

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3334

Appeal MA14-416

City of Toronto

June 15, 2016

**Summary:** The appellant filed a request under the *Municipal Freedom of Information and Protection of Privacy Act* to the City of Toronto for records relating to funds received and spent by the Toronto Police, in addition to communications exchanged between the city and the police about the appellant. The city transferred the portion of the request for financial information to the police and located responsive records for the remaining portion of the request. The city granted the appellant partial access to responsive records claiming that the withheld portions qualified for exemption under section 38(a) in conjunction with sections 7(1) (advice or recommendations) and 12 (solicitor-client privilege) and section 38(b) in conjunction with section 14(1) (personal privacy). The appellant appealed the city's decision to this office. In this order, the adjudicator finds that a small portion of a withheld email does not contain the "personal information" of city staff members and orders the city to disclose this portion of the email to the appellant. However, the remaining records are found to qualify for exemption under section 38(a) in conjunction with sections 7(1) and 12. The city's decision is upheld in part.

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

**Orders and Investigation Reports Considered:** Reconsideration Order R-980015 and Order PO-3063.

### OVERVIEW:

[1] The appellant submitted a request to the City of Toronto (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records

relating to funds received and spent by the Toronto Police Services Board (the police or TPSB) in addition to records regarding communications exchanged between the city and the police about the appellant.

[2] The city determined that the police has a greater interest in the records relating to financial transactions regarding itself and transferred the portion of the request seeking access to these records to the police under section 18(3). The police subsequently issued an access decision to the appellant, which the appellant separately appealed to this office.

[3] The city advises that it clarified the request with the appellant and issued a decision letter granting the appellant partial access to records relating to communications the city and police had about the appellant. The city takes the position that the withheld portions of the records contain solicitor-client privileged information (section 12) and/or advice and recommendations (section 7(1)). The city also claims that portions of one email contain the personal information of city staff members and its disclosure would constitute an unjustified invasion of personal privacy (section 14(1)).

[4] The appellant appealed the city's decision to this office.

[5] During mediation, the mediator raised the possible application of sections 38(a) and (b) to the records, which would make the city's access decision regarding the application of the exemptions a discretionary decision under Part II of the *Act*.

[6] Also during mediation, the appellant advised that he believed that the narrowed request failed to capture some records he thought should be responsive. Accordingly, the scope of request was added as an issue to the appeal.

[7] The parties were not able to resolve the appeal and it was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*.

[8] During the inquiry, the parties provided written representations to this office, which were shared in accordance with this office's confidentiality criteria. The city provided an Index of Records with its submissions in addition to numerous court documents relating to a civil matter between the appellant and the police. Throughout his representations, the appellant takes the position that the city should not have provided this office with copies of the court documents. No further mention of the court documents are made in this order as they were not found to be relevant to the issues determined in this appeal.

[9] In this order, I find that a small portion of an email does not contain the "personal information" of city staff members and order the city to disclose this portion of the record to the appellant. I find that the remaining information at issue qualifies for exemption under section 38(a) in conjunction with sections 7(1) and 12.

## RECORDS:

[10] The records at issue in this appeal consist of 33 emails and 1 hand-written note. The city divided the records into 2 groups – documents held by its Legal Services Division (LSD) and documents held by the Office of the Deputy City Manager and Chief Financial Officer (DCMO).

[11] I have categorized the records, as follows:

<b>Category of Records</b>	<b>General Description of Record</b>	<b>Record/ Page Number</b>	<b>Exemption claimed by city</b>
Group A Records	Handwritten telephone note from the city solicitor's office	LSD record, page 1	Section 38(a) in conjunction with sections 7(1) and 12
Group B Records	Emails exchanged between the city solicitor's office and the city and/or police.	LSD records, pages 2-22, 24-28, and 32-38  DCMO records, pages 11, 13-14, 16-17, 19, 20-22, 24-27, 29-30, 32-35 and 37-38 (which are duplicates of pages 3, and 15-16 of the LSD records).	Section 38(a) in conjunction with sections 7(1) and 12
Group C Records	Emails exchanged between city staff	DCMO records, pages 7-10	Sections 38(a) and (b) in conjunction with sections 7(1) and 14(1).

## ISSUES:

- A. Are the records at issue responsive to the request?
- B. Do the records contain "personal information" as defined in section 2(1)?
- C. Do the records contain solicitor-client privileged information under section 38(a) in conjunction with section 12?

- D. Do the records contain advice or recommendations under section 38(a) in conjunction with section 7(1)?
- E. Did the city properly exercise its discretion in applying the discretionary exemption under section 38(a)?
- F. Does the public interest override under section 16 apply to the record found exempt under section 38(a) in conjunction with section 7(1)?

## **DISCUSSION:**

### **A. Are the records at issue responsive to the request?**

[12] 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).

[13] 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.<sup>1</sup>

[14] To be considered responsive to the request, records must "reasonably relate" to the request.<sup>2</sup>

[15] The request the appellant filed with the city sought access to:

A full accounting of any and all financial information with respect to the funds [received] and spent by the Toronto Police Service and the Toronto Police Services Board; Full disclosure of communication [with respect to Toronto Police Services], City of Toronto and [myself].

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<sup>1</sup> Orders P-134 and P-880.

<sup>2</sup> Orders P-880 and PO-2661.

***Representations of the parties***

[16] The city submits that upon its receipt of the request, its Registrar contacted the appellant to seek clarification about the request. The city states:

[the appellant] informed the Registrar that he is seeking records showing the flow of communication between City staffers. [The appellant] indicated that during the week of [specified date], he called the City Manager; Chief Financial Officer and City Solicitor. Their assistants returned the calls, each indicating to [the appellant] that they were advised to have no dealings with him. [The appellant] further indicated to the Registrar that he is seeking information to prove that the Toronto Police Service is using public funding to subsidize private litigation. Thus the request was clarified as follows: "Full disclosure of communications with the following City of Toronto staffers and [the appellant], in particular from [specified date] onwards: 1) Chief Financial Officer and/or assistant [named individual]; 2) City Solicitor and/or assistant: [named individual]; 3) City Manager and/or assistant: [named individual].

...

The City conducted a search based on a broad, expansive, and liberal interpretation of the request as clarified by City staff in their dealings with [the appellant]. The request itself is a request for specific communications between himself and specific parties. In actuality, very few of the records located respond to the request as worded. However, the City took an overly responsive and broad interpretation of the request, and attempted to locate any document [that] could even arguably be considered to "reasonably relate" to the clarified request.

[17] The appellant submits:

- That "simultaneous with the time [he] had filed the written request, [he] provided fully and clearly expressed detail to the city in oral form, to help the city identify the records responsive to [his] request. For instance, [he] streamlined the request to include, in part, specific and meaningful records regarding communications about [him], the office of the chief financial officer, the office of the city solicitor, and the office of the city manager". However, he did not agree that the request was limited "strictly and solely" to the offices of these individuals.
- That the city's written correspondence to him in response to the request did not advise him that his request was defective or express any concern regarding any potential ambiguity in the written request. In addition, the city's letter did not offer help in reformulating the request;

- That the city “unilaterally transferred” the portion of his request seeking financial information to the police. The appellant takes the position that the city’s actions in this regard “concede that it refused to conduct a reasonable search for responsive records”. The appellant also takes the position that “some, if not all, of the requested financial information by the appellant is in the custody or under the control of the city”; and
- That additional records than what have been identified by the city should exist given the “length and complexity of a tortuous civil action”. The appellant also questions the reasonableness of only one handwritten note in the city’s legal files being located given the city’s role in the civil matter involving him. Finally, the appellant submits that he believes that “incriminating documents” should exist and that “there is a real possibility [that the city] may destroy such material”.

[18] In closing the appellant states:

It can be reasonably inferred from the city’s very own language that the city did not work constructively with the appellant, nor did the city have a sincere intention to deal fairly with the appellant. It can also be inferred that the city performed a voluntary act or engaged in a course of conduct that avoided or attempted to avoid the appellant’s request. For instance, the city has gone so far as to concede in its representations that its employees were “advised to have *no* dealings with him”, referring to the requester (now the appellant). Standing alone, this offending language could be generally taken to refer to callous, insensitive, or oppressive treatment, if not evasive conduct. That language is inconsistent with the city’s bald assertion that it took ‘an overly responsive and broad interpretation of the request, and attempted to locate any document’.

### ***Decision and analysis***

[19] There is no dispute between the parties that after the appellant submitted his request the city and the appellant had discussions about the request. The appellant concedes that as a result of the discussions he had with the city he “streamlined” his request. However, the appellant submits that it was never his intention to restrict the scope of the request to records from the three offices or the individuals identified in the city’s decision letter.

[20] In support of his position, the appellant submits that the city failed to inform him of any defect or offer assistance in reformulating the request. However, in my view the city’s decision letter to the appellant demonstrated its understanding of the narrowed request. Given that I have not been provided with evidence that the appellant objected to the narrowed request upon his receipt of the city’s letter, I am satisfied that the scope of the request was narrowed to communications with the Chief Financial Officer, City Solicitor and City Manager and their assistants regarding the appellant from a specified date to the date of the request. In addition, I am satisfied that the scope of the request was narrowed as a result of discussions the city had with the appellant to

seek clarification about the request.

[21] I am also satisfied that the city's decision to transfer the portion of the request relating to financial information to the police was in accordance with section 18(3). Section 18(3) allows institutions to transfer a request, and if necessary, the record in question to another institution if it determines that the other institution has a greater interest in the record. In this case, the city transferred the portion of the request for financial information relating to the expenditure of public funds by the police. The appellant appears to take the position that whether or not the city has custody or control of records should determine whether the city is entitled to transfer the request to the police. However, section 18(3) only requires that the city consider that the police has a greater interest. In fact, the wording of section 18(3) provides that the city can have an interest in the records, transfer the request and retain custody or control of the records.

[22] Finally, I find that the appellant failed to adduce sufficient evidence that there is a reasonable basis to believe that additional records responsive to the narrowed request should exist. The appellant submits that additional records relating to the civil matter should exist given the length and complexity of the matter. The appellant also submits that "incriminating" documents relating to the civil matter should have been located. However, the request sought access to records relating to specific communications about the appellant exchanged between city staff.

[23] For the reasons stated above, I am satisfied that the records identified by the city respond to the narrowed request.

**B. Do the records contain "personal information" as defined in section 2(1)?**

[24] 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.

[25] The appellant submits that the records contain his personal information as portions of the records would reveal something of personal nature about himself; namely his name appearing with the views and opinions of other individuals about him. The appellant takes the position that this information qualifies as his personal information as defined in paragraph (g) and (h) of the definition in section 2(1).

[26] The city submits that the records do not relate to the appellant in his personal capacity but rather his professional capacity relating to his legal claim against the police. The city also submits that a small portion of page 10 in the DCMO group of records constitute the personal information of city staff members. The city described the information at issue in the non-confidential portion of its Index of Records, as follows:

This is a subsequent entry in the email chain involving [DCMO records, page 7]. This provides further updates in light of the subsequent developments indicated in the record [DCMO records, page 7], how to implement the advice. It also contains a comment of an individual's personal opinion on a subject unrelated to a specific individual, or the specific matter addressed in the earlier entries in this email chain.

[27] In its representations, the city states:

These comments are simply personal opinions stated informally by City employees/ officials in the context of a conversational email exchange, unrelated to the official communications elsewhere in the email chain. The City's submission is that while the individuals expressing these opinions are City employees or officials, these opinions are personal opinions, expressed in personal dialogue while the individuals were "at work" rather than opinions expressed by individuals' in their employment/official capacity.

...

The "voice" expressing each of the opinions is that of the individual communicating it rather than the "voice" of the organization. These are not "official" opinions expressed by an individual in their personal capacity, but rather opinions of a personal nature [See Order PO-3063]. As such these opinions are the personal information of the authors of the comments.

[28] 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.<sup>3</sup>

[29] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.<sup>4</sup>

[30] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>5</sup>

[31] Having regard to the representations of the parties and the records themselves, I find that the records contain the personal information of the appellant. The subject-matter of the records address issues relating to how the city should respond to the appellant's inquiries for information. The fact that the appellant has a legal claim with

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<sup>3</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225

<sup>4</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>5</sup> Order PO-1880, upheld on judicial review in Ontario (Attorney General) v. Pascoe, [2002] O.J. No. 4300 (C.A.).



the police and represents himself in the proceedings reveals something of a personal nature of himself. I am satisfied that the records contain the personal opinions or views of the appellant [paragraph (e) of the definition of "personal information" under section 2(1)], the views or opinions of other individuals about the appellant [paragraph (g)] along with his name as it appears with other personal information relating to him [paragraph (h)].

[32] With respect to the small portion of the email at page 10 of the DCMO group of records, I must determine whether the information contained in the email reveals something of a personal nature about the city staff members exchanging the email.

[33] Following the analysis set forth in Order PO-2225, the first question I must ask is: *"In what context does the name of the individual appear?"* The second question I must ask is: *"Is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about this individual?"*

[34] The two individuals exchanging the email in question are the city's CFO and the Accounting Director. With respect to the first question, I am satisfied that their names appear in a professional, official or business context. The emails were sent and exchanged using the email addresses provided by the city.

[35] With respect to the second question, I find that the withheld information does not reveal something of a personal nature about the individuals exchanging the email. The views or opinions expressed by the city staff members are general and do not relate specifically to any one individual. The city submits that disclosure of this information contain the staff members' personal opinions expressed while "at work" rather than opinions expressed in their official capacities.

[36] In support of its position, the city refers to Order PO-3063 in which Commissioner Brian Beamish found that information contained in transcripts recording the conversations of ministry employees and employees of a college were of a professional nature and therefore not personal information. In arriving at this decision, the Commissioner considered Reconsideration Order R-980015 in which Adjudicator Donald Hale stated "[t]he voice is that of the organization, expressed through its spokesperson, rather than that of the individual delivering the message". The city argues that the views and opinions expressed in the email are not "official" opinions expressed by individuals in their professional capacity but rather opinions of a personal nature.

[37] Having regard to the submissions of the parties and the record itself, I find that the views or opinions expressed by the city staff members relate to their professional duties. Specifically, I find that the views and opinions express a general impression formed as a result of the type of work they do for the city. In the other words, the views and opinions at issue are related to their professional experiences at the city. In addition, the views and opinions do not specifically relate to the appellant.

[38] The remaining information at issue is a salutation given from one staff member

to another. It does not reveal any personal information of the staff member receiving the salutation such as information relating to their ethnic origin, religion, age, marital or family status. Accordingly, I find that this information does not reveal something of a personal nature of the staff members exchanging salutations.

*Summary*

[39] I find that the records contain the personal information of the appellant. Accordingly, I will determine whether the records are exempt under sections 38(a) in conjunction with section 7(1) (advice or recommendations) and 12 (solicitor-client privilege).

[40] As I have found that the portion of the email the city claims qualifies for exemption under section 14(1) (personal privacy) does not contain the personal information of the city staff members or any other identifiable individuals, I will order the city to disclose this information to the appellant.

**C. Do the records contain solicitor-client privileged information under section 38(a) in conjunction with section 12?**

[41] 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. 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.

[42] 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.<sup>6</sup>

[43] 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.

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

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<sup>6</sup> Order M-352.

[45] 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.

[46] The city claims that both branches 1 and 2 apply to the Group A and B records.

[47] For the reasons stated below, I find that the solicitor-client privilege communication privilege under branch 1 applies to the Group A and B records and that the city has not waived its privilege. Accordingly, it is not necessary for me to determine whether the litigation privilege under branch 1 or the privileges under branch 2 also apply.

***Branch 1: common law privilege***

[48] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

*Solicitor-client communication privilege*

[49] The city takes the position that disclosure of the Group A and B records would disclose communications between members of the city's Legal Services Division and staff. In support of its position, the city states in its representations:

Many of the Communication-Records are email communications between staff in the City's Legal Services Division with staff in other City Divisions. [Section 12] has been claimed as to disclose these documents would disclose the communications between members of the City's Legal Services Division and the institutional clients.

Some of the Communication-Records are emails between City staff which did not include staff assigned to City Legal Services Division; [Section 12] has been claimed for these records as disclosure would indirectly reveal the content of communications with the City's Legal Services Division by reference or by forwarding copies of other Communication-Records. A single document is a handwritten note prepared by members of the City Solicitor's Office for use in responding to developments related to [the appellant's] communication with Legal Services.

...

The general subject matter of all the Communication-Records is related to one development or another relating to [the appellant's] communication with City staff on matters which he believes are relevant to the issue of [his claim against the police]. In the context of these communications, [the appellant] raised the issue of potential litigation involving the City, and the on-going [claim against the police]. In dealing with the issue of

[the appellant's] inquiries and demands for documents, City staff were required to address various issues. In doing so, these staff members communicated with the City's Legal Services Division staff in light of the on-going [claim against the police], and the potential for further litigation raised by [the appellant].

[50] The appellant's submissions question the validity of the city's claim that the Group A and B records contain solicitor-client privileged information. However, the appellant does not argue that the documents do not contain information which was exchanged between the city's legal department, staff and police or that the city waived its privilege. Instead, the appellant submits that the city's submissions amount to "bald assertions" that the privilege applies. The appellant takes the position that the city has "...failed to produce a shred of evidence, let alone strong evidence, by affidavit". The appellant also states:

Furthermore, where the communication was made to a public authority for the 'purpose of obtaining advice or assistance to exceed its statutory powers or preventing others from exercising their rights under the law', then no privilege should apply. Indeed, communications made to a solicitor by the solicitor's client for the purpose of being 'guided or helped' in preparation for, or in furtherance, of, any ulterior purpose is injurious to the interests of good government. Under such circumstances, the denial of access to records in an institution's hands would be contrary to a higher public interest: "meaningful public discussion and criticism on matters of public interest would be substantially impeded."

### *Decision and Analysis*

[51] 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.<sup>7</sup> The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter. 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.<sup>8</sup>

[52] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.<sup>9</sup>

[53] 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.<sup>10</sup> The privilege does not cover communications between a

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<sup>7</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>8</sup> Orders PO-2441, MO-2166 and MO-1925.

<sup>9</sup> *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

<sup>10</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

solicitor and a party on the other side of a transaction.<sup>11</sup>

Group A: handwritten telephone note from the city's solicitor's office

[54] The index of records prepared by the city describe this record as a telephone note prepared by an individual from the city's Legal Services Department. I have reviewed this record and am satisfied that it forms part of the "continuum of communications" recognized in *Balabel* as falling within the solicitor-client privilege in branch 1. In my view, the telephone message was created to keep the city's solicitor informed so that legal advice may be sought and obtained.

[55] In making my decision, I considered the appellant's submission that the city failed to adduce sufficient evidence that the privilege applies. In support of his position, the appellant appears to suggest that the city should be required to provide affidavit evidence to this office. This office recognizes that parties seeking access to withheld records may be at a disadvantage to determine whether a particular exemption applies. In such situations, such as when the solicitor-client privilege exemption is claimed, the burden of proof rests with the party resisting disclosure.

[56] Based on my review of the records, affidavit evidence from the city is not necessary. It appears that the telephone note was created as a result of a telephone inquiry the appellant made to the Legal Services Department. The content of the telephone message was forwarded to the city's solicitor who, in turn, sent an email to city staff. In my view, the telephone note was prepared for the city solicitor for the purpose of giving legal advice to the city.

[57] Accordingly, I find that this record falls within the solicitor-client privilege in branch 1 subject to my finding below on whether the privilege has been waived.

Group B: Emails exchanged between the city's solicitor's office and the city and/or police

[58] These records consist of the withheld portions of the Legal Services Department (LSD) records, pages 2-22, 24-28, and 32-38 and Office of the Deputy City Manager and Chief Financial Officer (DCMO) records, pages 11, 13-14, 16-17, 19, 20-22, 24-27, 29-30, 32-35 and 37-38 (which are duplicates of pages 3, and 15-16 of the LSD records).

[59] These records consist of emails exchanged between the city solicitor and staff in addition to the police's Chief Administrative Officer and external counsel. A substantial portion of these records contain duplicate information as a result of the creation of lengthy email chains.

[60] I have reviewed the emails and am satisfied that disclosure would directly or indirectly reveal communications of a confidential nature between the city solicitor and

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<sup>11</sup> *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

city. In addition, I find that the withheld portions of the records constitute information passed between the city's solicitor and city aimed at keeping both informed so that advice may be sought and given.

[61] Having regard to the nature of the information at issue, I find that these records fall within the ambit of the solicitor-client privilege under branch 1, subject to my finding as to whether the privilege has been waived.

### *Loss of privilege*

#### Waiver

[62] 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.<sup>12</sup>

[63] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.<sup>13</sup>

[64] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.<sup>14</sup> However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.<sup>15</sup>

[65] The appellant did not submit that the city waived its privilege. Instead, the appellant takes the position that any privilege that may attach to the records should be pierced as a result of the records being created for an "improper purpose". The appellant states:

... where the communication was made to a public authority for the 'purpose of obtaining advice or assistance to exceed its statutory powers or preventing others from exercising their rights under the law', then no privilege should apply. Indeed, communications made to a solicitor by the solicitor's client for the purpose of being 'guided or helped' in the preparation for, or in furtherance of, any ulterior purpose is injurious to the interests of good government.

[66] The city's responded as follows in its reply representations:

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<sup>12</sup> *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

<sup>13</sup> *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

<sup>14</sup> J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

<sup>15</sup> *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

The records for which s.12 has been claimed represent a continuum of correspondence in which a variety of legal advice, opinions, and suggestions were either requested or provided in relation to a legal issue in general, and with respect to a development in relation to litigation involving the TPSB. Certain communications involved both the City and the TPSB staff, as noted above, certain aspects of the City's responsibilities include the provision of administrative services relating to aspects (including management of the TPSB's legal representation) of the TPSB's operation. As such, the nature of such communications would include a solicitor communicating with more than one client. In addition, with respect to other matters, the City and the TPSB would have a "common interest" in the legal issues; neither of these two situations constitute a waiver of solicitor-client privilege...

[67] I have considered the appellant's submissions and am not satisfied that there is insufficient evidence to demonstrate that the city waived its privilege attached to the Group A and B records. In any event, the records do not appear to have been circulated in a manner which would result in a waiver of privilege. In this regard, I note that the emails were circulated amongst the city's solicitor's office, other city departments, and the police's CEO and external counsel. I am satisfied that in the circumstances of this appeal the city and the police share a "common interest" in responding to the appellant's inquiries and request for documents. With respect to the appellant's position that any privilege attached to the records should be pierced in "...the interests of "good government", I note that even if the appellant adduced sufficient evidence to demonstrate that the records were created for "an improper purpose" the remedy proposed by the appellant is not one available under the *Act*. The public interest override under section 16 does not apply to records which have been found exempt under section 12. However, I will consider the appellant's submission in this regard when I determine whether the city properly exercised its discretion in applying section 38(a).

[68] Having regard to the above, I find that the city has not waived its privilege to the records I found falling within the ambit of the solicitor-client communication privilege under branch 1.

**4. Do the records contain advice or recommendations under section 38(a) in conjunction with section 7(1)?**

[69] 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.

[70] 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.<sup>16</sup>

[71] "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.

[72] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.<sup>17</sup>

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

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

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.<sup>18</sup>

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

[76] The city claimed that a number of records qualified for exemption under section 7(1). However, it also claimed that the majority of those records were also exempt under section 12. As I have found that the exemption 12 apply to those records, the only record remaining at issue is an email chain at pages 7-10 of the DCMO records. The non-confidential portion of the city's Index of Records described the first email in the chain, as follows:

... an email which provides instructions from the [Deputy City Manager/CFO] to the Director, Accounting Services, concerning the course of action which was the basis of advice, and the advice upon which it was based". The city takes the position that the record would indirectly reveal the advice previously provided.

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<sup>16</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43

<sup>17</sup> See above at paras. 26 and 47.

<sup>18</sup> Order P-1054.

<sup>19</sup> *John Doe v. Ontario (Finance)*, cited above, at para. 51.



[77] The appellant's submissions raised questions about the adequacy of the city's evidence. In particular, the appellant advises that the city's representations do not address the issue of when the record was prepared. The appellant also seeks additional information as to whether the record contains objective information, such as factual, background, analytical and/or evaluative information which does not qualify for exemption under section 7(1).<sup>20</sup>

[78] The email in question was created in June 2014. Accordingly, the application of section 7(1) will be assessed as of the time the city's CFO prepared the advice or recommendations.

[79] I have reviewed the email and am satisfied it contains advice or recommendations for the purposes of section 7(1). In my view, the email itself contains advice or recommendations. In addition, I find that if disclosed it would permit the accurate inference as to the nature of the advice which forms the basis for the CFO's advice or recommendations to the Director.

[80] Accordingly, I find that the withheld information contained on pages 7-10 of the DCMO records qualify for the exemption under section 7(1) subject to my review of the city's exercise of discretion.

**D. Did the city properly exercise its discretion in applying the discretionary exemptions under section 38(a)?**

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

[82] 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.

[83] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>21</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>22</sup>

[84] The city takes the position that it exercised its discretion in good faith and took into account relevant considerations including:

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<sup>20</sup> See section 13(2) of the *Act*.

<sup>21</sup> Order MO-1573.

<sup>22</sup> Section 43(2).

- the purposes of the *Act*;
- the wording of the exemptions under sections 7(1) and 12 and the interests they seek to protect;
- whether the appellant has a sympathetic or compelling need to receive the information;
- whether disclosure of solicitor-client privileged information would increase public confidence in the city's operations;
- the nature of the information and the extent to which it is significant and/or sensitive to the city;
- the age of the information; and
- the historic practice of the institution with respect to similar information.

[85] The appellant submits that the city failed to properly exercise its discretion and in doing so took into account irrelevant considerations and exercised its discretion in bad faith. The appellant also submits that the city failed to take into consideration that disclosure will increase public confidence in the city's operations. In support of his position, the appellant states:

To provide good government, the city must be "accountable to the public" and the process for making decisions must be transparent.

...

In this matter, the process has been murky rather than completely transparent. It is offending and insulting that the city has claimed to carry a transparency banner, even as it transferred the first portion of the appellant's request to the police, only to have [the] police conveniently claim that the requested records are 'publicly available for viewing via the city's financial statements'. The people who deliberately conceal how taxpayer dollars have been allocated would become accomplices themselves in wiping out any sense that we are in the presence of an injustice.

Worse, the process has been dictated by characteristics of unfairness toward[s] the appellant. In support of this position, the city has now gone so far as to concede that its employees were "advised to have *no* dealings with [me]". Such an attitude and approach by the city does not in the least bit foster the concept of respect, or the right to freedom of expression or personal dignity of an individual. Such a pact of silence by the city is not a healthy image of good government.

...

Taking into account all relevant considerations, a reasonably well-informed and reasonably observant and circumspect member of the public would say that bad faith is an inevitable conclusion.

Reasons of public importance deserve complete transparency in this matter. The public has a strong interest in getting at the truth about the use of taxpayer dollars entrusted in the hands of public institutions. Concealing or suppressing any material fact in that regard will substantially erode public confidence in all institutions. Concealing or suppressing any misdeeds by any member of an institution with the intention that others be misled as to the true state of affairs would itself be an egregious wrong.

[86] I have reviewed the parties' submissions and am satisfied that the city's evidence demonstrates that it properly exercised its discretion and in doing so took into account relevant considerations such as the sensitive nature of the information at issue that I found falls within the ambit of the solicitor-client communication privilege. In addition, I am satisfied that the city properly exercised its discretion in applying the exemption under section 7(1) (advice or recommendations) to a small portion of an email having regard to the principle that people employed or retained by institutions should be able to freely and frankly advise and make recommendations within the deliberative process of government decision-making.

[87] I am also satisfied that the city also considered the purposes of the *Act*, including the principle that individuals should have a right to access their own personal information and that information should be available to the public. In addition, given the amount of information which the city disclosed to the appellant, I find that the city also took into account the principle that exemptions from the right of access should be limited and specific.

[88] Having regard to the above, I find that the city's exercise of discretion was proper and it properly considered the interests sought to be protected under sections 7(1) and 12.

**E. Does the public interest override under section 16 apply to the record found exempt under sections 38(a) in conjunction with section 7(1)?**

[89] The appellant takes the position that despite the application of any exemption to the records, the records should be disclosed to him on the basis that disclosure would reveal information about the allocation of public funds. Section 16 states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[90] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[91] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of

reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.<sup>23</sup>

[92] In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act’s* central purpose of shedding light on the operations of government.<sup>24</sup> Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.<sup>25</sup>

[93] The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.<sup>26</sup> The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances. An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.<sup>27</sup>

[94] The appellant provided extensive submissions in support of his position that there is a compelling public interest in disclosure of the withheld records. The appellant’s main argument is that disclosure of the record would reveal information about the city’s allocation of public funds to finance police-related litigation. As the public interest override cannot apply to solicitor-client privileged information found exempt under section 12<sup>28</sup>, I will only consider whether the public interest override applies to the information found exempt under section 38(a) in conjunction with section 7(1) (advice or recommendations).

[95] The information remaining at issue is an email found at pages 7-10 of the DCMO records. In my view, the withheld portions of this email do not respond to the public interest considerations raised by the appellant. Specifically, disclosure of the record would not shed light on the allocation of public funds to finance police-related litigation.

[96] Accordingly, I find that the public interest override at section 23 does not apply to the information I found exempt under section 38(a) in conjunction with section 7(1).

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<sup>23</sup> Order P-244.

<sup>24</sup> Orders P-984 and PO-2607.

<sup>25</sup> Orders P-984 and PO-2607.

<sup>26</sup> Order P-984.

<sup>27</sup> Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).

<sup>28</sup> Section 12 or the provincial equivalent section 19 is not identified in the *Act* as one of the exemptions the public interest override could apply.

**ORDER:**

1. I order the city to disclose the withheld information in page 10 of the DCMO group of records which I found does not contain "personal information" as described in section 2(1) to the appellant by **August 22, 2016** but not before **August 16, 2016**. For the sake of clarity, in the copy of the record enclosed with the city's order, I have highlighted the portions of the records which **should not** be disclosed to the appellant.
2. I uphold the city's decision to withhold the remaining withheld information under section 38(a) in conjunction with sections 7(1) and 12.
3. In order to verify compliance with order provisions 1 and 2, I reserve the right to require a copy of the record disclosed by the city to me.

Original Signed by: \_\_\_\_\_  
Jennifer James  
Adjudicator

\_\_\_\_\_ June 15, 2016