

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3147-I

Appeal MA13-391

Exhibition Place

December 31, 2014

Summary: The appellant seeks access to all correspondence and communications relating to an advertising sign located at Exhibition Place in the City of Toronto. Exhibition Place denied access to portions of the records relying on the discretionary exemptions in sections 7 (advice or recommendations), 11(e) (economic and other interests of the institution) and 12 (solicitor-client privilege). This order upholds Exhibition Place's decision, in part. The majority of the records at issue are found to be exempt from disclosure under section 7(1), 11(e) or 12 of the *Act*. However, page 1 of Record 45, Record 109, Record 112, pages 5-6 of Record 117 and pages 4-7 of Record 119 are found not to be exempt from disclosure and Exhibition Place is ordered to disclose them to the appellant. In addition, Record 142 is found to be not exempt from disclosure under section 7(1). However, as Record 142 contains information that relates to a third party and may be exempt from disclosure under section 10(1), Exhibition Place is ordered to provide notice to this third party of the potential disclosure of the portions in which they may have an interest and then issue a decision letter to the appellant. Finally, this order finds that the public interest override in section 16 does not apply to the records exempt from disclosure under sections 7(1) and 11(e) of the *Act*.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, 7(1), 11(e), 12 and 16

Orders and Investigation Reports Considered: Order PO-1993

Cases Considered: *John Doe v. Ontario (Finance)*, 2014 SCC 36.

OVERVIEW:

[1] The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all correspondence and communications relating to an advertising sign located on the CNE grounds known as 2 Strachan Ave. in Toronto, Ontario (the sign).

[2] The city determined that Exhibition Place may have custody and control of some of the requested records and forwarded a portion of the request to it for response, pursuant to section 18 of the *Act*.

[3] Exhibition Place and the requester clarified the request to comprise the following:

... all records pertaining to the 2009 RFP process for an Outdoor Billboard Operator, including the proposals of the non-winners, and any other documents relating to the sign, particularly by-law amendments, correspondence, emails and minutes of meetings.

[4] Exhibition Place located responsive records and granted the requester partial access to them. Exhibition Place advised the requester that it withheld portions of the records pursuant to the discretionary exemptions in section 7 (advice or recommendations), 11 (economic or other interests) and 12 (solicitor-client privilege) and the mandatory exemption in section 10 (third party commercial information). Exhibition Place attached an Index of Records (the index) to its decision letter, which contains a description of the responsive records and the exemption(s) it relies on to withhold the responsive records, in full or in part.

[5] The requester, now the appellant, appealed Exhibition Place's decision.

[6] During mediation, the appellant advised the mediator that it seeks access to the records, or portions thereof, withheld under sections 7, 11 and 12 of the *Act*. The appellant indicated that it will not pursue access to the information withheld under section 10 of the *Act*. The mediator confirmed the records the appellant continues to seek access to and forwarded the list to Exhibition Place.

[7] Upon review of the records the appellant seeks access to, Exhibition Place issued a revised decision in which it advised the appellant that it would grant access to additional records, in full or in part. Exhibition Place provided the appellant with an updated index to reflect the changes to its decision.

[8] As a result of Exhibition Place's revised decision, records 19, 23, 48, 53, 54, 90, 92 and 121 are no longer at issue in this appeal. Exhibition Place also disclosed record 47, in part, and the appellant advised that he will not pursue access to the severed portions of this record. Accordingly, record 47 is also no longer at issue in this appeal.

[9] The appellant confirmed that it continues to seek access to the remaining records withheld under sections 7, 11 and 12 of the *Act*.

[10] Mediation could not resolve the appeal and it was transferred to the adjudication stage of the appeals process. I began my inquiry by inviting Exhibition Place to make representations in response to the issues raised in a Notice of Inquiry. Exhibition Place submitted representations. I then invited the appellant to make representations in response to the Notice of Inquiry and Exhibition Place's arguments, which were shared in accordance with section 7 of this office's *Code of Procedure and Practice Direction 7*. The appellant also submitted representations and raised the possible application of the public interest override in section 16 of the *Act*. After reviewing the appellant's representations, I sought and received further reply representations from Exhibition Place.

[11] In the discussion that follows, I uphold Exhibition Place's decision, in part. I find that the majority of the records at issue are exempt from disclosure under sections 7(1), 11(e) or 12 of the *Act*. However, I find that page 1 of Record 45, Record 109, Record 112, pages 5-6 of Record 117 and pages 4-7 of Record 119 are not exempt from disclosure and order Exhibition Place to disclose them to the appellant. In addition, I find that Record 142 is not exempt from disclosure under section 7(1). However, as Record 142 contains information that relates to a third party and may be exempt from disclosure under section 10(1), I order Exhibition Place to provide notice to this third party of the potential disclosure the portions in which they may have an interest and then issue a decision letter to the appellant respecting access to this record. Finally, I find that the public interest override in section 16 does not apply to the records exempt from disclosure under sections 7(1) and 11(e) of the *Act*.

RECORDS:

[12] The following records (or portions thereof) at issue are identified in the Index of Records as follows: 3 to 8, 11, 12, 15, 17, 20 to 22, 26, 28, 31, 40, 42 to 46, 50 to 52, 55 to 57, 62, 64, 71 to 73, 76, 84 to 88, 91, 93, 96, 98, 99, 109, 112, 115 to 117, 119, 122, 129, 130, 134, 135, 138 and 142.

ISSUES:

- A. Does the discretionary exemption at section 7(1) apply to the records?
- B. Does the discretionary exemption at section 11(e) apply to the records?
- C. Does the discretionary exemption at section 12 apply to the records?

- D. Did the institution exercise its discretion under sections 7, 11 and 12? If so, should this office uphold the exercise of discretion?
- E. Is there a compelling public interest in disclosure of the records that clearly outweighs the purposes of the section 7 and 11(e) exemptions?

DISCUSSION:

A. Does the discretionary exemption at section 7(1) apply to the records?

[13] 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.

[14] 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.¹

[15] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[16] In *John Doe v. Ontario (Finance)*², the Supreme Court of Canada held that "advice" has a broader meaning than "recommendations". "Advice" includes policy options, which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.³

[17] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

¹ 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.).

² *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

³ *Ibid.*, at paras. 26 and 47.

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

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.⁴

[19] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 7(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.⁵

[20] Section 7(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by s. 7(1).⁶

[21] Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information⁷
- a supervisor's direction to staff on how to conduct an investigation⁸
- information prepared for public dissemination⁹

[22] Section 7(2) creates a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7. The Supreme Court of Canada has observed that the exceptions in section 7(2) can be divided into two categories: objective information and specific types of records that could contain advice or recommendations. The first four paragraphs in section 7(2), paragraphs (a) to (d), are examples of objective information. They do not contain a public servant's opinion pertaining to a decision that is to be made but rather provide information on matters that are largely factual in nature. The remaining exceptions in section 7(2), paragraphs (e) to (l), will not always contain advice or

⁴ Order P-1054

⁵ *Supra* note 2, at para. 51.

⁶ *Ibid.*, at paras 50-51.

⁷ Order PO-3315.

⁸ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

⁹ Order PO-2677

recommendations but when they do, section 7(2) ensures that they are not protected from disclosure by section 7(1).¹⁰

[23] In its representations, Exhibition Place submits that section 7(1) applies to the following records: pages 1-2 of Record 3, Record 5, Record 7, Record 8, Record 11, Record 12, Record 15, Record 17, Record 20, Record 28, Record 40, Record 42, Record 43, Record 44, page 1 of Record 45, Record 46, page 1 of Record 50, Record 51, Record 52, Record 55, Record 71, Record 91, Record 96, Record 99, Record 109, Record 112, pages 1-3 of Record 116, pages 1-4 of Record 117, pages 1-3 of Record 119, Record 122 and Record 142.

[24] Exhibition Place submits that these records (or portions thereof) contain exchanges between and amongst its staff, consultants hired by Exhibition Place and city staff. Exhibition Place submits that, in order for information to qualify as advice, there must be evidence of some type of communication from one person to another that contains more than mere information. Exhibition Place also notes that the IPC has recognized that the purpose of the section 7 exemption is to ensure that persons employed in public service are able to advise and make recommendations, freely and frankly and to preserve the ability of an institution to take action and make decisions without unfair pressure.

[25] Exhibition Place submits that records 3, 5, 7, 8, 11, 12, 15, 17, 20, 28, 40, 42, 43, 44, 45, 46, 47, 50, 51, 52 and 55 primarily involve candid discussions between Board staff and consultants hired specifically to advise Exhibition Place on the drafting of an agreement with a third party. Exhibition Place submits that the discussions revolve around options open to Exhibition Place in negotiations with the appellant and the contents of counter proposals put forth by both sides. Exhibition Place states that the negotiation of the original agreement with the appellant was a "complex and protracted process, spanning over several years from the conclusion of the original RFP".

[26] Exhibition Place states that in February 2010, the city adopted a harmonized Sign By-law (Chapter 694 of the city's Municipal Code), which would be effective as of April 6, 2010. Exhibition Place states that under the *City of Toronto Act, 2006*, "specific rules apply to the applicability of municipal by-laws affecting signs which were lawfully erected and displayed on the effective date of the by-law." Exhibition Place states that the sign was erected and displayed under a historic special permission provided through various amendments and variances to a by-law of the former municipalities of the city. As such, the sign contained specific complications with respect to the parameters of

¹⁰ *Supra* note 2 at paras. 26, 47 and 51. See also Orders PO-2084, PO-2028 upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, p2004] 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.

acceptable modifications, and whether these modifications would attract the application of the city's new harmonized sign by-law.

[27] Further, Exhibition Place states that in light of the proposals submitted by the appellant to modify the sign, other than described in the agreement, these historic complications under the previous permissions, were affected by the enactment of Chapter 694. Exhibition Place submits that records 71, 91, 96, 99, 109, 112, 116, 117, 119 and 122 deal with the issue of the applicability of Chapter 694, in light of the appellant's proposal and the options with respect to it. Exhibition Place submits that the discussions primarily involve its staff seeking advice from the appropriate staff at the city concerning Exhibition Place's obligation with respect to the responsibilities concerning management of the lands held by the city.

[28] In its representations, the appellant submits that Exhibition Place has not established that the exemption in section 7(1) applies to the records. The appellant also notes that a number of exceptions to section 7(1) are enumerated in section 7(2) and these prohibit the institution from withholding factual material, feasibility studies and technical studies. Further, the appellant submits that "advice or recommendations" has been "very narrowly construed".

[29] Having reviewed the parties' representations and the records at issue, and having considered the context in which the records were created, I find that the following records are not exempt from disclosure under section 7(1) of the *Act*: page 1 of Record 45, Record 109 and Record 112. Upon review of page 1 of Record 45, I find that this page does not contain either "advice" or "recommendations". Rather, the email chain contained in the record merely refers to an attachment to the email. With regard to Record 109, I find that the email at issue does not contain "advice" or "recommendations". Instead, the record contains a question from a board member to Exhibition Place staff with regard to a possible permit violation. Similarly, I find that Record 112 does not contain "advice" or "recommendations" as it is an email chain with questions from a board member to board staff with regard to a possible permit violation and the response to that question. Reviewing these records, I find that their disclosure would not reveal any aspect of the deliberative process or the advice and/or recommendations of a public servant. Accordingly, I find that these records are not exempt under section 7(1) of the *Act*.

[30] Additionally, I find that Record 142 is not exempt under section 7(1) of the *Act*. In the index, the record is described as the "evaluations of proposals" and the "evaluation matrix" for the request for proposals (RFP) relating to the advertising sign that is the subject of this appeal. The record contains scoring and other types of evaluation information relating to the RFP.

[31] In Order PO-1993, Adjudicator Laurel Cropley applied this office's interpretation of the provincial equivalent of section 7(1) in relation to scoring information and RFP

summary charts for specific construction projects. Adjudicator Cropley reviewed the scoring process used by the Ministry of Transportation in that appeal and noted the difficulty she had in identifying any "advice", given the context in which the decisions to award certain contracts were made. With regard to the scoring information, Adjudicator Cropley rejected the ministry's argument that they represented the judgment of the scorer for the purpose of making a recommendation to senior staff. Rather, Adjudicator Cropley stated that, "in applying the pre-set criteria to the information contained in the proposals, the evaluators are essentially providing the factual basis upon which any advice or recommendations would be developed."¹¹ Further, Adjudicator Cropley found:

Even if a broader definition were adopted for "advice" and "recommendations", to include, for example, all expressions of opinion on policy-related matters, I would not find the Project Supervisor scores exempt because they are, as I noted above, primarily of a factual or background nature. In and of themselves, they do not "advise" or "recommend" anything, nor can they be seen as predictive of the advice or recommendations that would ultimately be given. It would not be accurate to view them as advice or recommendations in the sense required by section 13(1) [the provincial equivalent to section 7(1) of the *Act*]. On that basis, I find that section 13(1) does not apply to the records at issue or the records in their entirety.

[32] I agree with Adjudicator Cropley's analysis and adopt it for the purposes of this appeal. As stated above, 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. Reviewing the scoring and evaluative information contained in Record 142, I find that it does not contain "advice" or "recommendations", but rather, contains factual, analytical or evaluative material. Therefore, I find that section 7(1) of the *Act* does not apply to Record 142.

[33] With regard to the remainder of the records withheld under section 7(1), I am satisfied that their disclosure would reveal the advice and/or recommendations of a public servant, within the meaning of section 7(1) of the *Act*. Exhibition Place attached a detailed index of records with its representations that describe the records and why it has claimed a certain exemption to withhold them. I accept Exhibition Place's submission that the majority of these records involve candid discussions between board staff, city staff and/or consultants hired specifically to advise Exhibition Place on the drafting of an agreement with a third party and Exhibition Place's obligation with respect to the responsibilities concerning management of the lands held by the city.

¹¹ Order PO-1993, at page 7.

[34] Therefore, I find that the following records are exempt under section 7(1) of the *Act*, subject to my review of Exhibition Place's exercise of discretion below: pages 1-2 of Record 3, Record 5, Record 7, Record 8, Record 11, Record 12, Record 15, Record 17, Record 20, Record 28, Record 40, Record 42, Record 43, Record 44, Record 46, page 1 of Record 50, Record 51, Record 52, Record 55, Record 71, Record 91, Record 96, Record 99, pages 1-3 of Record 116, pages 1-4 of Record 117, pages 1-3 of Record 119 and Record 122. As I have found these records, or portions thereof, to be exempt from disclosure, I do not need to consider whether the other exemptions claimed apply to them.

[35] I will order Exhibition Place to disclose page 1 of Record 45, Record 109 and Record 112.

[36] In the analysis above, I found that section 7(1) does not apply to Record 142. However, based on my review of the record, I find that portions of Record 142 contain information in which a third party may have an interest. Therefore, I will order Exhibition Place to provide notice to the third party of the potential disclosure of those portions in which it may have an interest and then provide the appellant with a decision letter respecting access to Record 142.

B. Does the discretionary exemption at section 11(e) apply to the records?

[37] Exhibition Place submits that section 11(e) of the *Act* applies to the following records, or portions thereof: pages 3-13 of Record 3, Record 4, Record 22, Record 26, Record 31, pages 2-8 of Record 45, pages 2-13 of Record 50, Record 57, Record 62, Record 76, pages 5-13 of Record 87, Record 88, Record 93, pages 5-6 of Record 117, pages 4-7 of Record 119 and Record 138.

[38] Section 11(e) reads as follows:

A head may refuse to disclose a record that contains,

- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution

[39] The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy, 1980*¹² (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

¹² Vol. 2 (Toronto: Queen's Printer, 1980).

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute... Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[40] In order for section 11(e) to apply, Exhibition Place must show that:

1. the record contains positions, plans, procedures, criteria or instructions,
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of an institution.¹³

[41] Section 11(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation.¹⁴

[42] The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding.¹⁵ Previous orders of this office have defined "plan" as "a formulated and especially detailed method by which a thing is to be done"; a design or "scheme".¹⁶

[43] The section does not apply if the information at issue does not relate to a strategy or approach to the negotiations themselves but rather simply reflects mandatory steps to follow.¹⁷

[44] Exhibition Place submits that the records withheld under section 11(e) contain draft reports or confidential attachments to reports submitted to Exhibition Place or city council. Exhibition Place submits that some of the draft reports are attached to cover emails that discuss the contents of the draft, making it possible to infer the contents of the draft report itself.

¹³ Order PO-2064.

¹⁴ Orders PO-2064 and PO-2536.

¹⁵ Orders PO-2034 and PO-2598.

¹⁶ Orders P-348 and PO-2536.

¹⁷ Orders PO-2034.

[45] In relation to the draft reports and the confidential attachments, Exhibition Place submits that disclosing this information to the appellant would have a negative impact on ongoing negotiations. Both types of reports were created after consultation with Exhibition Place's solicitors and a third party hired to advise Exhibition Place on the negotiations. Exhibition Place submits that, in the current circumstances, the interests of the appellant and Exhibition Place do not currently align on certain issues and these issues have yet to be settled. Moreover, in the current circumstances, as both parties are seeking to obtain the maximum return for use of certain public lands, there is a conflict between the interests of the appellant who seeks to obtain the maximum amount of return on the utilization of the sign placed on the lands for their own profit and Exhibition Place, which is seeking the maximum social utility from the utilization of the lands.

[46] The appellant submits that Exhibition Place "had no discretion to withhold [the records] under s. 11(e) or, alternatively, has not disclosed a sufficient foundation for a s. 11(e) exemption." The appellant submits that Exhibition Place has no discretion to withhold the records under section 11(e) unless they contain "positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution". The appellant concludes by submitting that Exhibition Place has not established that the section 11(e) exemption is applicable.

[47] I have reviewed the records at issue that were claimed to be exempt under section 11(e) and find that all of them, with the exception of pages 5-6 of Record 117 and pages 4-7 of Record 119, contain positions, plans, procedures, criteria or instructions. Specifically, I find that these records contain positions and instructions from and between board staff and/or board solicitors. However, based on my review of pages 5-6 of Record 117 and pages 4-7 of Record 119, I find that they do not contain positions, plans, procedures, criteria or instructions intended to be applied to negotiations. Instead, these portions of Records 117 and 119 contain general background information and do not refer to pre-determined courses of action or ways of proceeding.¹⁸ Therefore, I find that pages 5-6 of Record 117 and pages 4-7 of Record 119 are not exempt under section 11(e). As no other exemptions were claimed or are applicable to these records, I will order Exhibition Place to disclose them to the appellant.

[48] With regard to the remainder of the records claimed to be exempt under section 11(e), I am satisfied that Exhibition Place has provided me with sufficient evidence to demonstrate that they were intended to be applied to negotiations, that the negotiations are being carried on currently or in the future and that they will be conducted by or on behalf of Exhibition Place. In its representations, Exhibition Place states that the disclosure of this information to the appellant would have a negative

¹⁸ Order PO-2034 and MO-2438-F.

impact on ongoing negotiations as they were created after consultation with Exhibition Place's solicitors and a third party hired to advise Exhibition Place on the negotiations. I have recently confirmed with Exhibition Place that the issues between Exhibition Place and the appellant remain unresolved. Exhibition Place's representations were shared with the appellant, and it did not dispute Exhibition Place's submission that negotiations are ongoing. In view of all the circumstances of the appeal and upon review of the records, I find that the following records are exempt from disclosure under section 11(e) of the *Act* subject to my review of Exhibition Place's exercise of discretion: pages 3-13 of Record 3, Record 4, Record 22, Record 26, Record 31, pages 2-8 of Record 45, pages 2-13 of Record 50, Record 57, Record 62, Record 76, pages 5-13 of Record 87, Record 88, Record 93 and Record 138.

C. Does the discretionary exemption at section 12 apply to the records?

[49] Of the records that remain at issue, Exhibition Place has applied the exemption in section 12 to the following: Record 6, Record 21, Record 56, Record 64, Record 72, Record 73, Record 84, Record 85, Record 86, pages 1-4 of Record 87, Record 98, Record 115, pages 4-5 of Record 116, Record 129, Record 130, Record 134 and Record 135.

[50] Section 12 states as follows:

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

[51] 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. In this appeal, it appears that Exhibition Place is relying on the solicitor-client communication privilege in branch 1.

[52] 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.¹⁹

[53] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.²⁰

[54] The privilege applies to "a continuum of communications" between a solicitor and client:

¹⁹ *Descôteaux v. Mierzewski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

²⁰ Orders PO-2441, MO-2166 and MO-1925.

. . . 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.²¹

[55] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.²²

[56] 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.²³

[57] Exhibition Place states that, in applying section 12, it disclosed all records to which the appellant, or his legal counsel, was party. Exhibition Place submits that the records that remain at issue cannot be disclosed without jeopardizing its interests and the purpose of the solicitor-client exemption. Exhibition Place notes that, in Order MO-1800, former Assistant Commissioner Tom Mitchinson found that items such as "email chains... involving members of the City's Legal Department and their internal clients, as well as draft legal documents and correspondence exchanged between lawyers" are documents which are intended to be treated confidentially and, as a result, qualify for exemption under section 12.

[58] Exhibition Place advises that, "under the terms of the agreements and relationship framework between the City and Exhibition Place, legal services are provided for the benefit of Exhibition Place, as needed, by staff of the City of Toronto's Legal Department." Exhibition Place submits that the records claimed to be exempt under section 12 contain communications between Exhibition Place's assigned legal counsel and staff of Exhibition Place and/or individuals hired as consultants by Exhibition Place. For example, Exhibition Place submits that specific advice by legal counsel can be found in records 73, 98 and 116. Exhibition Place states that these records contain draft sections of the agreement written by its legal counsel and provided to Exhibition Place for consideration and discussion. Exhibition Place submits that records 56, 84 and 134 contain descriptions by Exhibition Place's legal counsel of conversations with the appellant's legal counsel and advice to Exhibition Place based on those conversations.

[59] In addition, Exhibition Place submits that while less than half of the records at issue could be described as a "written discussion" between solicitor and client, the discussions centre on the negotiations and the path forward. Exhibition Place submits that all the records claimed to be exempt under section 12 represent portions of the "continuum of correspondence in which a variety of legal advice, opinions and suggestions were either requested or provided in relation to complex developments in

²¹ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

²² *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

²³ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

relation to the appellant.” Additionally, Exhibition Place submits that “where the documents do not directly contain such communications, the disclosure of these records would reveal, when compared to publicly available information, advice of Exhibition Place’s legal counsel”. Exhibition Place submits that the advice that would be indirectly revealed if the records are disclosed includes the identification of potential strengths and weaknesses in Exhibition Place’s position with respect to issues which may arise in potential litigation.

[60] Finally, Exhibition Place states that the IPC has found that the term “litigation” in section 12 includes matters such as arbitration. Exhibition Place notes that the appellant had commenced litigation against Exhibition Place. Exhibition Place submits that the disclosure of the records claimed to be exempt under section 12 could reveal information that would be highly prejudicial to Exhibition Place’s interests in contemplated or potential litigation.

[61] The appellant submits that Exhibition Place’s submissions “fall far short of demonstrating that *any* of the foregoing criteria for either [solicitor-client communication or litigation] privilege have been met” (emphasis in original). The appellant submits that Exhibition Place’s “submissions are virtually silent on the foundation, if any, for this privilege claim and has not been clear on where it asserts each branch of privilege.” In addition, the appellant submits that the document descriptions “do not even identify who was the author, who was the recipient, to whom the document was merely copied, or even that every part of an email thread was forwarded to all of the persons named. The mere inclusion of a lawyer as a cc does not make a document privileged.”

[62] On my review of the records withheld under section 12, I agree with Exhibition Place that they all contain direct solicitor-client communications or form part of a continuum of communications relating to the giving or receiving of legal advice. Based on my review, I am satisfied that Record 6, Record 56, Record 72, Record 73, Record 85, Record 86, pages 1-4 of Record 87, Record 98, Record 115, pages 4-5 of Record 116, Record 129, Record 130 and Record 135 qualify for exemption under the solicitor-client communication privilege in section 12 of the *Act*. I am satisfied that these records were prepared for the purpose of obtaining or giving professional legal advice. With regard to Records 21, 64 and 134, I am satisfied that they also qualify for exemption under section 12 even though they relate to obtaining or providing professional legal advice indirectly. Reviewing these three records, I am satisfied that they form part of a continuum of communication of legal advice. While a few of the emails within these chains are innocuous and relate to administrative or routine matters, I find that, in the circumstances, no useful purpose would be served in severing and disclosing these snippets of information.

[63] Therefore, I find that the records claimed to be exempt under section 12 are all subject to solicitor-client communication privilege. As such, section 12 applies to those

records and it is not necessary for me to determine whether they are also subject to litigation privilege. Based on my review of these records and the parties' representations, I find that there is no evidence before me to suggest that this privilege has been waived or lost. Accordingly, subject to my review of Exhibition Place's exercise of discretion, I find that Record 6, Record 21, Record 56, Record 64, Record 72, Record 73, Record 84, Record 85, Record 86, pages 1-4 of Record 87, Record 98, Record 115, pages 4-5 of Record 116, Record 129, Record 130, Record 134 and Record 135 are exempt under section 12 of the *Act*.

D. Did the institution exercise its discretion under sections 7, 11 and 12? If so, should this office uphold the exercise of discretion?

[64] The exemptions in sections 7, 11 and 12 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, I may determine whether the institution failed to do so.

[65] In addition, I 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.

[66] In either case I may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁴ However, I may not substitute my own discretion for that of the institution.²⁵

[67] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²⁶

- 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

²⁴ Order MO-1573.

²⁵ Section 13(2).

²⁶ Orders P-344 and MO-1573.

- 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
- 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 information, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[68] Exhibition Place submits that, in its exercise of discretion, it reviewed all of the relevant implications of releasing or denying access to the information in question. Exhibition Place submits that it took into account all of the relevant considerations listed above in exercising its decision. Exhibition Place states that records at issue relate to one of the many negotiations or other processes where it was to engage in business decisions relating to the operations of the appellant and obtained advice from the specific advisors or staff retained to provide advice to Exhibition Place in these matters.

[69] In addition, Exhibition Place suggests that the appellant attempts to seek access to the records provided with respect to previous incidents in the relationship between Exhibition Place and request for the purpose of using this information to further the appellant's private interests in further negotiations, arbitration or other proceedings in relation to the operation of the sign. Exhibition Place submits that the appellant is advancing a private interest in its request and has not identified a sympathetic or compelling need for the information.

[70] In its representations, the appellant submits that Exhibition Place failed to exercise its discretion properly. Firstly, the appellant submits that Exhibition Place failed

to take relevant considerations into account and relied on a "materially incorrect and inaccurate narrative that failed to consider the problems encountered by the appellant and the evidently questionable conduct of the municipal bureaucracy."

[71] Secondly, the appellant submits that "most of the considerations that the [board] did take into account were incorrect and irrelevant". The appellant submits that Exhibition Place failed to consider whether the disclosure of the information would have an impact on public confidence in the city as a whole, and not just Exhibition Place itself. As well, the appellant submits that there is a sympathetic or compelling need in the disclosure of the records as it "has been victimized by failure or refusal of a bureaucracy to perform its duties according to the law. In our submission, this is amply sympathetic or compelling." The appellant also takes issue with Exhibition Place's suggestion that "there is something wrong with a person having a private interest in the information he seeks to access, and that 'private interest' should weigh against disclosure". The appellant submits that "there is nothing improper or illegitimate about seeking access to advance a private interest".

[72] Finally, the appellant states that it is not a position to address whether Exhibition Place exercised its discretion in bad faith or for an improper purpose.

[73] On my review of all the circumstances in this appeal, I am satisfied that Exhibition Place has not erred in exercising its discretion not to disclose the records or portions thereof that I have found to qualify for exemption under section 7, 11(e) or 12. It has not done so in bad faith or for an improper purpose; nor has it taken into account irrelevant considerations or failed to take into account relevant ones. While I appreciate that the appellant feels that it has been "victimized" by Exhibition Place's behaviour, it has not provided me with sufficient evidence demonstrating that there is a sympathetic or compelling need for it to receive the information.

[74] Based on my review of the records and the parties' representations, I find that there is insufficient evidence before me demonstrating that Exhibition Place improperly exercised its discretion to withhold the records at issue under section 7, 11(e) or 12. Further, I find that the disclosure of the records at issue would not be likely to increase the public confidence in Exhibition Place or the city's operations. I note that Exhibition Place granted the appellant access to a large portion of the 145 responsive records and that the severances are limited and specific. On my review of the manner in which Exhibition Place exercised its discretion to disclose a large portion of the responsive records and sever the remaining records at issue, I find that Exhibition Place properly exercised its discretion to apply the exemptions in sections 7, 11(e) and 12 to the records that remain at issue.

E. Is there a compelling public interest in disclosure of the records that clearly outweighs the purposes of the section 7 and 11(e) exemptions?

[75] In its representations, the appellant raised the application of the public interest override to the records at issue. 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.

[76] 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.

[77] 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.²⁷

[78] 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.²⁸ 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.²⁹

[79] The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.³⁰

[80] The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[81] Although the appellant does not make specific representations on the application of the public interest override, it did provide me with a history of its relationship with

²⁷ Order P-244.

²⁸ Orders P-984 and PO-2607.

²⁹ Orders P-984 and PO-2556.

³⁰ Order P-984.

Exhibition Place and its agreement with Exhibition Place to operate the sign. In its representations, the appellant alleges that Exhibition Place and the city has hindered its operation of the sign due to the "unreasonable delay and groundless, frivolous positions" of the city, which prevented the appellant from properly operating the sign. The appellant describes, in detail, what it alleges to have been delay and misconduct on the part of the city and Exhibition Place in performing their public duties.

[82] In response to the appellant's allegations and claim that the public interest override in section 16 applies to the records withheld under sections 7 and 11(e), Exhibition Place submits that there is no compelling public interest in the disclosure of the records. Exhibition Place states that it rejects the notion that there is any relationship between the records and the *Act's* central purpose of shedding light on the operations of government. Exhibition Place submits that the dispute between itself and the appellant is fundamentally a private commercial dispute, as it relates to competing interpretations of contractual provisions.

[83] Exhibition Place states that the appellant has made a series of allegations of wrongdoing on the part of the city and/or Exhibition Place to build its case that there is a compelling public interest in the records exempt from disclosure under sections 7 and 11(e). However, Exhibition Place submits that the appellant's "unsupported allegations of wrong-doing... are premised entirely on a series of facts which do not accord with the publicly available documents, and are currently being disputed in another proceeding do not establish a reasonable basis for s. 16 to be applicable".

[84] Exhibition Place submits that any public interest in the records has been served through the disclosure of the records to date and the numerous public meetings where dealings between itself, the city and the appellant were considered and that public confidence in Exhibition Place is not at issue.

[85] On my review of the record and the parties' representations, I am satisfied that any public interest in disclosure of the particular information at issue in this appeal does not rise to the level of a compelling public interest. The records alone do not provide evidence of an obvious compelling public interest in disclosure of the remaining information. The appellant has provided insufficient representations in support of his claim that a public interest in disclosure exists. In fact, from all the evidence before me, it appears that the appellant has only a private interest in the records that were withheld under sections 7 and 11(e). In the circumstances, I do not have evidence establishing that disclosure of these records, in particular, would serve to enlighten the public about matters of compelling public interest.

[86] Therefore, I find the public interest override does not apply to the records exempt from disclosure under section 7 and 11(e) and I uphold Exhibition Place's decision to withhold them.

ORDER:

1. I uphold Exhibition Place's application of the exemptions in section 7, 11(e) and 12 of the *Act* to the records, with the exception of page 1 of Record 45, Record 109, Record 112, pages 5-6 of Record 117, pages 4-7 of Record 119 and Record 142.
2. I order Exhibition Place to disclose page 1 of Record 45, Record 109, Record 112, pages 5-6 of Record 117 and pages 4-7 of Record 119 to the appellant by **February 2, 2015**.
3. I order Exhibition Place to provide written notice to the third party identified in Record 142 of the potential disclosure of the portions of the record in which they may have an interest, for which the section 7 exemption claim was not upheld. This notice must be provided by the third party by **February 2, 2015** and a copy of it sent to my attention.
4. I order Exhibition Place to issue a decision letter to the appellant and the third party regarding access to Record 142 in accordance with section 21(7) of the *Act*, with a copy sent to my attention.
5. To verify compliance with this order, I reserve the right to require Exhibition Place to send me a copy of the records disclosed pursuant to order provision 2.
6. I remain seized of the issues in this appeal pending final determination of all outstanding issues.

Original Signed By: _____
Justine Wai
Adjudicator

December 31, 2014 _____