

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-2933-I

Appeal MA12-347

City of Hamilton

August 21, 2013

Summary: The appellants sought reports created by the city's insurer examining the cause of water damage to their home. The city denied access in part to the responsive records, citing the discretionary litigation privilege exemption in section 12 of the *Act*. This order upholds the city's decision and orders it to re-exercise its decision.

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

Orders and Investigation Reports Considered: Order MO-1571.

OVERVIEW:

[1] The City of Hamilton (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MIFFIPA* or the *Act*) for information as follows:

All records pertaining to [a specified address] from the Building Dept. for the period of beginning Feb 1st 2011 to present. Risk Management all records including [specified companies]...

[2] The city identified records responsive to the request and issued an access decision to disclose the responsive records in part, citing sections 12 (litigation privilege) and 14 (personal privacy) of the *Act* to deny access to some of the information in the records. The city also stated that no responsive notes were identified by the two inspectors who conducted inspections at the subject property.

[3] The requesters (now the appellants) appealed the city's decision to deny access to the withheld records.

[4] During mediation, the appellants confirmed that they were not seeking access to information severed under section 14(1) of the *Act* which was located in record 5-1, 5-4, 5-7, 5-10, 5-15, and 5-17. As a result, this information is no longer at issue in this appeal. The appellants advised the mediator that they are seeking access to the remaining information severed pursuant to section 12 of the *Act*. The appellants also advised that they do not take issue with the city's position that no responsive notes were identified by the two inspectors.

[5] The city advised the mediator that, as the remaining records may contain the information relating to the appellants, section 38(a) would apply to these records.

[6] As no further mediation was possible, this file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. Representations were exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[7] In this order, I uphold the city's decision that section 12 applies to the information at issue in the records and order the city to re-exercise its discretion.

RECORDS:

[8] The records at issue are listed in the following chart. The city has claimed the application of section 38(a) in conjunction with section 12 to all of the information at issue:

Record #	Description of Record	Pages at issue
2	Letter from city's insurance adjuster to city's Risk Management Services, dated April 26, 2011	2-2 to 2-5
3	Letter from city's insurance adjuster to city's Risk Management Services, dated August 9, 2011	3 to 3-3
5	Letter from city's insurance adjuster to city's Risk Management Services, dated August 31, 2011	5 to 5-5, 5-7 to 5-19
8	Report from investigator hired by city to aid insurance adjuster, dated November 8, 2011	8-2, 8-3

[9] Also at issue are pages 12-4 to 12-5 and 19-5 to 19-6, which are duplicates of pages 8-2 and 8-3.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(a) in conjunction with the section 12 litigation privilege exemption apply to the information at issue?
- C. Did the institution exercise its discretion under section 38(a)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

PERSONAL INFORMATION

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

[10] 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;

[11] 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.¹

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

(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 (2.1) 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.

[13] 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.²

¹ Order 11.

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

[14] 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.³

[15] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

[16] The city submits that the personal information of the appellants can be found in some of the responsive records, for example in the insurer reports and the hand-written version of notes that are incorporated into the reports. It also states that personal information of city employees, such as their personal home address and work history (i.e. length of time employed with the city), can be found in the insurer reports and in the handwritten notes that were incorporated into the reports.

[17] The appellants confirmed that the records would contain their personal information, as well as the personal information of other identifiable individuals.

Analysis/Findings

[18] Based on my review of the records, I find that they contain the personal information of the appellants and the city's building inspectors. The personal information of the appellants includes their home address, home phone number, dates of birth, and marital status. The personal information of the building inspectors includes their home addresses, dates of birth and employment histories. As the appellants are not interested in receiving access to the personal information of the inspectors, this information is not at issue in this appeal.

B. Does the discretionary exemption at section 38(a) in conjunction with the section 12 litigation privilege exemption apply to the information at issue?

[19] 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.

[20] Section 38(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

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.

[21] 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.⁵

[22] 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.

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

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[24] The city states that the records are reports that were prepared in anticipation of litigation between the city and the homeowners (the appellants) once the appellants initiated a liability claim with the city's Risk Management division in February 2011.⁶ The city considers liability claim files as privileged and confirms that they are not generally released except as part of a defence brief in the event of litigation.⁷

[25] The city states that its insurer was hired to determine the city's liability in the matter involving the appellants. The city submits that while the records contain the appellants' personal information, they deal primarily with the appellants' property and the liability issues pertaining to their claim for damages.

[26] The appellants submit that they have never anticipated legal action and that it seemed that the city had a preconceived idea that legal action was going to be taken. The appellants state that they are seeking to obtain the notes and findings of the inspections in order to determine the cause of the water damage to their home. The appellants state that they cannot anticipate legal action if they do not know what is wrong with their home.

[27] The appellants also state that the issues that are occurring may be causing structural or mould issues and withholding the records may be putting their health and safety at risk.

⁵ Order M-352.

⁶ Record 2-4, excerpt from a letter to the city from its insurance adjuster.

⁷ Record 7, email to one of the appellants from the city.

[28] In reply, the city states that the role of its Risk Management Services is to investigate liability claims advanced against the municipality and determine liability. It states that its insurer will investigate the circumstances of the loss and report back to the city with advice regarding potential settlement discussions or in the circumstance of the appellants, a denial of the claim alleging negligence on the part of the city for failing to properly inspect the addition that the appellants made to their home. It states that:

While the appellant[s] may state that [their] intention is not to pursue legal action against the city, the city's insurer becomes involved once a claim is submitted, and all documents assembled and prepared in connection with the investigation of a claim are done so by the city in anticipation of contemplated litigation. This is the case for all liability claims against the city.

[29] In sur-reply, the appellants state that they thought that one aspect of the city's Risk Management Services was to determine if an insurance claim is warranted and that, if this is the case, the city should be working with them to resolve any issues to avoid the possibility of any legal action. The appellants state that if the reports being withheld show that there have been issues that should have been caught by the city's inspectors then it should be working with them as homeowners and taxpayers to resolve the issues with legal counsel.

Analysis/Findings

[30] 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.

[31] 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.⁸

[32] Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

[33] The city has not claimed that the records are subject to solicitor-client communication privilege. Nor does it appear to me to be subject to solicitor-client privilege, as there is no indication that a solicitor was consulted or involved in the

⁸ 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).

records creation or distribution. Therefore, I will only consider whether the records are subject to litigation privilege under branches 1 or 2.

[34] Under branch 1, litigation privilege protects records created for the dominant purpose of litigation, actual or contemplated.⁹

[35] In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

The "dominant purpose" test was enunciated [in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169] as follows:

A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.

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[For this privilege to apply], there must be more than a vague or general apprehension of litigation.

[36] Branch 2 applies to a record that was prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation."

[37] Termination of litigation does not affect the application of statutory litigation privilege under branch 2.¹⁰

[38] Branch 2 includes records prepared for use in the mediation or settlement of actual or contemplated litigation.¹¹

⁹ Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (cited above).

¹⁰ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, (cited above).

¹¹ *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

[39] As the city has not alleged that the records were prepared by or for counsel employed or retained by it "in contemplation of or for use in litigation", I find that branch 2 does not apply. Instead, I will consider whether the records fall within the ambit of branch 1.

[40] The chronology of events involving the appellants and the city is set out in the appellant's representations, as follows:

After completing our home renovation at [address], we found that we were having issues with water damage to the new structure added to the rear of our home. The natural thought was that there was an issue with the roof. The issue only occurs during the winter and only under certain conditions, as a result of this it has taken time to investigate the cause or possible cause of where and how the water is entering the home.

We have had the contractor responsible for the roof return and remove and install another new roof with new material. When the roof was stripped off this gave us another opportunity to investigate other possible causes. At that time we discovered that there was insulation either missing or in our opinion installed improperly. We then brought in an insulation Company who confirmed our concerns that the insulation was substandard.¹² We then made our first inquiry with the City Building Department to request the notes and the inspection report on the insulation. When we received the report from the building inspectors we became concerned that the reports were incomplete.

At this time we became aware of the Risk Management Service at the City of Hamilton and we proceeded to open a file with the City and an investigation was started by the City of Hamilton's Risk Management Department.

During this time we continued to investigate on our own and applied for all of the building files associated with our home, including reports and inspections during the building process. Our request, are strictly for records associated with our residence located at [address].

The records requested were to get a full understanding at the time of construction if there were any concerns or any notes taken by the building inspectors that may or may not have been important or relevant to a possible cause to the water damage that exists...

¹² Record 16, photographs of the insulation at the appellants' home.

[41] The appellants explain in their representations why they sought access to the records, as follows:

We are seeking all the [records] to help determine the cause of our issue. How can we anticipate legal action if we don't know what is wrong with our home? If in the reports that we are requesting lies the answers to our issues, then the City's building department should be obligated to release the reports less the personal information in the reports. The issues that are occurring may be causing structural or mould issues and by withholding the reports may be putting our health and safety at risk...

[W]e never retained a lawyer and we could not find precedent case that would help our situation where we are just looking for answers whether our house was inspected properly and the most important part is the safety of our home. Our situation is unique that we just need to find out whether our home was justifiably inspected properly by the inspectors...

We thought that one aspect of Risk Management was to determine if an insurance claim is warranted if this is the case we believe that the City of Hamilton should be working with us to resolve any issues to avoid the possibility of any legal action. The City had taken the position that legal action was going to be taken even with no indication given by us...

[42] In order for litigation privilege to apply, the requested documents must have been created in contemplation of litigation which was reasonably likely to occur. Based on my review of the appellants' representations, I find that litigation was reasonably likely to occur at the time the records were created by the insurance adjuster and investigator.

[43] In Order MO-1571, Adjudicator Bernard Morrow summarized orders which found that adjuster's reports fell within the scope of litigation privilege, as follows:

In Order M-285, Adjudicator Holly Big Canoe found that reports prepared by an insurance adjuster for the City of Kitchener in response to damage claims for flooded homes by homeowners met the dominant purpose test and fit within the scope of litigation privilege. Adjudicator Big Canoe found that the dominant purpose for the preparation of the reports in that case was to prepare for anticipated litigation between the City and the homeowners. In Order M-502, Adjudicator Donald Hale found that a report prepared by the City of Timmins' Public Works Department following two incidents in which the appellant's home was damaged by a sewer back-up, met the dominant purpose test. In that case, Adjudicator Hale found that the report was intended to inform the adjuster retained by the City's insurer of the occurrence and the possible cause of the

problems with the sewer on the appellant's street. As the City had been put on notice by the appellant that a claim was being made, Adjudicator Hale found that there was a reasonable prospect of litigation at the time the report was prepared. Accordingly, Adjudicator Hale concluded that litigation privilege applied.

Consistent with Orders M-285 and M-502, I am satisfied that the consultant's report was prepared on behalf of the Municipality for the dominant purpose of using it in reasonably contemplated litigation against the City. It is clear that the Municipality's insurer sought the report to assess the Municipality's liability, in possible future litigation, for damages caused by the storm. In fact, some of the contemplated litigation has already come to fruition, and the Municipality has established that there is a reasonable prospect of further claims.

[44] I find that the city sought the services of the adjuster to assess its liability in possible future litigation by the appellants relating to water damage to their home. Based on my review of the parties' representations and the records, I find that at the time the records were created, the appellants were in a position to claim that the water damage to their home may not have resulted if the city's inspectors had properly inspected the installation of their home's insulation.

[45] Based on the communication between the city and the appellants, as set out in the records and the representations, and consistent with the reasoning in Order MO-1571 and the orders referred to therein, I find that the information at issue in the records was prepared by the insurance adjuster and the insurance investigator evaluating the city's liability for damages and that this information fits within the scope of litigation privilege. These records were created to aid in the conduct of litigation and that there was a reasonable prospect of litigation at the time they were prepared.

[46] The adjuster's and the investigator's reports that comprise the records were prepared by third parties retained to assess the city's liability after the incident of the water damage to the appellants' home occurred.¹³ I find that when the records were created, litigation was reasonably foreseeable by the city and the dominant purpose of the creation of these records by the city was to assist it in litigation. Therefore, I find that branch 1 litigation privilege applies to the information at issue in the records. The information at issue in the records is subject to the litigation privilege component of branch 1 of section 12. Subject to my review of the city's exercise of discretion, the information at issue in the records is exempt under section 38(a).

¹³ See Orders M-285, M-503, M-1571, M-2124-I, MO-2647 and PO-2818.

C. Did the institution exercise its discretion under section 38(a)? If so, should this office uphold the exercise of discretion?

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

[48] 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.

[49] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁴ This office may not, however, substitute its own discretion for that of the institution.¹⁵

[50] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁶

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information

¹⁴ Order MO-1573.

¹⁵ Section 43(2).

¹⁶ Orders P-344, MO-1573.

- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[51] The city submits that it is mindful of the fact that the records contain the appellants' personal information and in exercising its discretion, the city did consider whether the records or portions of the records should be released to the appellant, in spite of their declaration "... that they will be pursuing this matter further."¹⁷ The city submits that while the records contain the appellants' personal information, they deal primarily with their property and the liability issues pertaining to their claim for damages.

[52] The city states that in exercising its discretion to apply the section 12 exemption, it has provided the appellants with a significant amount of personal information, including their initial statement made to the city and, in an attempt to achieve the goals of the legislation, balanced the appellants' right of access with safeguarding the interests of the city.

[53] The appellants submit that by censoring of the reports, the city has not released any relevant technical information regarding its investigation. They state that they have followed the rules and waited for information from the city and sought advice from city workers on how to obtain the information they need. The appellants state that they never sought outside legal counsel and have cooperated with all of the city's investigators.

[54] The appellants state that they are homeowners looking to their local government to get information on their own home. They state that the information they were provided is of no substance, it contains no viable essential information. The appellants state that they are seeking the technical information and technical opinions of the

¹⁷ Record 6, insurance adjuster's letter of December 20, 2011, concerning voicemail of one of the appellant's to the insurance adjuster after denial of liability.

investigators, from the city's Building Department and of the third party agents brought in by the city. The appellants state that:

It is essential that we be allowed access to the information the City is withholding from us. We feel that the issues affecting our home may be affecting our health. It is unclear at this point and will be until we receive the records that have been requested.

[55] The city did not provide reply representations.

Analysis/Findings

[56] I find that the city did not take into account relevant information in exercising its discretion.

[57] The records show that the city has done a thorough investigation of the causes of water damage to the appellants' home. In exercising its discretion, I find that the city did not take into account that the appellants have a sympathetic or compelling need to receive the information in the records. The records may contain information helpful to the appellants about the construction of their home and any defects in this construction that may be causing mould. The information in the records may assist the appellants in addressing their health and safety concerns about the source of the water damage in their home. This information is significant to the appellant.

[58] Furthermore, the city's representations focus on whether it has disclosed personal information. As the appellants have not sought disclosure of the personal information of other individuals in the records, the issue in this appeal is not whether disclosure would constitute an unjustified invasion of another individual's personal privacy. The issue in this appeal is whether the records are subject to litigation privilege. I found above that the records were created in contemplation of litigation which was reasonably likely to occur at the time of the records creation. Nevertheless, at the time the city exercised its discretion it did not consider, given the age and the content of the records, whether litigation was reasonably likely to occur at that time. Nor did it consider that it would disclose the records, as stated in their representations, if litigation did occur.

[59] Based on my review of the parties' representations and the records, I find that the city did not exercise its discretion in a proper manner. The city did not properly consider relevant factors and took into account irrelevant factors. Accordingly, I will order the city to re-exercise its discretion.

ORDER:

1. I order the city to re-exercise its discretion in accordance with the analysis set out above and to advise the appellants of the result of this re-exercise of discretion in writing. If the city continues to withhold all or part of the records, I also order it to provide the appellants with an explanation of the basis for re-exercising its discretion and to provide a copy of this explanation to me. The city is required to send the results of its re-exercise of discretion and its explanation to the appellants, with a copy to this office by no later than **September 12, 2013**. If the appellants wish to respond to the city's re-exercise of discretion and/or its explanation for re-exercising its discretion to withhold information, it must do so within 21 days of the date of the city's correspondence by providing me with written representations.

2. I remain seized of this matter pending the resolution of the issue outlined in provision 1.

Original signed by: _____
Diane Smith
Adjudicator

_____ August 21, 2013