Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3242

Appeal MA14-72

Regional Municipality of Halton

September 17, 2015

Summary: The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* for records relating to him in connection with his application for Ontario Works benefits, including emails in the possession of seven identified staff members. The municipality located several records and granted access to most of them, with some records withheld or partially withheld pursuant to various exemptions found in the *Act*. The appellant appealed the reasonableness of the municipality's search, and also appealed the municipality's decision to withhold an email exchange that it claimed was exempt from disclosure pursuant to the exemption for solicitor-client privilege at section 38(a) in conjunction with section 12 of the *Act*. In this order, the adjudicator upholds the municipality's search for responsive emails as reasonable. Further, she upholds the municipality's application of section 12 to the email exchange.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 12 and 17.

BACKGROUND:

[1] This appeal raises two issues: whether the Regional Municipality of Halton (the municipality) conducted a reasonable search for records in response to an access request made by the appellant, and whether a record that the municipality withheld from the appellant is exempt from disclosure under section 38(1) in conjunction with section 12 of the Municipal Freedom of Information and Protection of Privacy Act (the Act).

[2] The appellant made a request to the municipality under the Act for access to records relating to him in connection with his application for Ontario Works (OW) benefits. His request was initially for documents in the possession of specific individuals:

> …copies de tous les documents en relation avec [the appellant] dans la possession ou control de
>
> [7 named individuals]
>
> En relation avec [the appellant] pour sa demande à l'aide et assistance de l'Ontario travail de la région de Halton depuis le 6 avril 2010 (deux mille dix) jusqu'à la date de cette demande.

[3] The municipality's Freedom of Information (FOI) Co-ordinator clarified with the appellant that he was seeking access to his entire Ontario Works file if the municipality would waive the photocopying fee. The municipality then located the paper records located in the appellant's Ontario Works file, as well as electronic notes and emails relating to the appellant, and granted partial access to these records, withholding some personal information of third parties pursuant to the mandatory personal privacy exemption at section 14(1) of the *Act*. As a result, the appellant was provided with several hundred pages of records.

[4] The appellant appealed the municipality's decision to this office on the basis that he believes further records exist. He did not appeal the application of the section 14(1) exemption to the withheld information and, during mediation, his counsel confirmed that the appellant is not pursuing access to the information withheld pursuant to section 14(1) of the *Act*.

[5] Also during the mediation stage of the appeal, the appellant's counsel expressed the view that further emails and faxes should exist. The municipality conducted another search for responsive emails and faxes and located eight additional emails, to which it granted partial access. One email exchange was withheld, in full, pursuant to the discretionary exemption at section 38(a) of the *Act*, in conjunction with the solicitor-client privilege exemption at section 12, and another was withheld, in part, pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*. The municipality also explained that one of the seven individuals listed in the appellant's request is not an employee of the municipality and, therefore, his email could not be searched.

[6] With respect to additional faxes, the municipality advised that they should be in the physical file that was already disclosed to the requester and asked for particulars of any additional faxes that the appellant believes exist.

[7] The appellant's counsel provided details of eight additional faxes that the appellant believes should exist. The municipality conducted another search for records, located two additional faxes and granted full access to them. With respect to the

remaining six faxes, the municipality advised that it had consulted the employees to whom the appellant advised the faxes were addressed, that none of them had the faxes in their personal possession, and that, to the best of their recollection, they would have sent any faxes they received for filing in the appellant's physical OW file.

[8] The appellant's counsel advised the mediator that he remains of the view that additional responsive records should exist. The appellant also continues to seek access to the email exchange withheld pursuant to section 38(a), in conjunction with the solicitor-client privilege exemption at section 12 of the *Act*. However, he is not seeking access to the withheld portions of the record that was withheld, in part, pursuant to the personal privacy exemption at section 38(b).

[9] As no further mediation was possible, the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I sought and received representations from the municipality. Pursuant to the IPC's *Practice Direction 7*, the municipality's representations were then shared, in their entirety, with the appellant, who then filed representations.

[10] In this order, I uphold the municipality's search as reasonable. Further, I uphold the municipality's decision to withhold the email exchange pursuant to section 38(a) in conjunction with section 12 of the *Act*.

RECORDS:

[11] The sole record at issue is an email exchange among municipality staff dated November 7 and 8, 2013.

ISSUES:

A. Did the municipality conduct a reasonable search for records?

B. Does the discretionary exemption at section 38(a) in conjunction with the section 12 (solicitor-client privilege) exemption apply to the record at issue?

C. Did the municipality exercise its discretion under section 38(a), in conjunction with section 12? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A: Did the institution conduct a reasonable search for records?

[12] The appellant believes that further records exist beyond those identified by the municipality. Specifically, the appellant is of the view that the municipality has six faxes

that it has not disclosed, as well as further emails.

[13] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[1] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[2]

[14] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[3] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[4]

[15] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[5]

Representations

[16] In the Notice of Inquiry that I sent to the municipality, I asked it to provide a written summary of all steps taken in response to the request.

[17] The municipality submits that when it received the appellant's request, its FOI Co-ordinator asked him whether he was seeking access to his entire Ontario Works file or only the records created or received by the employees listed in his request. The appellant responded that he would like to receive copies of all records relating to him if the municipality would waive the photocopying fee. As a result, the FOI Co-ordinator considered that all records relating to the appellant were within the scope of the appellant's request. Staff responsible for the Ontario Works program advised that records relating to the appellant would be located in his physical file. As noted above, the municipality located the appellant's Ontario Works file, as well as electronic notes and emails, and provided partial access to the records in that file.

[18] The municipality submits that the appellant, on several occasions, communicated to the municipality that he was mainly interested in copies of emails and faxes that he had sent to the municipality outlining his concerns about discrimination.

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[1] Orders P-85, P-221 and PO-1954-I.
[2] Order MO-2246.
[3] Orders P-624 and PO-2559.
[4] Orders M-909, PO-2469 and PO-2592.
[5] Order MO-2185.

[19] The municipality further submits that in response to the appellant's follow-up about missing records, the Ontario Works (OW) Supervisor asked employees to review their in-boxes for emails relating to the appellant. The OW Supervisor and an administrative assistant searched the in-boxes of an employee who was on maternity leave and another who had retired. As a result of these searches, several additional emails were located.

[20] The municipality submits that during mediation, the mediator provided the municipality with a list of faxes that the appellant believes exist, which the mediator forwarded to the municipality. In response to this list, the OW Supervisor spoke with existing employees again, none of whom had the faxes or knowledge of their whereabouts. The employees advised that they would have sent any faxes that they received to the Records Program for filing. To ensure a complete search, the FOI Co-ordinator then examined the OW physical file and located two of the listed faxes. The FOI Co-ordinator submits that she is unsure why these faxes were not captured in the initial response to the FOI request, but surmises that they were located and placed in the file after she had processed the appellant's access request approximately 10 months earlier.

[21] The municipality also submits:

> Due to the high volume of e-mails and faxes that Social & Community Services employees received on a daily basis, verifying whether the Region actually received the outstanding e-mails and faxes from the requester would be difficult. Records sent via e-mail could have been caught in the Region's filtering system and hence never received by staff; or if received, the e-mails may have been deleted by accident in staffs' attempt to manage the large volume of e-mails received and stored in their in-boxes. In terms of faxes, the only logical explanation for not having all of them is that they were not successfully transmitted when the client sent them.

[22] In support of its representations, the municipality filed an affidavit sworn by the OW Supervisor, who was the primary employee contact for the appellant's request. Her affidavit sets out the steps that she undertook, after the municipality's initial disclosure, to locate additional emails and faxes:

- She asked current employees to check their email for any correspondence relating to the appellant which had not already been provided to the appellant.

- She and the administrative assistant completed searches of the email accounts of two employees who were either retired or on maternity leave. Responsive records were provided to the FOI Co-ordinator.

- She asked three of the five employees mentioned in the appellant's list of faxes whether they had any faxes in their custody relating to the appellant. They all stated that they did not, and that any faxes would have been sent to the records area for filing in the appellant's OW file.

- She was not able to speak to the retired employee or the employee on maternity leave, but has no reason to believe that they would have any client information in their personal possession. Further, she searched the workstation of the employee on maternity leave and did not locate any faxes relating to the appellant.

[23] The appellant filed brief representations in which he submits as follows:

> [T]he attached 2004 report from the Information and Privacy Commissioner of Ontario sums up our contention that the failure to locate the requested documents in issue, relates to both systemic and individual *failures* by the Region to maintain proper record management processes.
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> The harmful effects of the failure by the Region in regards to adequate and proper record keeping and records management, is particularly set out at pages 13-15 of the attached 2004 report. Clearly, this is not a new concern on our part.
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> As such, the Region should (i) work with the Privacy Commissioner to ensure its record keeping systems, and the management of those systems, comply with the legislation, and explain (ii) why its record management systems remain non-compliant and deficient, to date, such that it has prejudiced [the appellant] in this matter.

Analysis and findings

[24] Based on my review of the municipality's decision letters, the parties' representations and the municipality's affidavit, I find that the municipality's search for records responsive to the appellant's request was reasonable. The initial search included the appellant's physical OW file, as well as electronic notes and records. When the appellant raised concerns about missing faxes and emails, additional searches were undertaken by both the FOI Coordinator and the OW Supervisor, both of whom would reasonably be expected to be familiar with the OW's record holdings. The OW Supervisor also consulted with the staff members identified by the appellant who, in turn, performed their own searches of their email holdings and their physical work areas.

[25] I acknowledge that the municipality's representations explain that emails may have been deleted by accident due to the large number of emails received and stored in the in-boxes of staff. Thus, there exists the possibly that emails that would have been

responsive to the appellant's request have been deleted. However, this remains a mere possibility. While an institution is required to undertake a reasonable search, the *Act* does not require the institution to prove with absolute certainty that further records do not exist. In this case, the appellant has not provided a reasonable basis for a belief that further emails exist, beyond those located by the municipality. In these circumstances, I find that the appellant has not provided sufficient evidence to justify conducting further searches.

[26] With respect to the six missing faxes that the appellant states he sent to the municipality, I accept the municipality's explanation that they may have failed to transmit. Even if they were transmitted and received, however, two searches have failed to locate them. I am not satisfied that there is any basis to justify conducting another search for them.

[27] I also note the appellant's submission that the municipality's record-keeping is deficient; that the municipality should work with the Information and Privacy Commissioner to ensure its record keeping systems comply with the legislation; and that the municipality should explain why its record management systems remain non-compliant and deficient. While I acknowledge the appellant's concerns, such concerns are not properly addressed in a reasonable search appeal. The issue before me is whether the municipality's search for existing records was reasonable, not whether the municipality's record-keeping practices are appropriate.

[28] For the reasons set out above, I uphold the municipality's search as reasonable.

B: Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the record at issue?

[29] 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.

[30] Section 38(a) reads:

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

[31] 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.[6]

[32] 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.

[33] 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.

[34] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Representations

[35] The municipality submits that the record contains email communications between the municipality's legal counsel and its employees regarding the appellant's Human Rights complaint, and that the communications contained in the emails were for the purpose of preparing for the Human Rights Tribunal hearing. It argues that, because the record was created by the municipality's legal counsel in preparation for that hearing, it is covered by communication privilege and litigation privilege.

[36] In its supplementary representations, the municipality advises that the Human Rights Tribunal matter has now concluded.

[37] The appellant's representations do not address the applicability of the section 38(a) exemption, in conjunction with section 12, to the record at issue.

Analysis and findings

Litigation privilege

Branch 1: common law litigation privilege

[38] Litigation privilege at common law protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and

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[6] Order M-352.

prepare a case for trial.[7] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications,[8] but does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[9] The litigation must be ongoing or reasonably contemplated.[10]

[39] Common law litigation privilege generally comes to an end with the termination of litigation.[11]

Branch 2: statutory litigation privilege

[40] Branch 2 is a statutory privilege that applies where the records were "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." The statutory and common law privileges, although not identical, exist for similar reasons.

[41] Statutory litigation privilege applies to records prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation." Like the common-law litigation privilege, it does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[12]

[42] In contrast to the common law privilege, however, termination of litigation does not end the statutory litigation privilege in section 12.[13]

[43] In its representations, the municipality initially argued that the Branch 1, or common law privilege applies. In its supplementary representations, however, the municipality advised that the litigation has now concluded. This suggests to me that the municipality now also relies on Branch 2, the statutory privilege, since the Branch 1 litigation privilege expires upon the termination of litigation, while the Branch 2 litigation privilege does not.

[44] I have reviewed the record and conclude that it is exempt from disclosure under section 12 as a record to which the Branch 2 statutory litigation privilege applies. On its

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[7] *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).
[8] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).
[9] *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).
[10] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.
[11] *Blank v. Canada (Minister of Justice)*, cited above.
[12] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.
[13] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

face, the record, an email exchange among municipality staff, was clearly prepared for the dominant purpose of preparing for the litigation to which the municipality was a party, the Human Rights Tribunal proceeding brought by the appellant.

[45] Furthermore, the communications took place within a zone of privacy. The only individuals in the email chain are the municipality's counsel and its own staff.

[46] Finally, as noted above, Branch 2 litigation privilege does not expire upon conclusion of the litigation. There is also no evidence before me that the privilege has been waived.

[47] Given my finding that the record is exempt under the statutory litigation privilege, I do not need to consider whether the record is also privileged as a solicitor-client communication for the purpose of giving or obtaining legal advice.

[48] Subject to my findings on the municipality's exercise of discretion, therefore, I find that the record at issue is exempt from disclosure pursuant to section 38(a) in conjunction with section 12 of the *Act.*

C: Did the institution exercise its discretion under section 38(a), in conjunction with section 12? If so, should this office uphold the exercise of discretion?

General principles

[49] The section 38(a) exemption, in conjunction with the section 12 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.

[50] 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; or
- it fails to take into account relevant considerations.

[51] 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]

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[14] Order MO-1573.
[15] Section 43(2).

Relevant considerations

[52] 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
- 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.

Representations

[53] The municipality submits that in exercising its discretion in favour of withholding the record at issue, it took into account the following considerations:

- the appellant, on several occasions, communicated to the municipality that he was mainly interested in copies of emails and faxes that he had sent to the

[16] Orders P-344 and MO-1573.

municipality outlining his concerns about discrimination. The record at issue is not an email that matches this description;

- although the municipality often discloses records that qualify for a discretionary exemption, it rarely does so for records to which section 12 applies, as doing so can affect future litigation related to the same or similar matters. For example, with respect to this particular Human Rights complaint, the matter has been settled and the municipality considers it closed; however, the requester's representative advised the mediator that he is pursuing this appeal because he needs the records for an "ongoing matter". The municipality believes that this is the same Human Rights complaint;

- The purpose of section 12 is to protect communications between clients and their lawyers related to legal matters. When the appellant made his request, the municipality was in the midst of dealing with his Human Rights complaint.

[54] In my view, the municipality considered relevant factors in its decision to withhold the record at issue. There is no evidence that it considered improper factors or exercised its discretion in bad faith or for an improper purpose. Further, it is implicit in the municipality's representations that it considered the fact that the appellant was seeking his own personal information, but that this consideration was, in the municipality's view, outweighed by the considerations listed above.

[55] I therefore uphold the municipality's exercise of discretion in favour of withholding the record at issue.

ORDER:

1. I uphold the municipality's search for records as reasonable.

2. I uphold the municipality's decision to withhold the record at issue pursuant to section 38(a), in conjunction section 12 of the *Act.*

Original Signed by: September 17, 2015

Gillian Shaw
Adjudicator