Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2701

Appeal MA10-412-2

City of Greater Sudbury

March 20, 2012

Summary: The appellant requested records relating to her file with the city. The city disclosed some responsive records and withheld the remainder pursuant to sections 7 (advice or recommendations), 11 (economic interests), 12 (solicitor-client privilege), 13 (danger to safety or health) and/or 38(b) (personal privacy) of the *Act*. The adjudicator concluded that the records contain the appellant's personal information and that two records contain the personal information of certain city staff. The decision also finds that the portions of two records containing the personal information of individuals other than the appellant are exempt under section 38(b) and that, with one exception, the remaining records are exempt under sections 12/38(a). The public interest override does not apply to the personal information in the records. The city is ordered to disclose the non-exempt portions of one record and the city's decision to withhold the remainder is upheld.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1), 12, 14(1), (14(2), 14(3), 16, 38(a), 38(b).

OVERVIEW:

[1] The appellant is involved in a dispute with the City of Greater Sudbury (the City) over a building inspection issue. On September 3, 2010, she submitted a request to the City under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> [P]lease provide a copy of all interoffice correspondence pertaining to our

> file since January 1, 2010. This would include any memos, emails, etc, by any building services personnel and/or City Council members and/ or [named CAO, named City Auditor, and seven other identified individuals].
>
> Note: I am simply looking for correspondence on which we were not cc:ed and/or included in the distribution list.

[2] The city did not issue a decision within the appropriate time frame and the appellant filed a deemed refusal appeal with this office. Appeal MA10-412 was opened to address this matter and subsequently closed when the city issued an access decision on November 30, 2010.

[3] In its decision, the city indicated that of the 28 responsive records located, it was denying access, in full or in part, to 15 records pursuant to the discretionary exemptions in sections 7 (advice or recommendations), 11 (economic interests), 12 (solicitor-client privilege), 13 (danger to safety or health) and/or 38(b) (personal privacy) of the *Act*. The city also advised that two of the individuals named in the request do not have responsive records.

[4] The appellant appealed the city's access decision, and Appeal MA10-412-2 was opened to address the issues arising from this appeal.

[5] During mediation, the appellant took the position that the records relate to a matter of public safety, raising the possible application of the public interest override at section 16 of the *Act.*

[6] As well, on January 28, 2011, the city issued a revised decision granting additional access to the records at issue. The decision was accompanied by an index of records describing the sections of the *Act* on which it relies for denying access to the remainder of the records.

[7] In its decision, the city advised that in addition to the exemptions claimed in its November 30, 2010 decision letter, it wishes to apply the discretionary exemptions in sections 6, 12 and 38(a) of the *Act* to certain identified records. The appellant objected to the city's application of these new discretionary exemptions based on section 11.02 of the IPC *Code of Procedure* (the *Code*), which states that an institution is not permitted to claim new discretionary exemptions after making an access decision arising from a deemed refusal appeal.

[8] In addition to the discretionary exemptions claimed in its revised decision, the city claims that the mandatory exemption in section 14(1) applies to the information withheld in Record 26. I note that although the city did not refer to this section in its original decision, it did describe the reason for exempting it as "the personal employment history of an individual." In my view, the revised decision merely clarifies the basis for exempting the information as opposed to identifying a new exemption

claim. Moreover, section 14 is a mandatory exemption and must be considered. Accordingly, I included section 14 as an issue in this appeal.

[9] The appellant confirmed that the adequacy of the search for responsive records maintained by the two named individuals who the city advised had no responsive records is not at issue in this appeal.

[10] No further mediation was possible, and the file was forwarded to the adjudication stage of the appeal process. During the inquiry into the appeal, I sought and received representations from the city and the appellant. The representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[11] It should be noted that the city has withdrawn its reliance on the discretionary exemption at section 11. Accordingly, the possible application of this section of the *Act* is no longer at issue.

[12] As a preliminary matter, I uphold the city's request that I consider the application of section 12 to additional records, although raised after the 35 day time for adding new discretionary exemptions.

[13] In this decision, I uphold the city's decision to withhold the information at issue in Records 14 and 26 under section 38(b). With one exception, I uphold the city's decision to withhold the remaining information under section 38(a), in conjunction with section 12. With respect to Record 18, I uphold the application of sections 38(a) and 12 for two portions of the record, and find that the remaining portions are not exempt under the *Act*. I also find that the public interest override in section 16 does not apply to the personal information in Records 14 and 26.

RECORDS:

[14] The records remaining at issue consist of emails, as described in the City's November 30, 2010 decision and the Index of Records provided to the appellant with the City's January 28, 2011 decision.

ISSUES:

A. Should the city be precluded from claiming the application of sections 6 and 12 to certain records where these exemptions were claimed outside the permitted time for raising discretionary exemptions?

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

C. Does the discretionary exemption at section 38(b) apply to the information at issue in Records 14 and 26?

D. Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the remaining records?

E. Should the city's exercise of discretion to deny access under sections 38(a), in conjunction with section 12 and 38(b) be upheld?

F. Does the public interest override in section 16 apply to the information withheld under section 38(b)?

DISCUSSION:

A. Should the city be precluded from claiming the application of sections 6 and 12 to certain records where these exemptions were claimed outside the permitted time for raising discretionary exemptions?

[15] The city's initial access decision claiming the application of sections 7, 12, 13 and 38(b) for specifically identified records was made on November 30, 2010. On January 28, 2011, the city issued a revised decision in which it clarified that it was also claiming section 38(a) for the records to which section 13 had been claimed. As well, it has raised, for the first time, the application of section 6 for eight of the records, and has added section 12 to two of the records previously identified. In addition to the possible application of section 11.02 of the IPC *Code*, which arises as a result of the issuance of an additional access decision following the deemed refusal appeal, the revised access decision was made outside the 35 day period of time allotted for the adding of new discretionary exemptions. Accordingly, the city was asked to address both issues.

[16] The *Code* provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Sections 11.01 and 11.02 state:

> In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

> An institution does not have an additional 35-day period within which to make a new discretionary exemption claim after it makes an access decision arising from a Deemed Refusal Appeal.

[17] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. A number of previous decisions of this office and decisions of the court have addressed the 35-day rule in section 11.01 of the *Code* (see, for example: Orders PO-2780, PO-2664 and MO-2576). Section 11.02 has not received the same degree of attention (see: Order MO-1647). However, it would appear that similar considerations apply in determining its application in the circumstances of a particular appeal. Accordingly, much of the discussion set out below, is relevant to both sections of the *Code*.

[18] With respect to section 11.01, where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[1]

[19] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must balance the relative prejudice to the institution and to the appellant.[2] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[3]

[20] The wording of section 11.02 does not appear to consider an exercise of discretion on the part of the adjudicator determining the issue. However, in addition to the above discussion, sections 2.01 and 2.04 of the *Code* must also be considered:

> This Code is to be broadly interpreted in the public interest in order to secure the most just, expeditious and least expensive determination on the merits of every appeal.
>
> The IPC may in its discretion depart from any procedure in this Code where it is just and appropriate to do so.

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[1] Ontario (Ministry of Consumer and Correctional Services v. Fineberg), Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also Ontario Hydro v. Ontario (Information and Privacy Commissioner) [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

[2] Order MO-1832

[3] (Orders PO-2113 and PO-2331)

[21] The parties were therefore asked to consider the following with respect to both sections 11.01 and 11.02:

1. Whether the appellant has been prejudiced in any way by the late raising of a discretionary exemption or exemptions.

2. Whether the institution would be prejudiced in any way by not allowing it to apply an additional discretionary exemption or exemptions in the circumstances of this appeal.

3. By allowing the institution to claim an additional discretionary exemption or exemptions, would the integrity of the appeals process be compromised in any way?

Representations

[22] By way of background, the city notes that the year 2010 produced the largest number of access requests the city had received since the *Act* came into force. The city indicates that, beginning in January 2010 and continuing over the next 13 months, the appellant submitted 32 access requests "many of which were repetitive and often contained questions about records received in earlier requests." In describing city staff's interactions with the appellant in responding to her access requests, the city claims that the appellant:

> often made informal requests, revised or added to her access requests, demanded information from city staff, told staff how to perform their jobs, and unfairly questioned city staff. The communications were persistent, sometimes threatening and often threatened legal action against the city or its officials.

[23] The city outlined a number of incidents involving the appellant over this period of time, and attached documents, including e-mails that it had received from the appellant, to corroborate its allegations that the appellant was instrumental in creating a situation that led to delays by the city in responding to her access request.

[24] In addition to the sudden increase in access requests that it received in 2010, the city indicates that the Clerk's section was also short-staffed during part of this time due to the municipal election and there was some staff changeover. The city notes that although the staff resources in the past were sufficient to permit it to provide timely responses to access requests, the unique circumstances described above left it unprepared to deal with the volume of requests it received in 2010, in part as a result of the actions of the appellant.

[25] The city points out that it took steps to mitigate the resources shortage and quickly issued a decision after the initial deemed refusal appeal was commenced. The city indicates further that it has instituted changes within its Freedom of Information and Privacy office to address high volumes of requests so that future problems of this sort do not occur.

[26] In summary, the city states that its failure to apply the discretionary exemptions was inadvertent. It takes the position that a unique set of circumstances arose that led to the deemed refusal and the late raising of new discretionary exemptions, which were compounded by the appellant's own conduct and the fact that by the time it had received the appellant's request in this appeal, it was already dealing with 22 other requests, which included voluminous access requests, continuous calls and e-mails from the appellant to revise, clarify or change her requests.

[27] The city refers to a number of decisions of this office that allowed an exemption to be claimed late in the appeal process.[4] In most of these decisions, the analysis was conducted under section 11.01 of the *Code*, as the situation described in section 11.02 was not relevant in these orders. In Order MO-1647, however, Senior Adjudicator David Goodis considered the timing of certain exemptions claimed following a deemed refusal. The senior adjudicator clearly exercised his discretion in accepting the late raising of a discretionary exemption, and considered factors similar to those underlying previous section 11.01 decisions. In my view, the considerations taken into account in these previous analyses are relevant to my exercise of discretion in varying from the procedures outlined in the *Code*, as contemplated in sections 2.01 and 2.04.

[28] The appellant's hostility towards the city is apparent throughout her representations and creep into her responses to the issues she has been invited to address in this appeal. The appellant does not believe that she contributed to the problems faced by the city in responding to her requests and other communications. Rather, she submits that the city's inability to handle "the onslaught" was due to mismanagement. She believes that all the actions taken by the city to mitigate and/or rethink their processes "was only done for 'damage control' since [the city] now knew I had become familiar with the appeal process!" She continues:

> By the time the appeal was filed, close to 100 days had already elapsed, meaning [the city] was in deemed refusal since the beginning of October. The newly claimed exemptions were requested on January 28, 2011 – almost 4 months AFTER the election. The Mediator's report was prepared on February 14, 2011. Surely, the 'oversight' only became 'in good faith' after the new mayor had taken office and I had once again attempted to have these issues addressed by [the city] via the new mayor. [The city]

[4] Orders PO-2780, PO-2664, MO-1647 and MO-2576.

now new the issues had not 'died a quiet death' as perhaps previously thought.

> I was forced by [the city] itself to go through great lengths via the FOI process to get the simplest kernel of truth. The truth is out there and I will not relent until I have completely established the facts of the issues at hand…

[29] Many of the other comments made by the appellant are of a similar nature.

Analysis and findings

[30] In my view, the unique circumstances of this appeal (in combination with the numerous other requests and appeals by the appellant) and the appellant's own actions in dealing with the city mitigate against holding the city to a strict timeline. I find that the city was overwhelmed by the appellant's self-described "onslaught" at the time she submitted the request that led to this appeal, along with the numerous other requests she filed. I note that section 12 had already been claimed for a number of other records and find that the appellant had adequate notice of the exemption claim that raising it late would not cause her any prejudice. Accordingly, I have decided not to reject the section 12 claim solely on the basis of the timing of the claim.

[31] With respect to section 6(1)(b), I note that this exemption has been claimed for records to which sections 12 and 38(b) have also been claimed. With the exception of a portion of Record 18, I have found below that all of the information at issue is exempt under either section 38(b) or section 38(a), in conjunction with section 12.

[32] In particular, I found that the remaining portions of Record 18 contained only innocuous communications between two city staff and that this information did not qualify for exemption under section 12. On reviewing the city's representations relating to section 6(1)(b), I note that the city is only concerned about the non-disclosure of the portions of this record that I found to be exempt under section 12. In the circumstances, I find that it is not necessary to consider the application of section 6(1)(b) to the remaining portions of this record. In addition, the city initially claimed the application of section 6(1)(b) for Record 26 (a portion of which I found below to be exempt under section 38(b)). Following the submission of its representations, the city withdrew its reliance on the section 6(1)(b) exemption for Record 26. Accordingly, it is not necessary for me to determine whether section 6(1)(b) applies to the records for which it was claimed.

[33] Since it is not necessary to consider section 6(1)(b) in the circumstances of this appeal, I need not address whether or not the city should have been permitted to raise it after the initial access decision.

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

[34] 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 if 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 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;

[35] 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.[5]

[36] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.
>
> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[37] 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.[6]

[38] 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.[7]

[39] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[8]

[40] The city takes the position that the records contain the appellant's personal information, and that certain records also contain the personal information of other identifiable individuals.

[41] The appellant submits that any information contained in the records relating to city staff is not personal information.

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[5] Order 11.
[6] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[7] Orders P-1409, R-980015, PO-2225 and MO-2344.
[8] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[42] Having reviewed the records, I find that all of them refer to the appellant and thus contain her personal information. Records 14 and 26 also contain information about certain city staff. The information in record 26 pertains to an individual's employment history, and I find that it qualifies as this person's personal information under paragraph (b) of the definition set out above. Record 14 contains information about another staff member within the context of the appellant's complaints against the city and her overall behaviour in her dealings with the city and its staff. In the circumstances, I find that, although it pertains to the individual in this person's professional capacity, the disclosure of this information would reveal something of a personal nature about the individual, and therefore, it qualifies as this person's personal information under paragraph (h) of the definition.

C. Does the discretionary exemption at section 38(b) apply to the information at issue in Records 14 and 26?

[43] As I noted above, the city has applied the discretionary exemption at section 38(b) to the personal information in Record 14. The City also claims that the mandatory exemption in section 14(1), with reference to the presumption in section 14(3)(d), applies to exempt the personal information in Record 26. I found above that all of the records contain the appellant's personal information. Accordingly, I will consider the application of section 38(b) to both records.

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

[45] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[46] If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy. See below for a more detailed discussion of the exercise of discretion issue.

[47] Sections 14(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

Representations

[48] The city submits that the information withheld from Record 26 comprises the employment history of an identified employee and thus its disclosure is presumed to constitute an unjustified invasion of privacy under section 14(3)(d). The city notes that this information is personal to its employee and is incidental to the appellant's relationship with the city.

[49] The city submits that the information withheld from Record 14 was provided to it in confidence by a named employee and that it raises a sensitive health and safety concern for the employee. The city takes the position that none of the factors favouring disclosure apply to the information in this record.

[50] The appellant argues that employee qualifications are not personal information "since 'qualification processes' for building services personnel are established by the [Ministry of Municipal Affairs and Housing] via examinations and licensing/registration requirements…Years of service in a specific function serves to help establish competency and whether or not negligence occurred…Public health and safety are very much at issue…."

[51] With respect to the information at issue in Record 14, the appellant's submissions generally focus on her own "issues", including the various activities she has been involved in. She states:

> There are some things in life for which one must take a stand and the matters at hand certainly fall within that category.
>
> I have been tenacious but in no way did I harass public employees. If [the city's] employees have felt any stress, it most assuredly could have stemmed from seeing that [the city] had violated the law on numerous occasions."

[52] The appellant continues for the next several pages describing her "relationship" with the city and its staff, from her perspective.

Analysis and findings

[53] Having reviewed the information at issue in this discussion, I find that the information withheld from Record 26 constitutes an employee's employment history and its disclosure would be a presumed unjustified invasion of privacy under section 14(3)(d). I am not persuaded by the appellant's argument that all information about an employee's work history should be available by simple request under the *Act.* Accordingly, I find that the personal information in Record 26 qualifies for exemption under section 38(b).

[54] The information withheld from Record 14 relates to the personal concerns of an identifiable individual. I find that the information was provided to the city in confidence (section 14(2)(h)) and that it is highly sensitive (section 14(2)(f)) in the circumstances of this appeal, particularly given the appellant's stated hostility towards the city and its staff. In my view, these factors under section 14(2) carry significant weight in favour of privacy protection. Moreover, this information is incidental to the building permit issues between the city and the appellant. I find that none of the factors favouring disclosure apply to this information. Having determined that only factors favouring privacy protection apply, I find that the information on Record 14 qualifies for exemption under section 38(b) as its disclosure would result in an unjustified invasion of privacy.

D. Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the remaining records?

[55] 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.

[56] 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.

[57] 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.[9]

[58] 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. The institution is asked to address this under "Exercise of Discretion", below.

[59] In this case, the institution relies on section 38(a) in conjunction with section 12.

[60] 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

[9] Order M-352.

> an institution for use in giving legal advice or in contemplation of or for use in litigation.

[61] 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. The city claims that the records are exempt under the communication privilege aspect of branches 1 and 2. I will begin with the privilege set out in branch 1.

Branch 1: common law privilege

[62] 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.[10]

Solicitor-client communication privilege

[63] 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.[11]

[64] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[12]

[65] 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.[13]

[66] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[14]

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[10] 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).
[11] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[12] Orders PO-2441, MO-2166 and MO-1925.
[13] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[14] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

[67] 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.[15]

Representations

[68] The city notes that, with the exception of Record 18, "[a]ll of the records in this discussion flow from an email sent to Council by the Appellant making allegations against the City and threatening potential legal action." The city submits that the records comprise:

- Communications directly to the City Solicitor from city council and city staff seeking legal advice (Records 4, 13, 17)
- Communications from the City Solicitor providing legal advice to his clients, City staff or Council (Records10, 15, 22, 23 and 25) or
- Communications copying the City Solicitor to keep him apprised of the situation (Records 4, 9, 10, 13, 17, 20, 22, 23, 27 and 28)

[69] The city points out that the records consist of e-mail chains and, therefore, contain duplicate information, as well as one or more of the above three categories of information. The city states further:

> The City Solicitor, [named], is the legal advisor to Council. The City staff, as Council's delegate in implementing Council's directive, obtains legal assistance from the City Solicitor. As such, the City Solicitor either provides advice or receives information from Council or City staff in order to form legal opinions.
>
> The communications made in the records for which section 12 is claimed were made in confidence…The records themselves indicate that only Council and City staff responsible for managing the concerns raised and allegations made by the Appellant were included in the records.

[70] The appellant submits extensive representations describing her complaints against the city, which do not assist in determining whether the records are subject to solicitor-client privilege. She indicates that a number of individuals who would be identified in the records are not lawyers and states:

> [The city] should not be allowed to cloak its wrongdoing behind 'solicitor-client' given the city attorney was not even asked to participate in the proposed meeting in which I had wanted to detail the issues at hand for [city] Council. Instead, [the city] felt that only 2 Councillors and 2

[15] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

> administrators would suffice to hear the matters at hand. The City Attorney was not to be part of the proposed meeting.

[71] The appellant takes the position that transparency and accountability requires that "[t]he well-being and interests of the municipality MUST override behind closed doors meetings when public health and safety are at issue."[appellant's emphasis]

Analysis and findings

[72] Having reviewed the records at issue I agree with the city's characterization of them. All of the records at issue in this discussion pertain to allegations made by the appellant and the possible legal repercussions for the city of her actions. I find that some of the records contain requests for a legal opinion, or contain the legal opinion, and, therefore, qualify as 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.

[73] I find that the remaining records in this discussion represent part of a continuum of communications between the solicitor and his clients, aimed at keeping both informed so that advice may be sought and given as required.

[74] Based on the submissions made by the city and my review of the records, I find that Records 4, 9, 10, 13, 15, 17, 20, 22, 23, 25, 27 and 28 qualify for exemption under the solicitor-client communication privilege aspect of branches 1 and 2 of section 12 of the *Act*. I have no evidence before me that the city has lost or waived its privilege in the records.

[75] Accordingly, I find that Records 4, 9, 10, 13, 15, 17, 20, 22, 23, 25, 27 and 28 qualify for exemption under section 38(a) of the *Act*.

[76] In its representations, the city indicates that it no longer relies on section 12 for Record 18. However, on review of this record, which is an e-mail between a supervisor and employee that was not copied to legal counsel, I note that in the first two paragraphs, the supervisor apprises the employee of the legal issues and advice being requested identified in the other records. Although not a direct or indirect communication between legal counsel and his clients, in my view, its disclosure would reveal these communications and/or reflect the communications to and from legal counsel. It is apparent from the record that the employee in question was involved in addressing the concerns and allegations raised by the appellant, and would, therefore, need to be kept informed regarding the communications with counsel. In the circumstances, I find that the solicitor-client communication privilege extends to this information in Record 18. The remaining information on this record is innocuous and would not fall within the exemption at section 12 in any event. Accordingly, I find that the first two paragraphs of Record 18 qualify for exemption under section 38(a). As no

other exemption has been claimed for or applies to the remaining portions of this record, it should be disclosed to the appellant.

[77] Having found that sections 38(a) and 38(b) apply to Records 4, 14, 27 and 28, it is not necessary for me to consider the application of sections 7(1) or 13 to them.

E. Should the city's exercise of discretion to deny access under sections 38(a), in conjunction with section 12, and 38(b) be upheld?

[78] The section 12, 38(a) and 38(b) exemptions are discretionary, and permit 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.

[79] 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.

[80] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[16] This office may not, however, substitute its own discretion for that of the institution.[17]

Representations

[81] The city indicates that it is cognizant of the purposes and spirit of the *Act*, which is reflected in the "voluminous amounts of information relating to her concerns raised against the City" that she has received in response to the 32 requests she has made. The city notes that it released a number of records to the appellant in response to her current request and disclosed the headers of the records at issue, as well as the portions of the e-mail chains that contained the appellant's e-mails, in order to place the records in context.

[82] Referring to the appellant's assertion that the records relate to health and safety concerns, the city disputes the contention, noting:

> The city identified a *Building Code Act* deficiency which would increase the safety and security of the Appellant's family residing within the house…A

[16] Order MO-1573.
[17] Section 43(2).

> simple solution to the issue has been proposed to the Appellant by the City on numerous occasions but the Appellant refuses to accept the solution. Because she continues to threaten litigation, the City must treat her threats in a serious fashion although there is no compelling building safety concern upon which any litigation would be based.

[83] The city also refers to its experiences with the appellant and notes her "volatile temperament" and indicates that this was a factor considered in withholding certain personal information relating to other individuals.

[84] The appellant indicates that she has spent considerable time documenting and investigating the issues she has raised with the city. She states, "[t]his is hardly indicative of a person who would be seeking to hurt anyone." The appellant continues:

> I have limited my activities to documentation of the facts. The same could not be said to be true of [the city]. [The city] now indeed does find itself in a 'perfect storm' and I would add that for the most part, [the city] chose to stay in the eye of the hurricane as the storm continued to brew about – unbeknown to [city] officials and [city] Council. By the time [the city] realized that it was indeed in the eye of the hurricane, it was too late to evacuate!
>
> …
>
> If I truly was a threat to persons at [the city], why did the City Clerk not call security immediately upon seeing me at the City Clerk's desk?

[85] The appellant describes her dealings with the city and maintains that she is not a volatile person. She indicates further that her dealings with the city have been limited and asserts that any concerns the city has about her behaviour are unfounded.

Analysis and findings

[86] After considering the parties' representations, and the documentary evidence provided by the city along with its submissions, I find that the city has properly exercised its discretion to withhold the records to which sections 12/38(a) and 38(b) apply. I find that the city's decision was made in good faith, taking into account relevant considerations and not taking into account irrelevant considerations.

[87] The evidence is clear that the appellant has initiated a dispute against the city and certain of its staff, including threatening legal action. The evidence also depicts the appellant as a very intense and driven opponent. Contrary to the appellant's assertion that her dealings with the city have been limited, I find that the documentary evidence provided by the city, which includes the numerous e-mails sent to it by the appellant,

contain aggressive and, at times, threatening language and other evidence relating to her in-person and other contacts with individuals. In my view, these documents substantiate the city's concerns about disclosure of the information at issue in this appeal.

[88] Accordingly, I uphold the city's exercise of discretion.

F. Does the public interest override in section 16 apply to the information withheld under section 38(b)?

[89] Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[90] The appellant's representations focus largely on the information to which section 12 has been found to apply. Section 12 of the *Act* is not included as an exemption subject to the public interest override in section 16. In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security),*[18] the Ontario Court of Appeal held that the exemptions in sections 14 and 19 of the provincial *Act*, which are equivalent to sections 8 and 12 of the *Act,* are to be "read in" as exemptions that may be overridden by section 23, the provincial equivalent to section 16 of the *Act*.

[91] However, on June 17, 2010, the Supreme Court of Canada released its decision on this matter, overturning the Court of Appeal's decision.[19] The Court restored the Commissioner's decision confirming the constitutionality of section 23 and holding that two of three records at issue are exempt under section 19. The Court held that, while section 2(b) of the *Charter* does not guarantee access to government information, such access is nonetheless "a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government." The Court went on to find no section 2(b) *Charter* breach in the particular case before it. In arriving at this conclusion, the Court found, among other things, that the impact of the absence of a section 23 public interest override is minimal because the discretionary exemptions at sections 14 and 19 (sections 8 and 12 of the municipal *Act*) already incorporate consideration of the public interest.

[92] There is nothing in the circumstances of this appeal to support the application of section 2(b) of the *Charter*. I find that the application of section 16 is not available to override the exemption in section 12 of the *Act*. In the circumstances, section 16 is also not available to override the exemption in section 38(a), as it applies only in the context of the section 12 exemption.

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[18] (2007), 86 O.R. (3d) 259 (leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)
[19] *Ontario (Public Safety and Security) v. Criminal Lawyers' Assn.*, [2010] S.C.J. No. 23.

[93] Section 16 does, however, apply to records for which section 14 [and by extension, section 38(b)] has been found to apply. Accordingly, I will consider the possible application of section 16 to the two portions of Records 14 and 26 to which section 38(b) was found to apply, and will focus solely on the appellant's submissions relating to this particular information.

[94] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[95] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[20]

Compelling public interest

[96] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[21] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[22]

[97] A public interest does not exist where the interests being advanced are essentially private in nature.[23] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[24]

[98] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[25]

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[20] Order P-244.
[21] Orders P-984, PO-2607.
[22] Orders P-984 and PO-2556.
[23] Orders P-12, P-347 and P-1439.
[24] Order MO-1564.
[25] Order P-984.

Representations

[99] As I noted above, the appellant's representations focus on her dispute with the city, with implications relating to *inter alia* title insurance, home warranties and conflict of interest of the Law Society of Upper Canada and all Ontario lawyers. She believes that the city has violated its own by-laws and that its employees have created health and safety risks by their actions, and that city employees have abused the appellant and her family. She does not specifically address why there is a compelling public interest in the disclosure of the personal information in Records 14 and 26, although comments made by her in addressing the application of section 38(b) reflect her views to some degree. In particular, the appellant asserts that employment history information about public employees is "public information" and should, therefore, be made available to the public in order to hold them accountable for the public work they perform. Although the appellant does not address the personal information at issue in Record 14 (in fairness because she does not know what it is), her general belief is that as a victim of what she believes to be unscrupulous city employees, she has a right to know everything the city has relating to her dispute with it in order to hold the city and its employees accountable to and under the law.

[100] She concludes her submissions, stating:

> I do not have a disdain for the city itself – I only have a very real disgust for many of those who were supposed to be there to protect the public and so miserably failed to do so and for those who chose to completely disregard the health and safety of my own family by suggesting fixes to a matter of structural integrity which the KNEW was not acceptable and which they KNEW violated numerous sections of the [Ontario Building Code] and/or Act as evidenced by their constant "revisions" to what was needed when we said we would be hiring an outside, independent engineer.

[101] The city also provides extensive representations on this issue. Essentially, the city submits that there is no compelling public interest in disclosure of the records at issue, and in particular, Records 14 and 26 as the appellant is involved in a private matter with the city, which does not have a larger public interest. With respect to the personal information in the records, the city states:

> [T]he disclosure of personal information into the hands of a person who has entered another person's zone of privacy, such as the Appellant did with [a named individual] would offend one of the purposes of [the *Act*], the protection of personal information…[t]he same could also be said for giving the Appellant access to [a named individual's] employment history.

[102] The city also describes its dealings with the appellant and its opinion regarding her motives and actions, and concludes:

> The Appellant is motivated by a clear disdain for the City and its practices but is using the access to information process to fuel her own private vendetta and legal actions. As such, the public interest override should not be invoked in this case to override the discretionary exemptions.

Analysis and findings

[103] As I have noted throughout this order, the appellant clearly has a dispute with the city regarding its building inspection practices. She believes that the city has acted illegally, incompetently and maliciously towards her and her family. The city sees her as a volatile, aggressive and threatening individual. The documentary evidence submitted by the city supports a conclusion that the appellant's dispute has escalated to the point that the original dispute appears to be overwhelmed by the animosity between the parties and renders the appellant's motivation in seeking the information at issue subject to question. I find that the appellant's interest in obtaining the personal information in Records 14 and 26 is essentially a private one. Moreover, I am not persuaded that this private interest in disclosure raises issues of more general application. The appellant has been provided considerable information relating to her dispute with the city, and I find that there is no public interest in disclosure of the personal information of the affected parties that is contained in Records 14 and 26 in the circumstances of this appeal.

[104] Accordingly, I find that, with the exception of portions of Record 18, the remaining records at issue are exempt from disclosure under sections 38(a) and (b). I have highlighted the information that I have found to be exempt on Record 18 on the copy of this record that I am sending to the city along with this order. The remaining portions of this record should be disclosed to the appellant.

ORDER:

1. I order the city to disclose the portions of Record 18 that are not highlighted on the copy of this record that I am enclosing with this order to the appellant by **April 11, 2012.**

2. I uphold the city's decision to withhold the remaining records from disclosure.

3. In order to verify compliance with this order, I reserve the right to require the city to provide me with a copy of the record disclosed to the appellant pursuant to order provision 1.

Original signed by: March 20, 2012
Laurel Cropley
Adjudicator