

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3288

Appeals MA14-131 and MA14-131-2

City of Ottawa

February 11, 2016

Summary: The issues in this order are the application of the discretionary exemptions in section 38(a) in conjunction with sections 7 (advice or recommendations) and 12 (solicitor-client privilege), and 38(b) in conjunction with section 14(1) (personal privacy), as well as the search for responsive records. The appellant's request to the City of Ottawa (the city) was for records relating to her and the city's By-law services. In this order, the adjudicator finds that some of the records are exempt under sections 38(a) and (b), but that others are not. She also upholds the city's exercise of discretion and finds that the city's search for records was reasonable. The city is ordered to disclose some of the records to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2 (definition of personal information), 7, 12, 14(1), 17, 38(a) and 38(b).

OVERVIEW:

[1] This order disposes of the issues raised as a result of appeals of two decisions made in response to the requester's access request to the City of Ottawa (the city), under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records relating to her and the city's By-law services over a specified time period.

[2] The city located responsive records and issued an access decision to the requester. The city granted access in part, claiming the application of the discretionary exemption in section 8(1)(d) (law enforcement) and the mandatory exemption in

section 14(1) (personal privacy) of the *Act* to one record.

[3] The requester (now the appellant) filed an appeal of the city's decision to this office. As a result, appeal file MA13-131 was opened. During the adjudication stage of the appeal, the city conducted a further search for records and located additional records. The city issued a supplemental access decision granting full access to the additional records it had located. Later, the city issued another supplemental access decision, indicating that it had located a further 1119 pages of records, as well as 75 videos. The city granted access to the videos, in full. The city also granted partial access to the records. The city withheld other records either in whole or in part, claiming the application of the discretionary exemptions in sections 7(1) (advice or recommendations), 8(1)(d), 11(c) and (d) (economic and other interests) and 12 (solicitor-client privilege), as well as the mandatory exemption in section 14(1). The appellant appealed the second supplemental decision and appeal file MA13-131-2 was opened.

[4] The city also issued a decision letter to the appellant under the *Personal Health Information Protection Act (PHIPA)*, granting partial access to other records. The appellant filed a complaint of that decision to this office, and a separate *PHIPA* complaint file was opened, which will be processed separately from these appeals.

[5] During the mediation of the appeals, the appellant confirmed she did not wish to pursue access to the cell phone numbers of individuals or schedules/availability of individuals. In addition, the mediator reviewed the records with the appellant, who identified the records she wished to pursue and those she no longer wished to pursue. As a result, the exemption in section 8(1)(d) is no longer at issue. In addition, the appellant advised the mediator that she is of the view that further records exist. Consequently, reasonable search was added as an issue.

[6] The appeals then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. Because the records appear to contain the personal information of the appellant, the discretionary exemptions in sections 38(a) and 38(b) were added as issues. Representations were sought and received from both parties, and were shared in accordance with this office's *Practice Direction 7*. Portions of the city's representations were not shared with the appellant because they met this office's confidentiality criteria, and they will not be reproduced in this order. In its representations, the city indicated that it was no longer claiming the application of the exemption in section 11. Also during the inquiry, the city issued another supplemental decision letter to the appellant, granting further access to some of the records at issue.

[7] For the reasons that follow, I find that some of the records are exempt under sections 38(a) and (b), but that others are not. I also uphold the city's exercise of discretion and find that the city's search for records was reasonable. I order the city to disclose some of the records to the appellant, either in whole, or in part.

RECORDS:

[8] The records at issue are listed in an index of records which was provided to the appellant by the city. The types of records include photographs, email correspondence, summaries of actions taken and occurrence reports. There is some duplication of content within the records.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the information at issue?
- C. Does the discretionary exemption at section 38(a) in conjunction with the section 7 exemption apply to the information at issue?
- D. Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information at issue?
- E. Did the institution exercise its discretion under sections 38(a) and 38(b)? If so, should this office uphold the exercise of discretion?
- F. Did the institution conduct a reasonable search for records?

DISCUSSION:

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

[9] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the

individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

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

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[11] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.¹

[12] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something

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

of a personal nature about the individual.² To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

[13] The city submits that the records contain the personal information of:

- the identity of individual(s) who, in their personal capacity, brought to the city's attention property standards issues in relation to the appellant's property. The property standards issues are subject to the city's Property Standards By-law 2013-416. Therefore, the city submits, the information of the individual(s) in the records falls within paragraph (c) of the definition of personal information; and
- city employees or city contractors because the records contain their cell phone numbers, work/educational history or information about their activities outside of work.

[14] The appellant's representations do not address this issue.

Analysis and findings

[15] As previously stated, the appellant advised the mediator that she is not seeking access to cellphone numbers or the schedules/availability of individuals. Consequently, this information which is contained in the records is no longer at issue and will not be disclosed to the appellant. With respect to the remaining information, I have reviewed the records, and I find that they contain the personal information of the appellant, some city employees and other individuals.

[16] In particular, I find that most of the records contain the personal information of the appellant, as they disclose her name, her property's address and other personal information about her. This information falls within paragraphs (d) and (h) of the definition of personal information in section 2(1). Further, I find that the withheld information in record 819 (in appeal MA14-131-2) for which the city claimed the application of the exemption in section 14(1) is, in fact, the personal information of the appellant. In my view, this information falls within paragraph (g) of the definition as it consists of another individual's views of the appellant. As section 14(1) can only apply to withhold the personal information of another individual from the requester, it is not applicable to record 819 in the circumstances. Consequently, the exemption in section 14(1) is not applicable. As the city has not claimed any other exemptions with respect to this information, I order it to disclose record 819 to the appellant.

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

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

[17] In addition, some of the records contain the personal information of identified city employees, including an individual's educational history, and information relating to work absences. While these individuals were acting in their professional capacity as city employees, I find that this information reveals something of a personal nature about them and, therefore qualifies as their personal information, falling within paragraphs (b) and (h) of the definition.

[18] Lastly, I find that some of the records contain the personal information of other identifiable individuals, including their address, family status and personal opinions or views. This information falls within paragraphs (a), (d) and (e) of the definition.

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

[19] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[20] Section 38(a) reads:

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

if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[21] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.⁴

[22] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information. The institution is asked to address this under "Exercise of Discretion", below.

[23] In this case, the institution relies on section 38(a) in conjunction with section 12.

[24] The city is claiming the application of the discretionary exemption in section 12 to records 646, 647, 649, 684, 685, 688, 689, 690, 691, 693, 694, 695, 696, 697, 698, 699, 706, 707, 728, 763, 764, 784, 785, 786, 793, 794, 795, 799, 800, 801, 827, 828, 832, 835, 836, 838, 849, 857, 875, 876 and 877.

[25] Section 12 states:

⁴ Order M-352.

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.

[26] 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.

[27] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.⁵ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.⁶ 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.⁷ The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.⁸

[28] 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.⁹

[29] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege knows of the existence of the privilege, and voluntarily demonstrates an intention to waive the privilege.¹⁰

[30] The city claims that some of the records are exempt under section 12 as they are subject to solicitor-client communication privilege. The information at issue, the city submits, consists of advice provided by its legal counsel to staff members who were addressing various issues concerning the appellant and a property. The city further submits that the privilege extends to the entire continuum of communications between legal counsel and staff, including requests from staff to legal counsel for advice, and the legal and strategic advice provided by counsel. The city goes on to state that it also withheld subsequent emails that reveal the substance of the communications between legal counsel and staff. The city provided further confidential representations setting out details concerning the legal advice given, which I will not reproduce in this order.

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

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

⁷ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

⁸ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁹ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

¹⁰ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

[31] The city also advises that, while it withheld the legal advice provided to staff, it disclosed to the appellant the subsequent actions that staff took. The city states:

The City has therefore applied the exemption to protect the ability of City staff to confidentially consult with legal counsel while at the same time disclosing the actual actions taken, including the issuance of property standards Orders and the names of individuals who attended the Appellant's property and general meetings to discuss matters.

[32] Lastly, the city states that it has not waived the solicitor-client privilege, and that the advice provided remains internal to it and has not been shared with outside parties.

[33] The appellant's representations do not address this issue.

Analysis and findings

[34] I note that some of the records for which the city claimed section 12 were withheld in their entirety, and that other records were only partially withheld under this exemption.¹¹ I have reviewed the records and I find that the majority of them are exempt under branch one of section 12 of the *Act*, with two exceptions. I find that these records are subject to solicitor-client communication privilege because they form part of the continuum of communications between two of the city's legal counsel and other city staff members. In particular, the records contain:

- communications in which staff are providing legal counsel with information for the purpose of seeking legal advice from them;
- communications in which legal counsel are giving legal advice on legal issues and how to resolve them;
- communications between staff in which the legal advice that was given is summarized;
- drafts of legal documents provided by staff to legal counsel for review; and
- revisions of legal documents made by legal counsel.

[35] I also find that these communications were done so implicitly in confidence, and that the city has not waived its solicitor-client privilege. Consequently, I find that these records are exempt from disclosure under section 38(a) of the *Act*, in conjunction with branch one of section 12, subject to my findings with respect to the city's exercise of discretion.

¹¹ Therefore, my reference to "the records" refers to the withheld portions of records, whether that be in whole or in part.

[36] Conversely, I find that two of the records are not exempt from disclosure under section 12 because, in my view, they are not subject to solicitor-client communication privilege. Record 835 was withheld in part. The portion that was withheld is an email communication between two staff members and sets out next steps to be taken. While there is sharing of information between staff on actions to be taken, there is neither the seeking nor giving of legal advice in the email. Consequently, it does not qualify for exemption under section 12.

[37] Similarly, I find that record 838, which was withheld in its entirety, is also not exempt from disclosure under section 12. This record is an email communication in which a staff member provides an update to legal counsel. The information provided is factual, and there is nothing to indicate on the face of the record that the information was provided by the staff for the purpose of seeking legal advice, nor would it reveal any legal advice.

[38] The city is also claiming the application of the discretionary exemption in section 7(1) to the withheld information in record 835 and to record 838, which I consider below.

Issue C: Does the discretionary exemption at section 38(a) in conjunction with the section 7 exemption apply to the information at issue?

[39] The city is claiming the application of the discretionary exemption in section 7(1) to records 648, 686, 687, 691, 704, 705, 709, 710, 711, 712, 727, 729, 732, 733, 734, 735, 736, 737, 754, 756, 757, 758, 759, 760, 761, 762, 782, 783, 792, 797, 798, 815, 816, 817, 820, 821, 822, 823, 824, 825, 826, 835, 837 and 838.

[40] 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.

[41] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.¹²

[42] "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.

[43] "Advice" has a broader meaning than "recommendations". It includes "policy

¹² *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

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.¹³

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

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

- the information itself consists of advice or recommendations; or
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.¹⁴

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

- factual or background information;¹⁵
- a supervisor’s direction to staff on how to conduct an investigation.¹⁶

[47] In addition, 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. Section 7(2) states, in part:

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual material;

[48] The city submits that the records contain staff advice or recommendations that are not simply factual, but an analysis of facts that incorporates corresponding actions and/or recommendations that staff may consider. In particular, the city states that the records include staff discussions about how to address the property standards deficiencies at the property. The city goes on to state that the By-law and Regulatory Services Branch staff were at the centre of these discussions as they were responsible for issuing the property standards orders, obtaining a warrant to enter the premises

¹³ See above at paras. 26 and 47.

¹⁴ Order P-1054

¹⁵ Order PO-3315.

¹⁶ 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.).

and arranging for a contractor to remediate the property. These staff members were supported by the Building Code Services Branch, Fire Services Branch and the Health Unit, whose staff provided advice based on their area of expertise. The city advises that the types of discussions include:

- a study of the appellant's house that was completed by an engineering firm;
- how to enforce the city's property standards by-law, including how to approach the issuance and enforcement of property standards orders; and
- internal consideration of options and recommendations to remedy the condition of the appellant's house.

[49] The city states:

. . . [T]he City has focused on protecting the ability of staff to have frank discussions about the challenges in taking certain actions in respect to the property and the individuals and/or organizations that were responsible for the property.

[50] The appellant's representations do not address this issue.

Analysis and findings

[51] I note that the city withheld some of the records in their entirety, while portions of others were withheld under this exemption. I will conduct my analysis of the city's application of the exemption in section 38(a), in conjunction with section 7(1) on record-by-record basis. Where I find that the records contain factual information which does not qualify for exemption, I do so under the exception in section 7(2)(a).

Record 648

[52] This record is part of an email between two city staff. It consists mainly of factual and objective information, which does not qualify for exemption. The record does contain one recommendation, which is exempt from disclosure.

Records 686-687

[53] These records form part of an email communication amongst city staff. There are options and recommendations in this record, which qualify for exemption. However, other portions refer to factual and objective information concerning the property, which do not qualify for exemption.

Record 691

[54] This record, which is part of an email, does not contain any information that

would qualify as advice or recommendations as contemplated in section 7(1). It consists of factual, objective information as well as the opinion of an individual, but not in the context of providing advice or recommendations. The top portion of the record I have already found to be exempt under section 12 and will not be disclosed, but the remainder of the record is not exempt.

Record 704

[55] I uphold the city's decision to withhold portions of this record under section 7(1), as they contain recommendations.

Record 705

[56] This record which is part of an email communication does contain some advice which qualifies for exemption under section 7(1). However, other portions of the record contains factual or objective information which is not exempt.

Record 709

[57] Most of this record is duplicated in part in records 704 and 705. The portions that are in record 704 are exempt. The portion that is in record 705 is not exempt. The only other portion at issue consists of a question from one staff to another. It does not contain advice or recommendations and is therefore not exempt. While this portion of the record may raise the application of the solicitor-client privilege exemption in section 12, it is not apparent on the face of the record that the question was asked for the purpose of providing legal advice.

Records 710-712

[58] I am satisfied that the withheld portions of these records are exempt under section 7(1), as they contain advice, policy options, and the views or opinions of a staff member as to the range of courses of action to be considered by the decision maker.

Record 727

[59] This record is an email. The portion that was withheld does contain recommendations, which are exempt under section 7(1). However, the record also contains factual and objective information which is not exempt.

Record 729

[60] I am satisfied that the information the city withheld is exempt under section 7(1), as it consists of advice and recommendations.

Records 732-733

[61] I find that these records do contain advice, which is exempt under section 7(1).

However, other portions of the records contain factual and objective information which is not exempt under section 7(1).

Records 734-736

[62] I am satisfied that this record is exempt under section 7(1), as it contains advice, policy options, the views or opinions of a staff member as to the range of courses of action to be considered by the decision maker, as well as recommendations.

Record 737

[63] Most of this record is a duplication of part of record 686 and, therefore, my findings with respect to this duplicate information in record 686 applies. However, other information is not duplication and I find that this information is exempt under section 7(1) because it sets out options to be considered with respect to the property.

Record 754

[64] I find that the withheld portion of this record consists of questions posed by one staff member to another. It does not contain advice, recommendations, policy options or views or opinions as to the range of policy options available. Therefore, it is not exempt under section 7(1).

Record 756

[65] A portion of this record is duplication of part of record 754, which I found was not exempt. The remaining portion that was withheld does not consist of advice or recommendations. However, it does appear on its face to be providing information to legal counsel for the purpose of seeking legal advice. Therefore, I find that it is exempt under section 12.

Record 757

[66] I am satisfied that this record is exempt under section 7(1), as it contains advice and the views or opinions of a staff member as to the range of courses of action to be considered by the decision maker.

Record 758

[67] This record contains factual information only and does not contain any advice or recommendations and is, therefore, not exempt under section 7(1). The city has withheld a portion of the record, claiming section 14(1) which I consider below.

Record 759

[68] Part of this record does contain recommendations, which I find are exempt under section 7(1). However, other portions contain factual information which does not reveal

advice or recommendations.

Records 760-762

[69] I am satisfied that these records are exempt under section 7(1), as they contain advice. In particular, there is an ongoing discussion of the views or opinions of various staff members as to the range of courses of action to be considered by the decision maker and the basis for those actions.

Records 782-783

[70] Record 782 contains duplicate information of record 760 with additional discussions, all of which are exempt under section 7(1), as they reveal an ongoing discussion of the views or opinions of various staff members as to the range of courses of action to be considered by the decision maker and the basis for those actions. Similarly, record 783 contains some duplicate information of records 760 and 761 which is exempt under section 7(1). Other portions are duplicates of records 758 and 759 which I found not to be exempt.

Record 792

[71] This record contains some duplicate content from record 759, which I found to be exempt. There is also further information in this record which qualifies as recommendations. However, small portions of this record are not exempt, as they consist of factual and objective information only.

Records 797-798

[72] I am satisfied that these records are exempt under section 7(1), as they contain advice and recommendations. In particular, there is an ongoing discussion of the views or opinions of various staff members as to the range of courses of action to be considered by the decision maker and the basis for those actions.

Record 815

[73] I am satisfied that this record is exempt under section 7(1) as it consists of options and courses of action to be considered by the decision maker.

Records 816-817

[74] These records contain a suggested course of action, which is exempt under section 7(1). However, the remaining portion of these records contains objective and factual information, which does not qualify for exemption.

Records 820-822

[75] This record is an email communication which does contain advice and

recommendations. However, other portions contain factual or objective information, which is not exempt under section 7(1).

Records 823-826

[76] This record is an email communication which does contain advice, recommendations and the opinions of a staff member as to the suggested course of action to be taken. However, other portions contain factual or objective information, which is not exempt under section 7(1).

Record 835

[77] As previously stated, the city claimed the application of the exemption in section 12, which I found did not apply. It also claims the exemption in section 7(1) to the same information. The portion that was withheld is an email communication between two staff members and sets out next steps to be taken. While there is sharing of information between staff, there is no advice or recommendations in the email. Consequently, it does not qualify for exemption under section 7(1).

Record 837

[78] This record contains recommendations as to the suggested course of action to be taken. However, other portions contain factual or objective information, which is not exempt under section 7(1).

Record 838

[79] As previously stated, the city claimed the application of the exemption in section 12, which I found did not apply. It also claims the exemption in section 7(1) to the same information. This record is an email communication in which a staff member provides an update to legal counsel. The information provided is factual, with no advice or recommendations contained within it. Therefore, this record is not exempt under section 7(1).

[80] The information that I have found to be exempt under section 38(a) is subject to my findings in regard to the city's exercise of discretion. With respect to the information that does not qualify for exemption under section 38(a) in conjunction with section 7(1), I order the city to disclose those records, or portions thereof, to the appellant as set out in the order provisions.

Issue D: Does the mandatory exemption at section 14(1) or the discretionary exemption at section 38(b) apply to the information at issue?

[81] Section 36(1) of the *Act* 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.

[82] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[83] The city is claiming the application of the exemption in section 14(1) to portions of records 369, 487, 488, 490, 499, 501, 530, 546, 683, 690, 700, 702, 704, 714, 758, 759, 783, 787, 802, 819, 831, 842, 844, 848, 935, 947 and 949 in appeal MA14-131-2, as well as the sole record at issue in appeal MA14-131. As previously stated, some of the personal information withheld in these records consists of cell numbers and staff availability, both of which are no longer at issue in these appeals, and which will not be disclosed to the appellant.

[84] In applying either of the section 38(b) exemption, sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

[85] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy.

[86] If the records are not covered by a presumption in section 14(3), section 14(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy, and the information will be exempt unless the circumstances favour disclosure.¹⁷

[87] For records claimed to be exempt under section 38(b) (ie., records that contain the requester’s personal information), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.¹⁸

[88] The city submits that the mandatory exemption in section 14(1) of the *Act* applies to exempt the personal information at issue from disclosure because disclosure of this information would constitute an unjustified invasion of the affected individuals’ personal privacy. The city further submits that the factors in section 14(2)(f) and 14(2)(h), which do not favour disclosure, apply and that none of the factors in section 14(2) that favour disclosure apply. With respect to the factor in section 14(2)(f), the city argues that the identifying information is highly sensitive in the context of issues/disputes in the community and its disclosure may result in unwarranted contact

¹⁷ Order P-239.

¹⁸ Order MO-2954.

from the appellant and/or antagonism resulting in the complainant(s) experiencing personal distress. Concerning the factor in section 14(2)(h), the city argues that its established practice is to keep the names of individuals who register complaints or provide sensitive information to aid in an investigation, confidential.

[89] The appellant simply states that the city has claimed the personal privacy exemption without explaining why it has done so.

Analysis and findings

[90] The city has claimed the application of section 14(1) to only portions of some of the records. Although I find that the exemption in section 38(b) of the *Act* applies to this information, I uphold the city's decision to withhold the personal information of individuals other than the appellant, because the disclosure of this information would constitute an unjustified invasion of their personal privacy. I find that the presumptions in sections 14(3)(a) and (d) apply to some of this personal information as it reveals a medical diagnosis relating to one individual and the educational history of another.

[91] Turning to the factors in section 14(2), I find that none of the factors that weigh in favour of the disclosure of personal information applies. I further find that the factor in section 14(2)(h), which is a factor weighing against disclosure, applies to some of the personal information because it was supplied by individuals to whom the information relates in confidence.

[92] In sum, I find that the presumptions in sections 14(3)(a) and (d) apply, as well as the factor in section 14(2)(h), to some of the personal information and that it is, therefore, exempt from disclosure under section 38(b). With respect to the remaining personal information, I find that it too is exempt as there are no factors weighing in favour of its disclosure. Consequently, I uphold the city's decision to withhold this information and find that it is exempt from disclosure, subject to my findings with respect to the city's exercise of discretion.

Issue E: Did the institution exercise its discretion under sections 38(a) and 38(b)? If so, should this office uphold the exercise of discretion?

[93] The sections 38(a) and 38(b) exemptions 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, the Commissioner may determine whether the institution failed to do so.

[94] 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.

[95] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁹ This office may not, however, substitute its own discretion for that of the institution.²⁰

[96] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²¹

- 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; and 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; and
- 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.

[97] The city submits that it exercised its discretion properly, and considered all relevant circumstances in doing so, including the purpose of the exemptions in sections 7 and 12. The city further argues that it exempted from disclosure only the passages that actually constitute advice/recommendations and legal advice that were solely intended to be shared amongst staff members, who were addressing the various issues in relation to the appellant's property.

[98] The city also states that the information it withheld is consistent with section 4(2) of the *Act* because it disclosed as much of the responsive records as possible without disclosing exempt material.

[99] The appellant's representations do not address this issue.

¹⁹ Order MO-1573.

²⁰ Section 43(2).

²¹ Orders P-344 and MO-1573.

Analysis and findings

[100] The sections 38(a) and 38(b) exemptions are discretionary. Therefore, once it is determined that a record qualifies for exemption under this section, the city must exercise its discretion in deciding whether or not to disclose it. The city's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law.²² It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.²³

[101] Under section 38(a) in conjunction with section 7(1), the exercise of discretion involves a weighing of the appellant's right of access against the ability of public servants to provide full, free and frank advice and recommendations to the city. Under section 38(a) in conjunction with section 12, the exercise of discretion involves a weighing of the appellant's right of access against the city's ability to seek and receive legal advice without reservation and on a confidential basis.

[102] Under section 38(b), the exercise of discretion involves a weighing of the appellant's right of access to her own personal information against the other individuals' right to the protection of their privacy.

[103] I have carefully reviewed the representations of the city, and I am satisfied that the city exercised its discretion under sections 38(a) and 38(b) in a proper manner. I am satisfied the city considered relevant factors, including: the nature of the withheld information; the importance of the purpose of the exemptions in sections 7(1), 12 and 14(1); and the purposes of the *Act*, including the appellant's right of access, in exercising its discretion. I am also satisfied the city did not consider irrelevant factors. I also note that the city disclosed many of the records to the appellant, either in whole or in part.

[104] Consequently, I uphold the city's exercise of discretion under sections 38(a) and 38(b).

Issue F: Did the institution conduct a reasonable search for records?

[105] 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 17.²⁴ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

²² Order MO-1287-I.

²³ Order 58.

²⁴ Orders P-85, P-221 and PO-1954-I.

[106] 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.²⁵ To be responsive, a record must be "reasonably related" to the request.²⁶

[107] 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.²⁷ 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.²⁸

[108] 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.²⁹ A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.³⁰

[109] The city provided its evidence regarding its search for records by way of an affidavit. The city submits that, based on the wording of the request, over one thousand records including photographs and videos, were retrieved by the By-law and Regulatory Services Branch of the Emergency and Protective Services Department and by its Public Health Unit. The city acknowledges that staff encountered significant challenges in locating all of the responsive records. The city goes on to state that it conducted further searches during the mediation of appeal MA14-131 in order to address the concerns raised by the appellant during that time.

[110] In particular, the city states that the appellant's records of personal health information were initially overlooked, but subsequently located and disclosed to the appellant by way of a separate decision made under the *Personal Health Information Protection Act*.

[111] The city also acknowledges that there was a need to conduct comprehensive supplementary searches for records in the custody of the By-law and Regulatory Services Branch, and that these searches, completed by knowledgeable current and former staff, included:

²⁵ Orders P-624 and PO-2559.

²⁶ Order PO-2554.

²⁷ Orders M-909, PO-2469 and PO-2592.

²⁸ Order MO-2185.

²⁹ Order MO-2246.

³⁰ Order MO-2213.

- records and videos retrieved from the laptop and mobile storage device of the By-law Officer who had applied for warrants;
- records that were retrieved from the electronic database and hard copy files by the By-law and Regulatory Services retrieval contact;
- electronic records retrieved by the Ottawa Public Health Department staff member who was previously a By-law and Regulatory Services Officer; and
- all warrant-related materials that were retrieved from Provincial Offences Court where they had been filed by a city By-law and Regulatory Services Officer.

[112] The city states that as a result of all of these searches, further records were located and disclosed, in part to the appellant during the inquiry of appeal MA14-131.³¹

[113] The city concludes:

The City submits that the initial searches together with the subsequent steps the City took to identify and retrieve records from the Ottawa Public Health Department and By-law and Regulatory Services Branch of the Emergency and Protective Services Department have effectively addressed the challenges that staff had initially encountered in identifying responsive records and has resulted in the search being reasonable.

[114] The appellant advises that she made her first access request to the city and received a few records. She states that she then made the same request again and received a few more records. After a third access request, the appellant states that she filed an appeal and after some time, an "exhaustive" search carried out by the city produced thousands of additional documents. The appellant goes on to submit that she is of the view that additional records exist. For example, she states that:

- there are emails about scheduling meetings that include senior officials, but no records about what took place at these meetings;
- a particular police constable attended her property with city staff, but there are no records explaining his presence;
- the city has not provided records relating to the use of a locksmith;
- additional service notes should exist because activities were carried out during working hours;

³¹ These records are the subject matter of appeal MA14-131-2.

- there are records that imply that the appellant's property was "sold out from under" her, but there are no records that explain this; and
- there should be signed search warrants with affidavits of service, but the city solicitor sent her unsigned search warrants with no affidavits of service.

Analysis and findings

[115] On my review of the representations provided by the city, I am satisfied that as a result of its second search, it has conducted reasonable searches for responsive records, taking into account all of the circumstances of this appeal. A reasonable search is one in which an experienced employee expends a reasonable amount of effort to locate records which are reasonably related to the request.³² The city has provided extensive affidavit evidence explaining the nature and extent of the searches conducted in response to the request, including the extensive additional search conducted during the mediation and inquiry of appeal MA14-131. While I find that the first search the city conducted was inadequate, a fact that the city acknowledges, I am also satisfied that the city rectified this situation by conducting the extensive second search, which yielded a large amount of responsive records. Consequently, I am satisfied that the city's searches for responsive records were reasonable.

ORDER:

1. I order the city to disclose records 754, 819, 835 and 838 to the appellant in their entirety by **March 18, 2016**, but not before **March 14, 2016**.
2. I order the city to disclose records 648, 686, 687, 691, 705, 709, 727, 732, 733, 737, 756, 758, 759, 783, 792, 816, 817, 820, 821, 822, 823, 824, 825, 826 and 837 to the appellant, in part by **March 18, 2016**, but not before **March 14, 2016**. I have enclosed copies of these records with this order and have highlighted the portions of the records that are **not** to be disclosed to the appellant.
3. I reserve the right to require the city to provide me with copies of the records it discloses to the appellant.

Original Signed by: _____
Cathy Hamilton
Adjudicator

February 11, 2016 _____

³² Order M-909.