

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3456

Appeal MA15-336

The Greater/Grand Sudbury Police Services Board

June 12, 2017

Summary: The appellant seeks access to records relating to a particular property. Initially, the police issued a decision to the appellant advising that they could not locate responsive records. The appellant filed an appeal, claiming that records ought to exist. During the intake stage of the appeals process, the police located one record and issued a supplementary decision to the appellant granting him partial access to it. The police advised that a portion was withheld under the discretionary exemption in section 38(a) read with section 12 (solicitor-client privilege). The appellant maintained that additional responsive records exist and confirmed his interest in the information withheld from disclosure. The adjudicator finds that section 38(a) read with section 12 does not apply to the record at issue and orders the police to disclose it to the appellant. The adjudicator upholds the police's search as reasonable.

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

OVERVIEW:

[1] The Greater/Grand Sudbury Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a particular property and the requester's concerns regarding the ownership of that property.

[2] The police issued a decision to the requester indicating that no records responsive to his request exist. The requester, now the appellant, appealed the police's

decision.

[3] During the intake stage of the appeals process, the police issued a supplementary decision letter to the appellant granting him partial access to a one-page record.¹ The police advised the appellant that a portion of the record was exempt from disclosure under the discretionary exemption in section 12 (solicitor-client privilege) of the *Act*.

[4] During mediation, the appellant claimed that additional responsive records should exist, thereby adding the police's search as an issue in this appeal. The police conducted another search and advised the appellant that no further responsive records were located because there was "no investigation specific to this." The appellant maintained his position that additional responsive records should exist.

[5] The police clarified that they were now relying on section 38(a) in conjunction with section 12 of the *Act* to withhold a portion of the record. The police advised that they changed their decision because the record appears to contain the appellant's personal information. The appellant continues to pursue access to the withheld portion of this record.

[6] Mediation did not resolve the issues in this appeal. As a result, the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The adjudicator who had carriage of this appeal provided the police with the opportunity to provide representations in response to a Notice of Inquiry. The police submitted representations. The adjudicator then invited the appellant to make submissions in response to the Notice of Inquiry and the non-confidential portions of the police's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant did not make submissions.

[7] In the discussion that follows, I find that section 38(a), read with section 12, does not apply to the information at issue and order the police to disclose that portion to the appellant. I uphold the police's search as reasonable.

RECORD:

[8] The information at issue is a withheld portion of a document entitled "Inter Office Correspondence."

ISSUES:

- A. Does the record contain *personal information* as defined in section 2(1) and, if so, to whom does it relate?

¹ I note that it appears that the police created this record as a result of the appellant's request. However, since the parties identified this record as responsive to the request, it is at issue in this appeal.

- B. Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the information at issue?
- C. Did the police conduct a reasonable search for records?

DISCUSSION:

Issue A: Does the record 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. The term *personal information* 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

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.²

[10] 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.³ 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.⁴

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

[12] The police submit that the record contains information provided by an officer based on his conversations with the City Solicitor relating to previous dealings that both the officer and the City Solicitor had with the appellant. The police submit that the information at issue in paragraph 4 of the record contains the views or opinions of the author in relation to the appellant. Specifically, the police submit that the author describes the dealings between city staff and the appellant to "further substantiate the history with the Appellant for the purposes of providing background information" to the police.

[13] The record at issue is an "Inter Office Correspondence" or memorandum in which an officer summarizes the appellant's complaint regarding the hotel that is the subject of this request. As stated by the police, the withheld portion of the record contains a summary of the city's interactions and involvement with the appellant.

[14] Based on my review of the record, I find that it contains *personal information* relating to the appellant. Specifically, the record contains the appellant's personal opinions or views (paragraph (e)), the views or opinions of other individuals about him (paragraph (g)) and his name as it appears with other personal information relating to him (paragraph (h)).

[15] I find that the record does not contain personal information relating to any other identifiable individual. The remainder of the individuals who are mentioned in the record and the author of the record were acting in their professional capacity. As such, the record does not contain the personal information of these individuals.

[16] As I found that the record contains the appellant's personal information, I will consider the police's denial of access to the information at issue under Part II of the *Act*.

² Order 11.

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

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

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

[17] 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) states

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.

Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.⁶

[18] Where access is denied under section 38(a), the police must demonstrate that, in exercising their discretion, they considered whether a record should be released to the appellant because the record contains his personal information.

[19] In this case, the police rely on section 38(a) in conjunction with section 12. Section 12 states

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.

[20] 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 police must establish that one or the other (or both) branches apply.

[21] The police submit that they applied a "very broad interpretation of Branch 1, common law privilege". More specifically, the police submit that the information at issue is protected by solicitor-client communication privilege. The police admit that no professional legal advice was sought in this instance, but they had a "previous solicitor-client relationship" with the City Solicitor referred to in the record. Further, while the conversation that was the subject of the information at issue was not documented as legal advice, the "information passed between the solicitor and Institution [was] aimed at keeping both informed so advice could be sought and given if later required." In addition, the police submit that the conversation took place with an expectation that the details of the conversation would remain between the parties.

[22] At common law, solicitor-client privilege encompasses two types of privilege: (i)

⁶ Order M-352.

solicitor-client communication privilege; and (ii) litigation privilege.

[23] 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.⁷ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.⁸ 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.⁹

[24] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.¹⁰

[25] Confidentiality is an essential component of privilege. Therefore, the police must demonstrate that the communication was made in confidence, either expressly or by implication.¹¹ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.¹²

[26] Based on my review of the information that remains at issue, I find that section 38(a), in conjunction with section 12, does not apply to exempt it from disclosure. Firstly, the police submitted that they had a "previous solicitor-client relationship with this City Solicitor". However, the police did not provide me with evidence to demonstrate that there is a *current* solicitor-client relationship between themselves and the City Solicitor. The fact that there was once a solicitor-client relationship is not sufficient for me to find that the information at issue would be protected by solicitor-client privilege.

[27] In the absence of clear evidence that the communications passing between the City Solicitor and police was in the context of a solicitor-client relationship, I am not satisfied that these communications can be considered solicitor-client communications. In addition, the police did not argue that they shared a common interest with the city. As a result, even if the information in the record constituted the city's solicitor-client communications between its solicitor and staff (which I do not make a finding on), by disclosing this information to a third party (i.e., the police), any possible privilege in the information would have been waived.

[28] Furthermore, the police confirm that no professional legal advice was sought in this instance. Rather, it appears that the portion withheld from disclosure provides background information relating to the appellant's interactions with the City Solicitor and his staff. Based on my review, I find that the information at issue does not form

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

⁸ Orders PO-2441, MO-2166 and MO-1925.

⁹ *Balabel v. Air India*, [1998] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

¹⁰ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

¹¹ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

¹² *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

part of the *continuum of communications*¹³ between solicitor and client.

[29] I note that section 1(a)(ii) requires that exemptions from the right of access to information should be "limited and specific". The police's application of the solicitor-client privilege exemption to withhold a general discussion between a lawyer and another individual is, even in the police's own words "very broad". Moreover, the police did not provide me with any evidence to support its broad interpretation of the section 12 exemption. There is no evidence in the record and the police did not provide me with evidence to demonstrate that the police sought or contemplated seeking legal advice from the City Solicitor relating to the appellant's complaints and/or the hotel that is the subject of the request.

[30] Finally, I note that the police claim that the information passed between the City Solicitor and the police was "aimed at keeping both informed so advice could be sought and given if required later." I do not accept the police's claim that the exchange of information between the City Solicitor and the author of the record is sufficiently related to seeking, formulating or providing legal advice. As stated above, the information withheld consists of a summary of a discussion between the City Solicitor and the author of the record relating to their interactions with the appellant. It does not relate to seeking, formulating or giving legal advice. Although the police submit that the information was shared "so advice could be sought and given if required later", the possibility that advice may be required in the future is too remote, particularly where the police did not identify what matter the potential legal advice would relate to.

[31] Therefore, I find that the information that remains at issue is not exempt from disclosure under section 38(a) in conjunction with section 12 of the *Act* and will order the police to disclose it to the appellant.

Issue C: Did the police conduct a reasonable search for records?

[32] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution conducted a reasonable search as required by section 17 of the *Act*.¹⁴ 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.

[33] 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 made a reasonable effort to identify and locate responsive records.¹⁵ To be responsive, a record must be *reasonably related* to the request.¹⁶ 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

¹³ *Balabel v. Air India*, [1998] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

¹⁴ Orders P-85, P-221 and PO-1954-I.

¹⁵ Orders P-624 and PO-2559.

¹⁶ Order PO-2554.

the request.¹⁷ A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it made a reasonable effort to identify and locate all of the responsive records in its custody or control.¹⁸

[34] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable basis for concluding that such records exist.¹⁹

[35] The Manager of Records and Customer Service (the manager) submitted the police's representations. The manager states that she oversees all aspects of the police's Records Management System (RMS), including training, quality control and audits. The manager states that she received three email requests from the appellant raising a number of allegations relating to the subject hotel and city staff. Upon receipt of the requests, the manager conducted a search of RMS for records and occurrences matching the details contained in the appellant's request.

[36] The manager states that the police did not contact the appellant for additional clarification. The manager states that the appellant will not speak or meet with the police and he only communicates with the police through email. Given these limitations, the police chose to respond to the appellant's request literally. The manager states that she conducted a search of RMS using the details the appellant provided in his email request, including the business name, business address and occurrence/dispatch types. The manager states that no responsive records were located. The manager then consulted the Professional Services Branch for information relating to the appellant's allegations. However, the Professional Services Branch did not have any further information.

[37] The manager states that, during the intake stage of the appeal, the IPC analyst identified an officer who may be aware of the appellant's complaint. The manager contacted this officer who created the record at issue which reviews the appellant's allegation, the officer's subsequent investigation and the outcome of the investigation. The manager notes that the record at issue was disclosed, in part, to the appellant with the police's supplementary decision.

[38] The manager submits that it is not possible that any additional records existed but no longer exist and submits that it conducted a reasonable search for responsive records.

[39] The appellant did not provide any submissions to support his claim that additional records exist.

[40] Based on my review of the police's representations, I am satisfied that they provided sufficient evidence to demonstrate that they discharged their responsibility

¹⁷ Orders M-909, PO-2469 and PO-2592.

¹⁸ Order MO-2185.

¹⁹ Order MO-2246.

under the *Act* and made a reasonable effort to identify and locate records responsive to the appellant's request. In addition, as the appellant did not make submissions, I am not satisfied that there is a reasonable basis for his belief that additional records exist.

[41] I find that the searches were conducted by an experienced employee knowledgeable in the subject matter of the request, in accordance with the police's obligations under the *Act*.²⁰ I find that the police provided me with sufficient evidence to demonstrate that they made a reasonable effort to locate records responsive to the appellant's request. As noted above, the *Act* does not require an institution to prove with absolute certainty that additional records do not exist. Additionally, the institution is not required to go to extraordinary lengths to search for responsive records. An institution is only required to provide sufficient evidence to show that it made a reasonable effort to identify and locate records responsive to the request.

[42] In the circumstances of this appeal, I find that the police provided a sufficiently detailed explanation of the efforts they expended to identify and locate records responsive to the appellant's request. Therefore, in the absence of any evidence from the appellant demonstrating that there is a reasonable basis to believe otherwise, I am satisfied that the police's searches were reasonable.

ORDER:

1. I order the police to disclose the information at issue to the appellant by **July 11, 2017**.
2. I uphold the police's search as reasonable.

Original Signed by: _____
Justine Wai
Adjudicator

June 12, 2017 _____

²⁰ Orders M-909 and PO-1744.