

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3276

Appeal MA14-491

City of Hamilton

January 6, 2016

Summary: The City of Hamilton (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* for information regarding the cutting of trees at a specific property and the resulting charges laid by the city's by-law officer. The city denied access to the responsive records, citing the discretionary exemptions in section 8 (law enforcement) and section 12 (solicitor-client privilege). In this order, the adjudicator orders the city to disclose some of the records at issue. The adjudicator finds that the exemption in section 8 does not apply and that the exemption in section 12 applies to some of the records for which it was claimed. The adjudicator also upholds the city's search for responsive records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 8(1)(c), 8(2)(a), 12, 17.

OVERVIEW:

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

[a]ll information regarding cutting of trees by developer at [address]. All information regarding charges by [named Municipal Law Enforcement officer]¹ against developer.

[2] The city issued a decision advising the appellant that 141 pages of responsive records had been found as a result of the search undertaken. The city advised that:

...the records were created as a result of law enforcement investigations conducted by city by-law officials and include communications between city staff and its solicitors. Seven pages of the records also include information about other municipal property addresses that is not relevant or responsive to your request.

[3] The city withheld the records citing the discretionary law enforcement exemption at sections 8(1)(c) and 8(2)(a) and the discretionary solicitor-client privilege exemption at section 12.

[4] The requester, now the appellant, appealed this decision.

[5] During mediation, the appellant raised the point that since the tree cutting began in 2009; he believed there should be responsive records from that date. The city advised that the Municipal Law Enforcement Division undertook a second search for these records, and responded that there were no records regarding tree cutting dating from 2009. In addition, the city contacted the Ward Councillor, who conducted another search for records dating from 2009; none were found.

[6] The appellant also asked about the disclosure of the Order to Comply. The city advised that the record is not a public record and in fact, is a record that forms part of the Crown Brief, and accordingly, it will not reconsider its decision to withhold it under section 12.

[7] The appellant asked that the issues of the identified non-responsive severances to the records, the application of sections 8 and 12, and the reasonableness of the city's search for records be moved to adjudication.

[8] As mediation did not resolve all of the issues in this appeal, the file was transferred to the adjudication stage where an adjudicator conducts an inquiry. Representations were sought and exchanged between the city and the appellant in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[9] I also identified that the developer named in the request may have an interest in this appeal. I, therefore, notified the developer of this appeal and invited

¹ Also referred to as the by-law officer in this order.

representations on the application of the possible mandatory exemptions in section 10 (third party information) and section 14(1) (personal privacy). The developer did not provide representations in this appeal. In the circumstances, I am satisfied that no mandatory exemptions apply to the information at issue in this appeal.

[10] In this order, I find that the records are not exempt under sections 8(1)(a) and 8(2)(c). I partially uphold the city's decision to withhold records under section 12 and order the city to disclose the non-exempt records. I also uphold the city's search for responsive records.

RECORDS:

[11] There are 30 records at issue, as set out in the following chart prepared by the city:

Page #	Record Description	Exemption	Record Disposition
1 to 1-1	Hand-written notes dated March 16, 19, 2012	8(2)(a), 12, n/r	withheld in full - by-law enforcement investigation, part of Crown Brief, non-responsive information about other municipal property addresses
1-2	Hand-written notes dated March 22, 2012	8(1)(c), 8(2)(a), 12, n/r	withheld in full - by-law enforcement investigation, part of Crown Brief, non-responsive information about other municipal property addresses
1-3	Hand-written notes dated March 23, 2012	8(1)(c), 8(2)(a), 12, n/r	withheld in full - by-law enforcement investigation, part of Crown Brief
1-4	Hand-written notes dated March 26,	8(1)(c), 8(2)(a), 12, n/a	withheld in full - by-law enforcement investigation, part of Crown Brief, non-responsive information about other municipal

	2012		property addresses
1-5	Hand-written notes dated April 10, 2012	8(2)(a), n/r	withheld in full - by-law investigation, non-responsive information about other municipal addresses
1-6	Hand-written notes dated April 13, 2012	8(2)(a), 14(1), 12 n/a	withheld in full - by-law enforcement investigation, personal information, i.e. telephone number of an identifiable individual, part of Crown Brief, non-responsive information about other municipal addresses
1-7	Hand-written notes dated June 14, 2013	8(1)(c), 8(2)(a), 12, n/r	withheld in full - by-law enforcement investigation, part of Crown Brief, non-responsive information about other municipal addresses
2	Email dated Sept 4, 2014 10:51 am	8(2)(a)	withheld in full - details of law enforcement investigation
3 to 3-3	Hand-written notes (4 pages)	8(2)(a)	withheld in full - details of law enforcement investigation
4 to 4-3	Information - April 11, 2012 (4 pages)	8(2)(a), 12	withheld in full - details of law enforcement investigation, legal communications
5	Summons	8(2)(a), 12	withheld in full - details of law enforcement investigation, legal communications
5-1	Affidavit of	8(2)(a), 12	withheld in full - details of law enforcement

	Service of Summons		investigation, legal communications
6	Summons	8(2)(a), 12	withheld in full - details of law enforcement investigation, legal communications
6-1	Affidavit of Service of Summons	8(2)(a), 12	withheld in full - details of law enforcement investigation, legal communications
7 to 7-3	Information	8(2)(a), 12	withheld in full - details of law enforcement investigation, legal communications
8 to 8-3	Information	8(2)(a), 12	withheld in full - details of law enforcement investigation, legal communications
9	Request dated May 23, 2012	8(2)(a), 12	withheld in full - details of law enforcement investigation, legal communications
10	Municipal Law Enforcement dated April 11, 2012	8(2)(a), 12	withheld in full -legal communications - solicitor client privilege
11	Email message dated May 30, 2012 9:08 am	8(2)(a), 12	withheld in full - details of law enforcement investigation, legal communications
12	Email message dated May 30, 2012 3:24 pm	12	withheld in full -legal communications - solicitor client privilege
13 to 13-1	Email message dated June	12	withheld in full -legal communications - solicitor client privilege

	4, 2012 10:19 am		
14 to 14-1	Email message dated June 7, 2012 10:35 am	12	withheld in full - legal communications - solicitor client privilege
15 to 15-2	Email message dated June 7, 2012 11:42 am	12	withheld in full -legal communications - solicitor client privilege
16	For Legal Review dated April 11, 2012	8(2)(a), 12	withheld in full - details of law enforcement investigation, legal communications
17 to 17-2	Email message dated June 7, 2012	12	withheld in full - legal communications - solicitor client privilege
18 to 18-1	Email message dated July 24, 2012 10:14 am	12	withheld in full - legal communications - solicitor client privilege
19	Email message dated Sept 6, 2012 1:08 pm	12	withheld in full -legal communications - solicitor client privilege
20	Form dated 2012	8(2)(a), 12	withheld in full - details of law enforcement investigation, legal communications

21	Email message dated Oct 16, 2012 3:29 pm	12	withheld in full - legal communications - solicitor client privilege
22	Email message dated Jan 15, 2013 9:34 am	12	withheld in full - legal communications - solicitor client privilege
23 to 23-1	Email message dated Feb 12, 2013 3:50 pm	12	withheld in full -legal communications - solicitor client privilege
24	Email message dated March 13, 2013 1:16 pm	12	withheld in full - legal communications - solicitor client privilege
25 to 25-1	Email message dated March 13, 2013 3:37 pm	12	withheld in full -legal communications - solicitor client privilege
26	Email message dated March 26, 2013 2:18 pm	12	withheld in full - legal communications - solicitor client privilege
27 to 27-1	Email message dated May 24, 2013	12	withheld in full -legal communications - solicitor client privilege

	4:05 pm		
27-2	Aerial map	8(2)(a), 12	withheld in full - details of law enforcement investigation, legal communications, associated with record 27
28 to 28-1	Email message dated Oct 11, 2013 3:31 pm	12, n/a	withheld in full - legal communications - solicitor client privilege, non-responsive information about another municipal address
29	duplicate of record 28	12, n/a	withheld in full - legal communications, non-responsive information about another municipal property address
30 to 30-77	Crown Brief dated May 23, 2012	12	withheld in full

ISSUES:

- A. Does the discretionary law enforcement exemption at sections 8(1)(c) and/or 8(2)(a) apply to the records?
- B. Does the discretionary solicitor-client privilege exemption at section 12 apply to the records?
- C. Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?
- D. Are the portions of the records marked non-responsive responsive to the request?
- E. Did the institution conduct a reasonable search for records?

DISCUSSION:

A. Does the discretionary law enforcement exemption at sections 8(1)(c) and/or 8(2)(a) apply to the records?

[12] Sections 8(1)(c) and 8(2)(a) state:

(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

(2) A head may refuse to disclose a record,

(a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

[13] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b)

[14] The term "law enforcement" has covered the following situations:

- a municipality's investigation into a possible violation of a municipal by-law.²

[15] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.³

[16] It is not enough for an institution to take the position that the harms under

² Orders M-16 and MO-1245.

³ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.⁴ The institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.⁵

Section 8(1)(c): investigative techniques and procedures

[17] In order to meet the “investigative technique or procedure” test, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public.⁶

[18] The techniques or procedures must be “investigative”. The exemption will not apply to “enforcement” techniques or procedures.⁷

[19] The city provided both confidential and non-confidential representations.⁸ It states that the handwritten notes that comprise Records 1-2, 1-3, 1-4, and 1-7 each describe investigation procedures used by the city's by-law officers, who are appointed by the city's Council for the purposes of gathering evidence and enforcing the city's by-laws. The city states that the investigative procedures in the records at issue are currently used by its by-law officers and are not generally known to the public.

[20] The appellant did not provide representations on the application of the exemptions to the records.

Analysis/Findings

[21] I have reviewed Records 1-2, 1-3, 1-4, and 1-7, as well as the by-law referred to in the city's representations. I do not agree with the city that the investigative procedures set out in these records is not generally known to the public, as I find that these procedures are obvious techniques that would by necessity be used by by-law enforcement officers to investigate possible violations and to enforce the by-law.⁹ In

⁴ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

⁵ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

⁶ Orders P-170, P-1487, MO-2347-I and PO-2751.

⁷ Orders PO-2034 and P-1340.

⁸ Although I have considered both the confidential and non-confidential portions of the city's representations, in this order I will be only referring to the city's non-confidential representations.

⁹ The city referred to the applicable by-law number in its confidential representations. A copy of this by-law is publicly available on the city's website.

addition, the city did not provide any representations as to how disclosure could reasonably be expected to hinder or compromise its effective utilization, nor is this apparent to me from my review of the records at issue.

[22] Accordingly, I find that section 8(1)(c) does not apply to exempt the responsive information in Records 1-2, 1-3, 1-4, and 1-7. The city has claimed that the responsive information in these records is also subject to sections 8(2)(a) and 12. Therefore, I will consider the application of these exemptions to these records.

Section 8(2)(a): law enforcement report

[23] In order for a record to qualify for exemption under section 8(2)(a) of the *Act*, the institution must satisfy each part of the following three-part test:

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.¹⁰

[24] The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact.¹¹ The title of a document does not determine whether it is a report, although it may be relevant to the issue.¹²

[25] The city states that Records 1 to 11, 16, 20, and 27-2 are records created in the course of the by-law officer's investigation of a breach of a city by-law. It submits that the responsive records contain the results of the officer's investigations, including details of consultations with city staff and external sources, and documents prepared by the by-law officer.

Analysis/Findings

[26] The records for which the city has claimed the application of section 8(2)(a) consist of the following:

- Records 1 and 3 are handwritten notes.

¹⁰ Orders P-200 and P-324.

¹¹ Orders P-200, MO-1238 and MO-1337-I.

¹² Order MO-1337-I.

- Records 2 and 11 are emails with Record 2 being a short point form chronology and Record 11 being a repetition of the charges.
- Records 4 to 8 are court forms, consisting of Information forms, Summonses and Affidavits of Service.
- Record 9 is a Request for Legal Action form.
- Record 10 is a form regarding dates.
- Record 16 is a form requesting a legal review signed by the recipient.
- Record 20 is a form listing the property address, the name of the accused and two dates.
- Record 27-2 is an aerial map.

[27] I find that none of these records for which section 8(2)(a) has been claimed are reports within the meaning of this exemption. None of these records consist of a formal statement or account of the results of the collation and consideration of information. At most, some of the records have recordings of facts, such as a listing of the charges and chronologies of procedural information.

[28] The city has not established that these records represent the by-law officer's collation and consideration of information and as such are "law enforcement reports" within the meaning of section 8(2)(a). As none of the records at issue qualify as a report prepared in the course of law enforcement, I find that Records 1 to 11, 16, 20, and 27-2 are not exempt by reason of section 8(2)(a).

[29] As only section 8(2)(a) has been claimed for Records 2 and 3, and no mandatory exemptions apply, I will order Records 2 and 3 disclosed. Section 12 has been claimed for the remainder of the records for which section 8(2)(a) was claimed; therefore, I will consider the application of section 12 to Records 1, 4 to 11, 16, 20, and 27-2.

B. Does the discretionary solicitor-client privilege exemption at section 12 apply to the records?

[30] 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.

[31] 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.

[32] The city is claiming solicitor-client communication privilege for all of the records at issue. It does not indicate whether it is claiming this under branch 1 or branch 2.

[33] At common law, branch 1 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.¹³

[34] Branch 2 is a statutory solicitor-client communication privilege that applies where the records were “prepared by or for counsel employed or retained by an institution for use in giving legal advice.” The statutory and common law privileges, although not identical, exist for similar reasons. Like the common law solicitor-client communication privilege, branch 2 solicitor-client communication privilege covers records prepared for use in giving legal advice.

[35] The rationale for solicitor-client communication privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.¹⁴ The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.¹⁵

[36] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.¹⁶

[37] 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.¹⁷ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.¹⁸

[38] The city provided both confidential and non-confidential representations on section 12. The only confidential representations it provided on section 12 is with respect to Record 30, the Crown Brief, where it lists the types of information in the Crown Brief and the reason it prepared the Crown Brief.

[39] The city is claiming solicitor-client communication privilege for Records 11 to 15-

¹³ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

¹⁴ Orders PO-2441, MO-2166 and MO-1925.

¹⁵ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

¹⁶ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

¹⁷ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

¹⁸ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

2; 17 to 19; 21 to 26; 28 to 29, which it states are email communications between city staff and city prosecutors and legal staff. It submits that these records' contents demonstrate staff seeking legal advice/direction and the continuum of communication between the two.

[40] The city is also claiming solicitor-client communication privilege for Record 30, the Crown Brief Package, claiming that it was prepared by the by-law officer and then submitted to city prosecutors. It also claims that Records 1 to 1-4 and 1-6 to 1-7 form part of the Crown Brief package.

[41] The city states that Records 4 to 8-3 are forms completed by the by-law officer. It states:

The Information form was submitted with the Brief to the prosecutors. The Summons was subsequently prepared by Municipal Law and also submitted to the City prosecutors.

Analysis/Findings

[42] The city has described the records as follows:

- Records 11 to 15, 17 to 19, 21 to 26, 28 to 29, are emails;
- Records 1 to 1-4 and 1-6 to 1-7 form part of Crown Brief;
- Records 4 to 8 are forms completed by the by-law officer;
- Record 30 Crown Brief is the Crown Brief.

[43] I find that some of the emails chains in Records 11 to 15-2, 17 to 19, 21 to 26, 28 to 29 are subject to solicitor-client communication privilege as they contain emails of 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 or information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.

[44] However, I also find that the email chains in Records 11, 21, 23 to 25, 28 and 29 do not contain privileged solicitor-client communications. I am basing my decision on my review of the records and the city's representations.

[45] Record 11 is an email from the by-law officer to the Court Administration Clerk. The record merely lists two charges. Neither the sender nor recipient of this email is a legal counsel. I do not agree that this email is subject to solicitor-client communication privilege as there is no indication that it was made for the purpose of obtaining or giving professional legal advice, nor would disclosure reveal any such advice. As no

other discretionary exemptions have been claimed and no mandatory exemptions apply, I will order Record 11 disclosed.

[46] Records 21 and 23 to 25 all only contain a chart entitled Disposition Summary that was emailed to numerous individuals. This chart merely lists the details of the charges and the dates for the proceedings and indicates assigned counsel at the next scheduled hearing date. I find that these records were not created for the purpose of obtaining or giving professional legal advice or contain information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given. I find that section 12 does not apply and, as no other discretionary exemptions have been claimed and no mandatory exemptions apply, I will order these records disclosed.

[47] I also find that Records 28 and 29, which are identical email chains, do not contain solicitor-client privileged communications. These emails merely list how the court charges were disposed of by the court. I find that section 12 does not apply and, as no other discretionary exemptions have been claimed and no mandatory exemptions apply, I will order these records disclosed.

[48] I find that the emails that comprise Records 12 to 15-2, 17 to 19, 22 and 26 do contain information that is subject to section 12. These emails are confidential communications to or from legal counsel for the purpose of the giving or receiving of legal advice.

[49] As stated above, section 12 covers records that were prepared by or for counsel employed or retained by an institution. The Crown Brief, Record 30, was prepared upon completion of the enforcement investigation by the city for city prosecutors for use in litigation. The city states that the Crown Brief is subject to the statutory litigation privilege exemption.

[50] The 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." 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.¹⁹

[51] Records that form part of the Crown brief, including copies of materials provided to prosecutors by police, and other materials created by or for counsel, are exempt under the statutory litigation privilege.²⁰ Documents not originally created for use in litigation, which are copied for the Crown brief as the result of counsel's skill and

¹⁹ See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.

²⁰ Order PO-2733.

knowledge, are also covered by this privilege.²¹ However, the privilege does not apply to records in the possession of the police, created in the course of an investigation, just because copies later become part of the Crown brief."²²

[52] As such, I find that Record 30, the Crown Brief prepared by the city for its prosecutors for use in the prosecution, is subject to the statutory litigation privilege in branch 2 of section 12 as it is a copy of the material provided to the prosecutors. In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.²³ Therefore, subject to my review of the city's exercise of discretion, Record 30 is exempt under section 12.

[53] Records 4 to 8 are forms completed by the by-law officer. These records are court forms, consisting of Information forms, Summonses and Affidavits of Service. According to the city, the Information forms and Summonses were submitted to the city prosecutors. I find that these court forms that comprise Records 4 to 8 are not subject to section 12. These records were created in the course of an investigation by the city's by-law enforcement officer. They are not privileged and exempt under section 12 simply because they became a part of the Crown Brief.

[54] The only representations from the city on pages 1 to 1-4 and 1-6 to 1-7 of Record 1 are that these pages form part of the Crown Brief. These pages consist of the handwritten investigation notes of the by-law officer. Although copies of these pages may have been placed in the Crown Brief, I find that section 12 does not apply to these notes as privilege does not apply to records in the possession of the city, created in the course of an investigation, just because copies later become part of the Crown brief.²⁴

[55] As stated above, branch 2 is a statutory solicitor-client communication privilege that applies where the records were "prepared by or for counsel employed or retained by an institution for use in giving legal advice." The records that I have found subject to section 12 were all prepared by or for counsel employed by the city for use in giving legal advice.

[56] Accordingly, I have only found that certain emails are exempt under Section 12, namely the emails in Records 12 to 15-2, 17 to 19, 22 and 26. These records are subject to branch 2 solicitor-client communication privilege. As well, the Crown Brief, Record 30, a copy of which was provided to the prosecutors for use in litigation, is

²¹ *Ontario (Ministry of Correctional Services) v. Goodis*, cited above, and Order PO-2733.

²² Orders PO-2494, PO-2532-R and PO-2498, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952.

²³ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

²⁴ Orders PO-2494, PO-2532-R and PO-2498, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952.

subject to branch 2 section 12 litigation privilege. This privilege has not been lost through waiver. Subject to my review of the city's exercise of discretion, Records 12 to 15-2, 17 to 19, 22, 26 and 30 are exempt under section 12.

C. Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

[57] 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.

[58] 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.

[59] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁵ This office may not, however, substitute its own discretion for that of the institution.²⁶

[60] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²⁷

- 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

²⁵ Order MO-1573.

²⁶ Section 43(2).

²⁷ Orders P-344 and MO-1573.

- 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.

[61] The city states that it has considered in exercising its discretion of the application of the section 12 exemption it considered that:

- The records contain no personal information of the appellant.
- The records relate to law enforcement investigations and concern a municipal property address for which the appellant is not the property owner.
- The information is sensitive to the owner of the subject property.
- These records have traditionally been protected from disclosure by the city.

[62] I find that in denying access to the information at issue the city exercised its discretion in a proper manner taking into account relevant factors and not taking into account irrelevant factors. The information at issue is sensitive information that is subject to the solicitor-client privilege exemption.

[63] Accordingly, I am upholding the city's exercise of discretion.

D. Are the portions of the records marked non-responsive responsive to the request?

[64] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,

(a) make a request in writing to the institution that the person believes has custody or control of the record;

(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[65] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.²⁸

[66] To be considered responsive to the request, records must "reasonably relate" to the request.²⁹

[67] The city states that the request concerns only one municipal property address (the subject property) and that some of the records also contain information about other municipal property addresses that do not concern the subject property. In particular, it states that information about other municipal property addresses is contained in Records 1, 28 and 29. These addresses, according to the city, have no relation to the subject property.

Analysis/Findings

[68] Based on my review of the records and the city's representations, I find that the information in Records 1, 28 and 29 that the city has determined is non-responsive to the appellant's request is not responsive to the request. This information concerns properties other than the property listed in the appellant's request and thus do not reasonably relate to his request.

E. Did the institution conduct a reasonable search for records?

[69] 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 17.³⁰ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's

²⁸ Orders P-134 and P-880.

²⁹ Orders P-880 and PO-2661.

³⁰ Orders P-85, P-221 and PO-1954-I.

decision. If I am not satisfied, I may order further searches.

[70] 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.³¹ To be responsive, a record must be "reasonably related" to the request.³²

[71] 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.³³

[72] 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.³⁴

[73] 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.³⁵

[74] The institution was asked to provide a written summary of all steps taken in response to the request. In particular, it was asked:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the institution did not contact the requester to clarify the request, did it:
 - a. choose to respond literally to the request?
 - b. choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?
3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the

³¹ Orders P-624 and PO-2559.

³² Order PO-2554.

³³ Orders M-909, PO-2469 and PO-2592.

³⁴ Order MO-2185.

³⁵ Order MO-2246.

search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.
5. Do responsive records exist which are not in the institution's possession? Did the institution search for those records? Please explain.

[75] The city states that the request details were directed to staff in its Planning and Economic Development department (of which Parking and By-law Enforcement is a division) for a record search. It also states that, though not stipulated by the appellant, the request details were also directed to the city's Public Works department, in particular, the Forestry section of the department's Environmental Services division. The city states that it identified 148 pages of records as responsive to the request.

[76] The city further states that subsequent to its access decision, during the course of mediation of the appeal, each of the aforementioned departments was approached to conduct secondary searches. A city councillor's office also conducted a search.

[77] The city states that during the mediation process, it was suggested by the appellant that responsive records should exist from 2009 because he believed that trees were cut during that time period and in 2011 (the responsive records date from 2012). It states that city staff completed searches and that no further responsive records were located.

Analysis/Findings

[78] In his request, the appellant sought information regarding the cutting of trees by the developer at a particular address and all information regarding charges by a named by-law officer against the developer.

[79] I have carefully reviewed the appellant's representations. His representations focus on matters other than the issues on appeal, namely, the exemptions claimed for the responsive records, the responsiveness of the records and whether the city has conducted a reasonable search for responsive records. This order only concerns the request as outlined above, and whether the city has conducted a reasonable search for responsive records and properly applied the claimed exemptions to the responsive information in the records.

[80] Based on my review of the city's representations, I find that it has conducted a reasonable search for responsive records. The appellant has not provided a reasonable basis for me to conclude that additional responsive records exist and in my view, the

city's explanation about records from 2009 is reasonable.

[81] Accordingly, I am upholding the city's search for responsive records.

ORDER:

1. I uphold the city's search for responsive records.
2. I order the city to disclose to the appellant **by February 10, 2016** but not before **February 5, 2016** the responsive information in Records 1 to 11, 16, 20, 21, 23 to 25, and 27 to 29.
3. I uphold the city's decision to deny access to the remaining information in the records.
4. In order to verify compliance with order provision 2, I reserve the right to require the city to provide me with a copy of the records disclosed to the appellant.

Original Signed by: _____
Diane Smith
Adjudicator

_____ January 6, 2016