

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2793

Appeal MA11-275

City of Toronto

October 1, 2012

Summary: The appellant requested records relating to a request he made to the City of Toronto for a conveyance of land. The appellant sought access to similar records for a different time period in a related appeal disposed of in Order MO-2789. The city claims that the majority of records contain solicitor-client privileged information. The city also claims that disclosure of some records would constitute an unjustified invasion of personal privacy under section 38(b). In addition, the city claims that some records contain advice and recommendations and are exempt under section 38(a). The city's decision to withhold the records it claims contain solicitor-client privileged information is upheld. The city's decision to withhold the personal information of other individuals contained in the records is also upheld. The city is ordered to disclose to the appellant one record which only contains his personal information and this is not exempt under section 38(b).

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", 7(1), 12, 14(1), 38(a) and (b).

Orders and Investigation Reports Considered: Order MO-2789.

OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Toronto (the city), for access to

information relating to his property and his request for a conveyance for a specified period of time.

[2] The city identified responsive records and granted the appellant partial access. The city withheld the remaining records pursuant to the exemptions at section 7(1)(advice and recommendations), 12(solicitor-client privilege) and 14(1)(personal privacy) of the *Act*.

[3] The appellant appealed the city's decision to this office and a mediator was assigned to the appeal.

[4] At the end of mediation, the appellant confirmed that he continued to seek access to the withheld information. The appellant also confirmed that he did not seek access to information the city identified as not responsive to this request. Finally, the appellant withdrew his claim that additional responsive records exist.

[5] The issues remaining in dispute at the end of mediation were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. The city's representations were shared in accordance with the *IPC's Code of Procedure and Practice Direction 7*. The appellant did not provide representations in this appeal but requested that the representations he provided in a related appeal MA11-125 be considered for the purposes of this appeal.

[6] In this order, I find that the majority of the records at issue in this appeal contain the appellant's personal information but also find that these records contain solicitor-client privileged information and thus qualify for exemption. I also find that other records are exempt as their disclosure would constitute an unjustified invasion of personal privacy. However, I ordered the city to disclose one record that I found contains the appellant's personal information only.

RECORDS:

[7] The city provided an Index of Records with its representations. The Index groups the records in five categories.

Group A: Correspondence exchanged between Legal Services staff and other city staff where section 12 and 14(1) is claimed

Record #	Page Nos.	Record Description	Disclosed?
1	1 - 2	Email from Solicitor, Jan 28, 2011, p.1	s. 12 - Denied in full
3	7 - 9	Confidential Attachment 2 of staff report dated January 27, 2011	s. 12 - Denied in full

Record #	Page Nos.	Record Description	Disclosed?
11.	22	Emails between Solicitors and Transportation Manager, February 22, 2011	s. 12-Denied in full
12.	23	Email from Solicitor, February 17, 2011	Non responsive - Denied in full
13.	24	Email from Transportation Manager to Solicitors, February 17, 2011	s. 12 - Denied in full
17.	29	Emails between Solicitor and Transportation Manager, February 10, 2011, p. 1	s. 12 - Denied in part
19.	31	Emails between Solicitor and Transportation Manager, February 10, 2011, p. 1	s. 12 - Disclosed in part
20.	33	Emails between Solicitor and Transportation Manager, February 10, 2011, p. 1	s. 12 - Disclosed in part
23.	35	Emails between Solicitor and Transportation Manager, February 10, 2011	s. 12 - Disclosed in part
44.	73 - 75	Confidential Attachment 2 of staff report dated January 27, 2011	s. 12 - Denied in full
46.	83	Email from Solicitor, Jan 28, 2011	s. 12 - Denied in full
49.	88 - 91	Confidential Attachment 2 of staff report dated December 9, 2010	s. 12 - Denied in full
53.	100 - 103	Confidential attachment 2	s. 12 - Denied in full
56.	109 - 112	Confidential attachment to draft December 9, 2010 staff report	s. 12 - Denied in full
69.	128	Email between Transportation Director and Solicitor, January 5, 2011	s. 12 and s. 14 - Disclosed in part
70.	129	Email from Solicitor, January 5, 2011	s. 12 - Disclosed in part
98.	172	Email from Technical Services to Legal Services, November 16, 2010, p. 1	s. 12 - Disclosed in part
99.	173 - 174	Email from Transportation Manager to Legal Services, November 16, 2010, p. 2 & 3	s. 12 - Denied in full
100.	175	Email from Transportation Manager to Legal Services, November 16, 2010, p. 1	s. 12 - Disclosed in part
101.	176 - 177	Email from Transportation Manager to Legal Services, November 16, 2010, p. 2 & 3	s. 12 - Denied in full
102.	178	Email from Solicitor to Solicitor, Transportation Supervisor and Legal Services, November 16, 2010, p. 1	s. 12 - Disclosed in part
103.	179 - 180	Email from Solicitor to Solicitor, Transportation Supervisor and Legal Services, November 16, 2010, p. 2 & 3	s. 12 - Denied in full

Record #	Page Nos.	Record Description	Disclosed?
104.	181 - 183	Email from Transportation Supervisor to City Solicitors, November 15, 2010	s. 12 - Denied in full
105.	184	Email between Solicitor and Transportation Manager, November 12, 2010	s. 12 - Denied in full
107.	186	Email from Transportation Supervisor to City Solicitors, November 8, 2010	s. 12 - Denied in full
115.	197	Email between Transportation Director and Solicitor, November 1, 2010	s. 12 - Disclosed in part

Group B: Correspondence exchanged between non-legal staff where section 7 and 12 is claimed

72.	131 - 133	Draft staff report dated December 13, 2010	s. 7 and 12 - Denied in full
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Group C: Correspondence exchanged between Legal Services staff and a Councillor's Office

57.	113	Emails between Legal Services, Transportation Services and Councillor, January 14, 2011, p.1	s. 7 & 12 - Denied in full
59.	115	Emails between Legal Services, Transportation Services and Councillor, January 14, 2011, p.1	s. 7 & 12 - Denied in full
61.	117	Email from Solicitor, January 14, 2011, p.1	s. 12 and s. 14 - Disclosed in part
63.	119	Email from Transportation Director, January 13, 2011	s. 14-Disclosed in part
64.	120	Email from Councillor's office, January 13, 2011	s. 14 - Disclosed in part
66.	122	Email from Transportation Director to Councillor, January 11, 2011	s. 14 - Disclosed in part

Group D: Correspondence exchanged between non-legal staff

15.	27	Emails between Transportation Director and Transportation Manager and Transportation Supervisor, February 16, 2011	s. 7 & s.14 - Denied in full
78.	143 - 145	Emails between Transportation Manager and Transportation Supervisor, December 13 & 14, 2010	s. 7 and 12 - Denied in full
81.	148 - 151	Draft staff report dated December 13, 2010	s. 7 and 12 - Denied in full
82.	152	Email from Transportation Manager to Transportation Supervisor, December 13, 2010	s. 7 and 12 - Denied in full

85.	155	Email from Transportation Manager to Transportation Supervisor, December 13, 2010	s. 7 and 12 - Denied in full
88.	158 - 160	Draft staff report dated December 13, 2010	s. 7 and 12 - Denied in full
108.	187 - 189	Email and attachments from Transportation Analyst to Transportation Supervisor and Road Operations, November 4, 2010	s. 12 - Denied in full
109.	190 - 191	Email from Road Operations to Transportation Supervisor	s. 12 - Denied in full
110.	192	Email from Transportation Supervisor to Road Operations, November 4, 2010	s. 12 - Denied in full

Group E: Other documents withheld under section 14(1)

38.	65	North York Community Council Deputation List, February 16, 2011	s. 14 - Disclosed in part
51.	95 - 96	Letter from law firm, January 21, 2011	s. 14 - Denied in full
60.	116	Email from Councillor's office, January 13, 2011, p.2	s. 14 - Disclosed in part
73.	134	Emails between Solicitor and Transportation Director, January 5, 2011, p.1	s. 14 - Disclosed in part
75.	136	Email from Transportation Director to Solicitors and Transportation Manager, January 4, 2011	s. 14 - Disclosed in part

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Do the records contain solicitor-client privileged information under section 38(a)?
- C. Does page 27 of the records contain advice and recommendations under section 7(1)?
- D. Would disclosure of the withheld information on pages 27, 65, 95-96, 116, 119, 120, 122, 134 and 136 constitute an unjustified invasion of personal privacy under section 38(b)?
- E. Did the city properly exercise its discretion in applying the discretionary exemptions at section 38(a) and (b)?

DISCUSSION:

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

[8] 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.

[9] 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.¹

[10] 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.²

[11] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

[12] The city submits that the records do not primarily concern the appellant or any other individual, but rather are about the appellant's "entitlement, or lack thereof, to travel across City property." However, the city concedes that some of the correspondence in the Group A, C, D and E records contain the personal information of the appellant and other identifiable individuals. In its representations, the city states that these records may contain:

...telephone numbers, addresses, views, and opinions of individuals other than the [appellant]. The documents may also contain correspondence sent by individuals or their legal representative outlining personal opinions on a variety of subjects. For example, the Outstanding Records contain opinions of the [appellant] on the propriety of land-uses by himself and others. Therefore, the City submits that some, but not all, of the information in question could constitute personal information for purposes of s.2(1) of [the *Act*], and that the Outstanding Records contain the personal information of the [appellant], and other individuals.

[13] The appellant's representations submitted in the related appeal did not address this issue.

[14] Having regard to the city's representations and the records themselves, I find that all of the records but for the draft staff report found at pages 131-133, 148-151 and 158-160 contain the personal information of the appellant. The subject-matter of these records relate to the appellant's views and opinions about the use of the property. Accordingly, I find that the records contain information about the appellant's address [paragraph (d) of the definition of personal information in section 2(1)], his personal opinions or views [paragraph (e)] along with his name as it appears with other personal information relating to him [paragraph (h)]. I also find that some of the

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

² Orders P-1409, R-980015, PO-2225 and MO-2344.

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

records contain the personal information of other identifiable individuals, such as the names, views, opinions and contact information of members of the public. In my view, these portions of the records contain these individuals personal information as defined paragraphs (d), (e) and (h) of the definition of that term in section 2(1). In addition, I note that some of the emails exchanged between staff, legal or otherwise, refer to personal matters such as workload issues and when they are in or out of the office. These portions of the records also constitute personal information as defined in paragraph (h) of the definition in section 2(1).

[15] Having regard to the above, I will go on to determine whether the records, but for the draft staff reports, are exempt under sections 38(a) and (b) in conjunction with sections 7(1) and 12.

[16] With respect to the draft staff reports at pages 131-133, 148-151 and 158-160, I will consider whether these records contain "advice and recommendations" or solicitor-client privileged information under sections 7(1) and 12.

B. Do the records contain solicitor-client privileged information under section 38(a)?

[17] 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. 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.

[18] 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].

[19] 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.

[20] In this case, the institution relies on section 38(a) in conjunction with section 12, which states:

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.

[21] 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 both branches 1 and 2 apply to the Group A, B, and parts of C and D group of records.

[22] For the reasons stated below, I find that the solicitor-client communication privilege under branch 1 applies to the Group A, B, and parts of C and D group of records and that the city has not waived its privilege. Accordingly, it is not necessary for me to determine whether the litigation privilege under branch 1 or the privileges under branch 2 also applies.

Branch 1: common law privilege

[23] 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.⁴

Solicitor-client communication privilege

Representations of the parties

[24] In support of its position that the Group A, B and parts of the C and D records are subject to solicitor-client communication privilege, the city's representations state:

The Group A and B records are comprised of correspondence between solicitors employed by the City of Toronto and other employees or officers of the City of Toronto relating to issues about the [appellant's conveyance request].

...

[t]he Group D records are comprised of "re-transmissions" of the Group A and B Records within the members of the internal clients of the City's solicitors. This correspondence was largely transmitted by electronic means and often contains "attachments" to the correspondence. These "attachments" consisted of additional documents, which contain comments to the solicitors, or the "attachments" were provided to the

⁴ 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.

solicitors for the purpose of obtaining legal advice in relation to the content of the "attachment". This correspondence between the City's solicitor's and the City as a client dealt with various issues including the possibility of contemplated litigation and its ramifications, as well as the legal ramifications of the subject matters of negotiations.

[25] The city also states that pages 113, 115 and 117 in the Group C records contain protected communications between a client and solicitor.

[26] The city also submits that some of the records it claims contain solicitor-client privileged information are "working drafts" of documents prepared in relation to the dispute. I note that the Group A, B and D records contain draft staff reports in various stages of completion (pages 7-9, 73-75, 88-91, 100-103, 109-112, 131-133, 148-151 and 158-160). The city argues that the "working drafts" constitute correspondence exchanged between city staff "in light of the advice provided by City Legal". The city states that disclosure of these records would "make the substance or content of the solicitor-client advice provided to the City ... publicly available".

[27] The appellant's representations question the validity of the city's claim that the records contain solicitor-client privileged information. In this regard, the appellant's representations state:

... the sheer volume of legal records suggest that the City Solicitor's office has engaged itself in the day-to-day activities of the Transportation Department while moving away from its capacity as a legal advisor. The claim of privilege must be strictly applied so that public agency operating departments cannot hide by merely involving legal counsel in their normal activities and using lawyer's files as a dumping ground for information in the hopes of keeping such information confidential. This would represent a grotesque misapplication of the concept of such privilege.

Decision and Analysis

[28] 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.⁵

[29] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.⁶

⁵ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁶ Orders PO-2441, MO-2166 and MO-1925.

[30] 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.)].

[31] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.⁷

[32] 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.⁸

Groups A and C Records – Correspondence exchanged between Legal Services and other city staff or the Councillor’s office

[33] The Group A records comprise mostly of emails exchanged between city solicitors and non-legal staff, including a “working draft” report found at pages 7-9, 73-75, 88-91, 100-103 and 109-112, which I will refer to as the solicitor’s report. I have reviewed the contents of the Group A records and am satisfied that they were created to keep both the city and its solicitors informed so that legal advice may be sought and given as required.

[34] The city submits that pages 113, 115 and 117 in the Group C records also contain solicitor-client privileged information. I have carefully reviewed these records and am satisfied that the disclosure would reveal the direct communications between the city’s solicitors, staff and a city councillor.

[35] Having regard to the above, I find that the Group A and pages 113, 115 and 117 of the Group C records form part of the “continuum of communications” recognized in *Balabel* as falling within the solicitor-client privilege in branch 1, subject to my finding below, as to whether the privilege has been waived.

Group B Records – Correspondence exchanged between non-legal city staff

[36] The sole record in the Group B category is a “working draft” report found at page 131-133. This record is also found at pages 148-151 and 158-160 in the Group D records. I will refer to these records as the draft staff reports. The city argues that the information concerning in these draft reports are “re-transmissions” of confidential communications exchanged between solicitor and client. The city submits that the

⁷ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁸ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

draft staff reports were attached to correspondence from its solicitor "which contains specific advice concerning the drafting of the document". In support of its submission, the city refers to page 129 from the Group A records, which was disclosed in part to the appellant. I have reviewed page 129 and confirm that the withheld portions of this email contains the city solicitor's advice after her review of the draft staff report.

[37] Having regard to the above, I am satisfied that the staff report found at page 131-133 falls within the ambit of the solicitor-client communication privilege under branch 1, subject to my finding below, as to whether the privilege has been waived.

Group D- Correspondence exchanged between non-legal staff

[38] For the same reason I found that the draft staff report at pages 131-133 contains solicitor-client privileged information, I find that versions of the same draft report at pages 148-151 and 158-160 form part of the "continuum of communications" recognized in *Balabel* as falling within the solicitor-client privilege in branch 1. In my view, the email at page 129 establishes that the city's solicitor was involved in reviewing and amending the staff report. Accordingly, I am satisfied that the distribution of the draft report to the city's solicitor was aimed at keeping the city's solicitors informed so that legal advice be may sought and obtained.

[39] The remaining Group D records are emails exchanged between city staff (pages 143-145, 152, 155, 187-189, 190-191 and 192). The city submits that these emails are "re-transmissions" of confidential communications exchanged between solicitor and client. In support of its position, the city's representations state that these records:

... contain content which would directly or indirectly reveal the content of documents collected or received by the City's solicitors for the purpose of formulating legal advice or preparing for potential litigation (by directly including, paraphrasing, or otherwise revealing or referencing the content of discussions between City Legal and City Staff.

[40] I have carefully reviewed the records and am satisfied disclosure of the emails at pages 187-189, 190-191 and 192 would indirectly reveal information obtained for the purpose of keeping the city's solicitor's informed so that legal advice may be sought and given as required. The purpose of these emails is to gather and solicit information the solicitors asked staff to collect on their behalf.

[41] With respect to the emails at 143-145, 152 and 155, I am satisfied that disclosure would reveal the city solicitor's advice regarding what information should or should not be included in the final staff report. As evidenced in the email at page 129, the city solicitor was consulted by the city's Transportation department to review its report to Council. Though these emails were not directly sent to the city solicitor, the

content of the emails were included in the draft staff report which was sent to legal for approval.

[42] Having regard to the above, I find that the Group D records form part of the “continuum of communications” recognized in *Balabel* as falling within the ambit of solicitor-client privilege under branch 1, subject to my finding below, as to whether the privilege has been waived.

Loss of privilege

Waiver

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

[44] Waiver of privilege is ordinarily established where it is shown that the holder of the privilege⁹

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

[45] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.¹⁰

[46] The city submits that it has not waived privilege attached to the records I found fall within the ambit of the solicitor-client communication privilege under branch 1. The appellant submits that any privilege that may attach to the records has been waived. In support of his position, the appellant argues:

- The City Solicitor identified specific provisions of the *Municipal Code* to the appellant in an effort to assist him prepare his conveyance request to the city. The appellant states that “this action by the City Solicitor has removed the City Solicitor from the capacity of professional legal advisor to some other capacity and therefore solicitor-client privilege does not apply”.
- The city waived privilege by communicating its legal position and strategy to a Councillor, who is a third party. The appellant states “[s]uch action entirely negates any claim that the City might have to privilege of such records”. In support of this position, the appellant refers to a portion of

⁹ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

¹⁰ 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.).

an email (page 825), which was disclosed to him as the result of a previous access request.

[47] The appellant raised these same arguments in a related appeal which was disposed by Order MO-2789. In that order, I state:

In my view, the city's identification of relevant legislation to the appellant does not constitute a waiver of privilege. I also considered the appellant's evidence that the city revealed its "legal position and strategy" to a councillor and carefully reviewed page 825 of the records, which is an email from a councillor disclosed in part to the appellant. I have carefully reviewed the email and it appears that the email merely confirms the councillor's understanding that the matter is being supervised by the city's legal department. The councillor also states that it is his understanding that the city does not want to escalate its discussions with the appellant's lawyer. In my view, the fact that the councillor indicated that the city's legal department was supervising the matter and it was interested in de-intensifying the dispute does not amount to a disclosure of the city's "legal position and strategy".

[48] For the same reasons stated in Order MO-2789, I find that the appellant has adduced insufficient evidence to support a finding that in the circumstances of this appeal, the city has waived any privilege that attaches to the records. Accordingly, I accept the city's evidence that it has not waived privilege and find the records the city claims contain solicitor-client privileged information are exempt under section 38(a).

[49] I will go on to determine whether the city properly exercised its discretion in applying section 38(a) to these records. However, first I will consider whether page 27 of the Group D records qualifies for exemption under section 7(1).

C. Does page 27 of the records contain advice and recommendations under section 7(1)?

[50] Section 7(1) states:

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

[51] The city submits that the Group D records contain draft staff reports and emails about "the content of the reports, or actual staff reports" concerning the considerations which are to be taken into account in evaluating the proposed transfer of city land. The city also states that the Group D records "set out a suggested course of conduct with

respect to the City's determination" regarding the appellant's conveyance request. The city goes on to state:

It is the City's submission that overall, the selected records constitute advice, or a specific recommendation, or would permit the inferring of a recommendation, by comparing suggestions [and] actions with the publicly available information, which reveals the actions actually taken by the individual who received the advice.

[52] The appellant's representations submitted in the related appeal did not address this issue.

[53] The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.¹¹

[54] Previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information [see Order PO-2681].

[55] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised.¹²

[56] Advice or recommendations may be revealed in two ways:¹³

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

[57] The only record remaining at issue for which the city claims contains "advice and recommendations" is an email found at page 27. I have carefully reviewed this record

¹¹ Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.).

¹² Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

¹³ Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above).

and find that it does not qualify for exemption under section 7(1). Though the email constitutes an exchange of information between city employees, I am not satisfied that the communication qualifies as "advice and recommendations" for the purposes of section 7(1). As noted above, in order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised. In my view, the email in question does not suggest a course of action that will be ultimately be accepted or rejected. Instead, a city staff member asks his superior a question and receives an answer. In addition, the city's evidence is that the group D records "set out a suggested course of conduct with respect to the City's determination" regarding the appellant's conveyance request. However, the email in question appears to have been created after Council made its decision.

[58] Having regard to the above, I find that disclosure of the email at issue would not reveal the advice of either staff member and find that the exemption at section 7(1) does not apply. The city also submits that disclosure of a portion of this record would constitute an unjustified invasion of personal privacy under section 38(b). I will therefore consider whether disclosure of this record along with pages 65, 95-96, 116, 119, 120, 122, 134 and 136 would constitute an unjustified invasion of personal privacy under section 38(b).

D. Would disclosure of the withheld information on pages 27, 65, 95-96, 116, 119, 120, 122, 134 and 136 constitute an unjustified invasion of personal privacy under section 38(b)?

[59] Section 38(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and another individual. Earlier in this order, I found that portions of the records contain the personal information of the appellant and other identifiable individuals.

[60] Accordingly, the city must look at the information at issue and weigh the appellant's right of access to his own personal information against the affected party's right to the protection of their privacy. If the city determines that release of the information would constitute an unjustified invasion of an identifiable individual's personal privacy, then section 38(b) gives the city the discretion to deny access to the appellant's personal information.

[61] In determining whether the exemption in section 38(b) applies, sections 14(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the affected person's personal privacy. Section 14(2) provides some criteria for the city to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(4) refers to certain types of information whose disclosure does not constitute an

unjustified invasion of personal privacy. The parties have not claimed that any of the exclusions in section 14(4) apply and I am satisfied that none apply.

[62] Section 38(b) states:

A head may refuse to disclose to the individual to whom the information relates personal information where the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[63] The city claims that disclosure of the remaining information at issue would constitute an unjustified invasion of personal privacy under section 38(b) taking into account the presumption at section 14(3)(h), which states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[64] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b). In *Grant v. Copley* [2001] O.J. 749, the Divisional Court said the Commissioner could:

. . . consider the criteria mentioned in s.21(3)(b) [the equivalent provision in the provincial *Act* to section 14(3)(b)] in determining, under s. 49(b) [which is equivalent to section 38(b)], whether disclosure . . . would constitute an unjustified invasion of [a third party's] personal privacy.

Representations of the parties

[65] The city submits that portions of records remaining at issue contain information specifying individuals as members of a group of residents holding a specific belief concerning the property dispute between the appellant and the city. The city submits that the presumption at section 14(3)(h) applies to this information. The city also describes the information at issue as "highly sensitive".

[66] The appellant's representations submitted in the related appeal did not address this issue.

[67] I have carefully reviewed the records and am satisfied that disclosure of the withheld portions of the records which identify individuals, other than the appellant, would constitute an unjustified invasion of personal privacy taking into account the factor at section 14(2)(f), which states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether the personal information is highly sensitive

[68] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹⁴ In my view, disclosure of the names, views and opinions of individuals, who are adverse in interest to the appellant, could reasonably lead to significant personal distress. This information represents the withheld information on pages 65, 95-96, 116, 119, 120, 122, 134 and 136 of the records. Given my finding, it is not necessary that I also determine whether these individuals views and opinions constitute a political belief or association thereby falling within the ambit of the presumption at section 14(3)(h).

[69] The remaining record at issue is page 27 of the Group D records. The views and opinions expressed in this email are those of city staff members about the appellant. Though another individual is mentioned in the records, this individual is the appellant's agent. Accordingly, the personal information at issue in this email is solely that of the appellant. As a result, the factor at section 14(2)(f) and presumption at section 14(3)(h) have no application to the information at issue. Having regard to the record itself, I find that disclosure of page 27 to the appellant would not constitute an unjustified invasion of personal privacy under section 49(b). As the city has not claimed that any other mandatory exemptions could apply to this record, I will order the city to disclose it to the appellant.

E. Did the city properly exercise its discretion in applying the discretionary exemption at sections 38(a) and (b)?

[70] The sections 38(a) and (b) exemption are 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.

[71] 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.

¹⁴ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

[72] 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)].

[73] The city's submissions on its exercise of discretion mirror those provided in the related appeal that resulted in Order MO-1789. The city submits that it exercised its discretion in good faith and took into account the following relevant considerations:

- the purposes of the *Act*, including the principle that individuals should have a right of access to their own personal information;
- the wording of the exemption and the interests it seeks to protect;
- the nature of the information and the extent to which it is significant and/or sensitive to the city;
- whether disclosure will increase public confidence in the operation of the institution;
- whether the requester has a sympathetic or compelling need to receive the information; and
- the age of the information.

[74] The appellant's representations submitted in the related appeal did not address this issue.

[75] In my view, the city's evidence demonstrates that it properly exercised its discretion and in doing so took into account relevant considerations such as the confidential sensitive nature of the information that I found falls within the ambit of the solicitor client communication privilege and personal privacy provisions of the *Act*. The city also provided sufficient evidence to demonstrate that it took into consideration that one of the purposes of the *Act* includes the principle that requesters should have a right of access to their own information.

[76] Having regard to the city's submissions, I find that it 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.

[77] Accordingly, I find that the city properly exercised its discretion under sections 38(a) and (b).

ORDER:

1. I order the city to disclose page 27 to the appellant by **October 30, 2012**.
2. I uphold the city's decision to withhold the Group A and B records and parts of Group C (pages 113, 115 and 117) and Group D (pages 143-145, 152, 155, 187-189, 190-191 and 192) found exempt under section 38(a).
3. I uphold the city's decision to withhold pages 65, 95-96, 116, 119, 120, 122, 134 and 136 found exempt under section 38(b).
4. In order to verify compliance with order provision 1, I reserve the right to require a copy of the record disclosed by the city to be provided to me.

Original signed by: _____ October 1, 2012 _____
Jennifer James
Adjudicator