appellants submit that TCHC is required to retain copies of the requested notices and place them in the tenant file. In support of their position, the appellants refer to the Ontario Landlord and Tenant Board's Interpretation Guideline #10. In particular, the appellants refer to the section which sets out the landlord requirements to serve N4's in situations where there are multiple tenants.

[56] The appellants submit that the N4's in question exist and provided this office with copies. The appellants question whether poor file management or inadequate search efforts are the reason TCHC failed to locate these records.

[57] TCHC submits that it does not retain copies of N4's as the result of a glitch in its Housing Management System. TCHC states that:

> … when an N4 is produced, it is not saved as a document by the system, and the only copy of the particular notice would be a hard copy. All N4's are immediately overwritten, staff can see when N4's were produced, and … the appellants were advised of these dates.

[58] In my view, the Ontario Landlord and Tenant Board's Interpretation Guideline #10 does not require TCHC to retain hard copies of the N4's it has served. Even if the guideline directed landlords to retain physical copies of N4's served, it would merely amount to a recommendation if not followed, could defeat the landlord's application before the Landlord and Tenant Board.

[59] The relevant policy in the circumstances of this appeal is TCHC's record management policy. TCHC provided a copy of this policy with its representations. I reviewed this policy and am satisfied that it does not require TCHC to keep physical copies of N4's.

[60] I have reviewed the parties' representations and am satisfied that TCHC conducted a reasonable search for the three N4's, despite the fact that the appellants produced hard copies of these records. In making my decision, I considered TCHC's explanation about the limitation of its Housing Management System and the absence of

a requirement for TCHC to retain hard copies of N4's for its file. I am satisfied by TCHC's evidence that no responsive records exist in its record holdings.

B. Does the information at issue contain "personal information" as defined in section 2(1) and, if so, does it relate to the appellants?

[61] 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.

[62] Section 38(a) 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.

[63] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information [Order M-352].

[64] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information. In this case, the institution relies on section 38(a) in conjunction with section 12.

[65] In order to determine whether section 38(a) of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

[66] TCHC submits that the records do not contain the personal information of the appellants. TCHC's representations state:

> … the main thrust of the emails concerns the litigation and maintenance issues addressed at the Landlord and Tenant Board. These particular emails were generated due to the ongoing legal matters pertaining to the appellants. The address of the appellants may be within the email but the content of the emails concern the gathering of facts in order to present a credible case at the Landlord and Tenant Board.

[67] The appellants' representations did not specifically address the issue of whether the records contain their personal information as defined in section 2(1). However,

throughout their representations, the appellants maintain that the subject-matter of the records concern their tenancy and thus contains information which relate to them.

[68] 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].

[69] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225].

[70] 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 and MO-2344].

[71] 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.)].

[72] I have reviewed the records at issue and am satisfied that some of the withheld information contain the appellants' names, address and the opinions and views of the appellants and the views and opinions of others about the appellants (paragraphs (d), (e), (g) and (h) of the definition in section 2(1).

[73] The term "personal information" is defined, in part, in sections 2(1)(d), (e), (g) and (h) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (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,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where 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

[74] As I have found that some of the withheld information contains the "personal information" of the appellants mentioned in the records, I will review whether disclosure of this information qualifies for exemption under section 38(a) in conjunction with section 12.

C. Does the solicitor-client privilege exemption at section 12 or 38(a) apply to the withheld information?

[75] 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.

[76] Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[77] In the circumstances of this appeal, TCHC claims that both branches 1 and 2 apply.

Branch 1: common law privilege

[78] 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

[79] 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.)].

[80] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Orders PO-2441, MO-2166 and MO-1925].

[81] 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.)].

[82] 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].

[83] 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.)].

Loss of privilege

[84] Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

[85] Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege

[*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

[86] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

[87] Waiver has been found to apply where, for example

- the record is disclosed to another outside party [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)]

- the communication is made to an opposing party in litigation [Orders MO-1514 and MO-2396-F]

- the document records a communication made in open court [Orders P-1551 and MO-2006-F]

[88] Waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party. The common interest exception has been found to apply where, for example

- the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties [*General Accident Assurance Co. v. Chrusz* (above); Order MO-1678]

- a law firm gives legal opinions to a group of companies in connection with shared tax advice [*Archean Energy Ltd. v. Canada (Minister of National Revenue)* (1997), 202 A.R. 198 (Q.B.)]

- multiple parties share legal opinions in an effort to put them on an equal footing during negotiations, but maintain an expectation of confidentiality vis-à-vis others [*Pitney Bowes of Canada Ltd. v. Canada* (2003), 225 D.L.R. (4th) 747 (Fed. T.D.)]

Representations of the parties

[89] TCHC submits that the records at issue comprise of direct communications of a confidential nature between two of its in-house counsel and TCHC staff. TCHC states in its representations:

> It is noted on the emails sent by both Legal Counsel that "*This communication is confidential and privileged. It is intended only for the person(s) to whom it is addressed. If you have received this message in error, please notify us immediately. Thank you.*" While this notice in and of itself is not enough to claim privilege, the contents of the emails … uphold this notice. Toronto Community Housing does not wish to reveal its strategy or deliberations on the matter to the appellants, just as the appellants would never confide in staff on their course of action in the application. Confidentiality is the cornerstone of the relationship between Legal Counsel and the client. Without this, it would be impossible to compile a statement of defence or case, as every record would be public.

[90] The appellants advise that they believe that TCHC's legal counsel's decision to retain the original tenant file has had the effect of circumventing their access to records

that they would normally have access to. The appellants also submit that they require access to the records at issue to address outstanding issues before the Landlord and Tenant Board.

[91] The appellants also take the position that the emails in question do not contain legal advice but discuss facts, issues or information regarding them, their tenancy and their tenant file.

[92] Finally, the appellants submit that any privilege that may attach to the records has been waived by TCHC.

Decision and Analysis

[93] I am satisfied that the records at issue fall under the ambit of the solicitor-client communication privilege aspect of branch 1 of section 12 as they were made for the purpose of seeking, formulating and/or giving legal advice relating to issues arising from the appellants' tenancy.

[94] In making my decision, I note that most of the emails constitute direct communications between TCHC's counsel and staff. The only email that does not meet this description is the initial email in the chain found on pages 9 and 10 of the Batch G records. This email was sent by staff from one of TCHC's subsidiary corporations to TCHC staff and copied to a third party service provider. The email was then sent to legal and the original sender was advised that legal would handle the matter. The appellants' submit that the original email "was never sent or copied to legal counsel so solicitor-client privilege should not apply". The appellants suspect that the content of the email relates to "the gathering of facts of an issue that had already happened and [was] discussed at a hearing [before the Landlord and Tenant Board] years ago and has since been closed."

[95] In my view, this email, though not a direct communication between solicitor and client, forms part of a "continuum of communications" between TCHC counsel and staff as described in *Balabel*. Based on my review of the record, it is clear that the email was sent to TCHC's counsel, who reviewed it and provided a response to TCHC staff. Previous decisions from this office (see for example Orders MO-2474, PO-2624, PO-2630 and PO-2767) have recognized that communications which are not sent directly to legal counsel but which refer to the subject matter for which legal counsel had been consulted can form part of the "continuum of communication" recognized in *Balabel.*

[96] I have reviewed the email and am satisfied that the information contained in the email relates to the subject-matter for which counsel had been consulted. In addition, I find that the email was forwarded to TCHC staff initially and then sent to counsel to keep TCHC and its counsel informed so that advice may be sought and given as required.

[97] Having carefully reviewed all of the emails not disclosed to the appellants, I am satisfied that they represent confidential communications pertaining to the seeking and giving of legal advice on matters that relate directly to legal issues.

Loss of privilege

[98] The appellants' submit that any privilege that may attach to records found to contain solicitor-client privilege information has been waived. The appellants' main argument is that the subject-matter of the emails were discussed in hearings before the Landlord and Tenant Board. With respect to the email originally received by TCHC staff and forwarded to legal counsel (pages 9 and 10 of the Batch G records), the appellants argue that the email contains information that was disclosed as "part of documents or testimony at [a] hearing". However, the appellants' did not adduce evidence, such as copies of documents or transcripts, which would support their argument that TCHC waived its privilege to this email or any of the other emails I found fall under the ambit of the solicitor-client communication privilege aspect of branch 1.

[99] In addition to the appellant's evidence, I considered the fact that the original email TCHC received from staff at one of its subsidiary corporations was copied to a third party service provider. It appears that the third party service provider was retained by the subsidiary corporation to perform maintenance work. In my view, the disclosure of the email to the third party does not constitute waiver as the common interest exception applies as the third party and TCHC both anticipated litigation against the appellants. In fact, the subject heading of the email, which was disclosed to the appellants, confirms that litigation against the appellants was anticipated. The common interest exception has been found to apply where the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties [*General Accident Assurance Co. v. Chrusz* (above); Order MO-1678].

[100] Given my finding that privilege has not been waived, I find that the records are exempt under section 38(a), in conjunction with 12.

[101] Under the circumstances, it is not necessary for me to also consider whether branch 1 litigation privilege or either of the branch 2 privileges would apply.

D. Was TCHC's exercise of discretion proper?

[102] The section 38(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[103] In addition, 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.

[104] In either 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)].

Representations of the parties

[105] In support of their submission that TCHC exercised its discretion in bad faith, the appellants submit that TCHC "is trying to protect themselves by destroying key documents from the tenant file while trying to suppress other documents". The appellants also made the following arguments in their representations:

- disclosure of the withheld information would subject the activities of TCHC to public scrutiny
- the information at issue is relevant to their fair determination of rights
- the subject-matter of the request is significant to them
- the information at issue is about them and/or contains their personal information and TCHC should not have greater access to the information

[106] TCHC's representations state:

> The appellants may claim that Toronto Community Housing is acting in bad faith when they are denied access to every single piece of paper or electronic mail that may or may not have been created about them. However this is not the case. Toronto Community Housing has been opened to the concept of severance and has readily released documents to the appellants. When we have erred in not releasing or not initially finding a record, we have readily done so.
>
> …
>
> Toronto Community Housing has consistently taken into consideration numerous factors including the nature of the information and the extent which it is significant to the requester. I understand that the appellants

> are consumed by the Landlord and Tenant Board hearings, and that there has been significant disruption to their lives.
>
> …
>
> Their right to information does not trump Toronto Community Housing's right to present a well reasoned case at the hearings. [We] have attempted to get them all the records they have requested, but Toronto Community Housing is allowed to claim limited and specific exemptions within the Act.

[107] Having regard to the parties representations, I am satisfied that TCHC properly exercised its discretion and in doing so took into account relevant considerations such as the confidential nature of the information at issue and the significance and sensitivity attached to it. I am also satisfied that TCHC did not exercise its discretion in bad faith or for an improper purpose, nor is there any evidence that it took into consideration irrelevant considerations.

[108] In making my decision, I considered the appellants' argument that TCHC's activities should be publicly scrutinized. In my view, this factor has no application in circumstances where the solicitor-client privilege exemption is found to apply given the Supreme Court of Canada's decision in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*.[1]

[109] In addition, I considered the appellant's argument that the records contain information which is relevant in a fair determination of their rights. In my view, this factor is not a relevant consideration given the nature of the information I found exempt. The information I found exempt are privileged communications between counsel and staff or communications that forms part of a "continuum of communications" aimed at keeping counsel informed so that advice may be sought and given.

[110] I am also satisfied that TCHC considered that the subject-matter of the emails are significant to the appellants and that one of the purposes of the *Act* includes the principle that requesters should have a right of access to their own information. In my

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[1] 2010 SCC 23, in this case the Supreme Court remitted an appeal back to the Information and Privacy Commissioner/Ontario to examine the institution's exercise of discretion under the section 14 law enforcement exemption, but did not remit the Ministry's exercise of discretion under section 19. The Court explained its different approach to section 19 as follows:

> We view the records falling under the s. 12 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in McClure, stressed the categorical nature of the privilege:
>
> > . . . solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, *and does not involve a balancing of interests on a case-by-case basis*. [Emphasis added; para. 35.]

view, the fact that TCHC applied the solicitor-client privilege exemption in a limited and specific manner demonstrates that it considered these factors. As a result, a significant amount of information was released to the appellants. In any event, the combination of these factors do not outweigh the purpose of the solicitor-client privilege exemption which seeks to protect confidential communications between solicitors and their clients.

[111] Having regard to the above, I find that TCHC properly exercised its discretion in the circumstances of this appeal.

ORDER:

I uphold TCHC's decision and dismiss the appeal.

Original signed by: October 28, 2011
Jennifer James
Adjudicator