Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3507

Appeal MA15-378

City of Toronto

October 23, 2017

Summary: The appellant filed an access request under the *Municipal Freedom of Information and Protection of Privacy Act* with the City of Toronto for "all records" relating to him. The city located records in its Legal Services and Human Resources divisions. It denied access to all of the Legal Services Division records and one Human Resources Division record under the discretionary exemption (solicitor-client privilege) in section 12 of the *Act*. The appellant appealed the city's decision to refuse access to the records and also claimed that additional records must exist. In this order, the adjudicator finds that the records in the files of the city's legal counsel are exempt from disclosure under section 38(a), in conjunction with section 12 of the *Act*. However, he finds that a one-page note to file from the city's Human Resources Division is not exempt under section 38(a), in conjunction with section 12, except for parts of one paragraph. He also finds that a handwritten phone number is responsive to the appellant's access request and must be disclosed to him. Finally, he finds that the city conducted a reasonable search for records that are responsive to the appellant's access request.

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"), 12, 17 and 38(a).

OVERVIEW:

Background

[1] The appellant is a former participant in a mentorship program run by the City of Toronto (the city). In December 2014, he sued multiple defendants, including the city

and the Toronto Police Services Board (the police). His various claims included invasion of privacy, harassment and torture, and he asked for millions of dollars in damages from the defendants.

[2] In May 2015, a motions judge of the Ontario Superior Court of Justice struck his statement of claim against the defendants in its entirety without leave to amend. The appellant appealed the motion judge's decision to the Ontario Court of Appeal, which upheld the lower court's decision.

Access request/appeal

[3] The appellant then filed an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) with the city for "all records" relating to him other than those records which the city had disclosed to him as a result of a previous access request.

[4] In response, the city sent a decision letter to the appellant which stated that it had located records in its Legal Services and Human Resources divisions. The responsive records from the city's Legal Services Division are in the files of the legal counsel who was assigned to defend the city and the police against the lawsuit commenced by the appellant. The city denied access to these records in full under the discretionary exemption in section 12 (solicitor-client privilege) of the *Act*.

[5] The responsive records from the city's Human Resources Division mostly relate to the appellant's participation in the city's mentorship program. The city disclosed all of these records to him, except for a note to file relating to his lawsuit against the city, which it denied in full under section 12 of the *Act*.

[6] The appellant appealed the city's access decision to the Information and Privacy Commissioner of Ontario (IPC), which assigned a mediator to assist the parties in resolving the issues in dispute.

Mediation

[7] During mediation, the appellant stated that the records he received did not include any information relating to his spouse, even though he had sent the city a form signed by her in which she consented to the city disclosing her personal information to the appellant. He also claimed that the city had not located all records responsive to his access request and asserted that additional records should exist.

[8] As a result, the city disclosed full copies of several records to the appellant in which it had previously severed the personal information of his spouse. In addition, it conducted a further search for additional records responsive to his access request but did not locate any. The city also acknowledged that the discretionary exemption in section 38(a) (discretion to refuse requester's information), in conjunction with section 12 of the *Act*, might apply to some of the records at issue.

Adjudication

[9] This appeal was not resolved during mediation and was moved to the adjudication stage for an inquiry. The adjudicator originally assigned to this appeal started her inquiry by sending a Notice of Inquiry to the city that invited it to submit representations to her on the issues to be resolved in this appeal, including:

- Production of records subject to solicitor-client privilege (preliminary issue)
- Did the city conduct a reasonable search for records?
- Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the information at issue?
- Did the city exercise its discretion under sections 38(a) and 12? If so, should this office uphold the exercise of discretion?

[10] After receiving the Notice of Inquiry, the city notified the IPC that it had located additional records that are responsive to the appellant's access request. It then issued a supplementary decision letter to the appellant, which stated that it was disclosing these records in full to him, except for some non-responsive information (a handwritten phone number) that it removed from two pages (the appellant's résumé and an email chain about the appellant's participation in the mentorship program). The appellant advised the IPC that he is seeking access to this information.

[11] The adjudicator then issued a Supplementary Notice of Inquiry to the city which elaborated on some issues and raised an additional issue to be resolved, specifically whether the handwritten phone number is responsive to the appellant's access request. With respect to the preliminary issue raised in the initial Notice of Inquiry (production of records subject to solicitor-client privilege), the Supplementary Notice of Inquiry stated, in part:

> . . . the city has two options in relation to the records over which it claims solicitor-client privilege:
>
> > 1. prepare the detailed index of records and affidavit, as outlined in the November 16, 2015 Notice of Inquiry; or
> >
> > 2. produce the records, accompanied by the standard index, to the IPC.

[12] In response, the city submitted representations to the IPC on the issues set out in the Notice of Inquiry and Supplementary Notice of Inquiry. With respect to the

preliminary issue (production of records subject to solicitor-client privilege), the city included the following documents with its representations:

- a sworn affidavit from the legal counsel who was assigned to respond to the legal proceeding commenced against the city by the appellant (Schedule 1);
- a table that sets out the names, positions and other information about "relevant persons" mentioned in the records (Exhibit 1); and
- a detailed index of records that summarizes the records at issue in the litigation file of the legal counsel who was assigned to respond to the legal proceeding commenced against the city by the appellant (Exhibit 2).

[13] With respect to the sharing of its representations with the appellant, the city agreed to partly share its representations with the appellant.

[14] After the IPC received the city's representations, the parties agreed to return to mediation to determine if further issues could be resolved. During mediation, the appellant agreed to narrow the scope of his access request. The mediator sent a letter to the appellant which stated, in part:

> . . . you confirmed that you are not seeking any records from the legal services branch which you already have in your possession. You are not seeking access to litigation records, such as the Statement of Claim or the Statement of Defence, Notice of Appeal or any letters, emails or attached materials that you received from, or sent to, another party.

[15] This appeal was then transferred to me to complete the inquiry and render a decision. I continued this inquiry by first issuing a decision to the city that addressed whether it was required to produce the records at issue in this appeal to the IPC, and what parts of its representations should be shared with the appellant.

[16] With respect to the production of records subject to a solicitor-client privilege exemption claim, I found that Schedule 1, including Exhibits 1 and 2, provided sufficient detail about the contents of the records held by the city's Legal Services Division to enable me to fully and properly adjudicate this appeal. Consequently, I decided that in the circumstances of this particular appeal, it was not necessary to require the city to produce these actual records to me. In addition, I found that parts of the city's representations (e.g., Schedule 1 and Exhibits 1 and 2) should not be shared with the appellant because they fall within the confidentiality criteria in *IPC Practice Direction Number 7,* while other parts that the city asked be withheld should be shared with him because they do not fall within these confidentiality criteria.

[17] I then sent a Notice of Inquiry to the appellant, along with a severed copy of the city's representations. I invited him to submit representations to me that address all of the issues below and that respond to the city's representations. In response, I received

representations from the appellant.

[18] In these representations, the appellant submits that fair procedure requires that he be provided with the parts of the city's representations that I withheld from him under the confidentiality criteria in *IPC Practice Direction Number 7*, including the index of records that summarizes the records found in the litigation file of the in-house legal counsel who was assigned to defend the city against the lawsuit commenced by the appellant. Consequently, I have added this as a preliminary issue that must be resolved in this appeal.

[19] In this order, I find that:

- fair procedure does not require that the appellant be provided with additional parts of the city's representations;
- the records at issue contain the appellant's "personal information," as that term is defined in section 2(1) of the *Act*;
- the records in the files of the legal counsel who was assigned to defend the city and the police against the lawsuit commenced by the appellant are exempt from disclosure under section 38(a), in conjunction with section 12 of the *Act*;
- the one-page note to file from the city's Human Resources Division relating to his lawsuit against the city is not exempt from disclosure under section 38(a), in conjunction with section 12, except for parts of the last paragraph;
- the handwritten phone number on both the appellant's résumé and the email chain about his participation in the mentorship program is responsive to his access request and must be disclosed to him; and
- the city conducted a reasonable search for records that are responsive to the appellant's access request.

RECORDS:

[20] The records at issue in this appeal are summarized in the following chart:

General description of record	**City's decision**	**Exemption claimed/reason for not disclosing**
Records in files of legal counsel representing city and police in civil proceedings brought by	Withheld in full	s. 38(a) s. 12

appellant		
Note to file from city's Human Resources Mentorship Program1	Withheld in full	s. 38(a) s. 12
Appellant's résumé	Withheld in part (handwritten phone number redacted)	Non-responsive
Email chain re appellant's participation in mentorship program	Withheld in part (handwritten phone number redacted)	Non-responsive

ISSUES:

A. Does fair procedure require that the appellant be provided with additional parts of the city's representations?

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

C. Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the information at issue?

D. Did the city exercise its discretion under sections 38(a) and 12? If so, should the IPC uphold the city's exercise of discretion?

E. Is the phone number that the city severed from two records responsive to the appellant's access request?

F. Did the city conduct a reasonable search for records?

[1] The city refers to this record as a "Summary Document."

DISCUSSION:

PRELIMINARY ISSUE

A. Does fair procedure require that the appellant be provided with additional parts of the city's representations?

[21] The city's representations consist of:

- 18 pages of submissions on the issues to be resolved in this appeal;
- Schedule 1 – Affidavit of city legal counsel, including Exhibit 1 (table of relevant persons mentioned in records) and Exhibit 2 (index of records);
- Schedule 2 – Affidavit of city access and privacy officer, on the city's search for records;
- Schedule 3 – Relevant court endorsements; and
- Appendix A (copy of two records).

[22] When I sent a Notice of Inquiry to the appellant, I included significant parts of the city's representations, including most of the 18 pages of its submissions and Schedules 2 and 3 in their entirety. I did not share limited parts of the city's submissions, Schedule 1 (including Exhibits 1 and 2) and Appendix A. I concluded that these parts of the city's representations fall within the confidentiality provisions in sections 5 and 6 of *IPC Practice Direction Number 7,* which are set out below.

[23] In his representations, the appellant complains that I did not share parts of the city's representations with him, and specifically identifies Schedule 1, including Exhibits 1 and 2. He submits that fair procedure requires that a full copy of these attachments be shared with him:

> [These attachments] are essential to prepare my submission in the legal arguments, facts, laws, precedents and in terms of getting a fair judgement in this appeal. I believe that in the absence of fair disclosure and the consequences of the above, I will be deprived of fair judgment.

[24] For the reasons that follow, I find that fair procedure does not require that the appellant be provided with additional parts of the city's representations.

[25] Section 41(13) of the *Act* makes it clear that no party is entitled to see the representations that another party has submitted to the IPC during an inquiry. This provision states:

> The person who requested access to the record, the head of the institution concerned and any other institution or person informed of the notice of appeal under subsection 39 (3) shall be given an opportunity to make representations to the Commissioner, *but no person is entitled to have access to or to comment on representations made to the Commissioner by any other person* or to be present when such representations are made.
>
> [emphasis added]

[26] However, the IPC has found that procedural fairness requires some degree of mutual disclosure of the arguments and evidence of all parties that are submitted during the adjudication of an appeal. It has established a process for sharing representations that balances the requirement that parties be given an opportunity to respond to the arguments and evidence of the other parties with the recognition that it may be appropriate to withhold parts of a party's representations in limited and specific circumstances.

[27] Under section 7.07 of the IPC's *Code of Procedure*, the adjudicator may provide some or all of the representations received from a party to the other party or parties in accordance with *Practice Direction Number 7*. Sections 5 and 6 of this practice direction state:

> 5. The adjudicator may withhold information contained in a party's representations where:
>
> > (a) disclosure of the information would reveal the substance of a record claimed to be exempt; or
> >
> > (b) the information would be exempt if contained in a record subject to the [*Municipal Freedom of Information and Protection of Privacy Act*]; or
> >
> > (c) the information should not be disclosed to the other party for another reason.
>
> 6. For the purpose of section 5(c), the adjudicator will apply the following test:
>
> > (i) the party communicated the information to the IPC in a confidence that it would not be disclosed to the other party;
> >
> > (ii) confidentiality is essential to the full and satisfactory maintenance of the relation between the IPC and the party;

> (iii) the relation is one which in the opinion of the community ought to be diligently fostered; and
>
> (iv) the injury to the relation that would result from the disclosure of the information is greater than the benefit gained for the correct disposal of the appeal.

[28] My reasons for partly accepting the city's position that parts of its representations are confidential, and for not sharing those parts with the appellant, were set out in the sharing decision that I issued to the city, and I will summarize its contents here. In this sharing decision, I decided that the following parts of the city's representations should not be shared with the appellant:

- Schedule 1 – Affidavit of city legal counsel, including Exhibit 1 (table of relevant persons mentioned in records) and Exhibit 2 (index of records); and
- Most of paragraphs 43 and 44 of the city's submissions.

[29] I decided that these parts should not be shared with the appellant for the following reasons:

> Although some of this information might fall within the confidentiality criteria in sections 5(a) and (b) of *Practice Direction Number 7*, I find that it should not be shared with the appellant for "another reason," as stipulated in section 5(c).
>
> In particular, the appellant brought a civil action against several defendants, including the city. Subsequently, he filed an access request under the *Act* with the city for "all records relating [to] me." The records at issue in this appeal are almost entirely from the city's legal services division. In its representations, the city describes these records as the assigned legal counsel's "working papers used in defending litigation against the city commenced by [the appellant]." In my view, detailed information about a legal counsel's work on a litigation file, including his working papers, should generally not be shared with a requester who is the opposing party in litigation, particularly if there is sufficient information elsewhere in the institution's representations that provide a general description of the records at issue and other evidence.
>
> In accordance with the test in section 6 of *Practice Direction Number 7,* which an adjudicator must apply in determining whether section 5(c) applies, I find that the city communicated this information to the IPC in a confidence that it would not be disclosed to the other party; that confidentiality is essential to the full and satisfactory maintenance of the relation between the IPC and the city; that the relation is one which in the opinion of the community ought to be diligently fostered; and that the

> injury to the relation that would result from the disclosure of the information is greater than the benefit gained for the correct disposal of the appeal.

[30] However, I also found that procedural fairness requires that the appellant be provided with a general description of the records at issue in this appeal, particularly since I decided not to share the city's index of records with him. My sharing decision stated:

> . . . I have reviewed the shaded information that the city has asked not be shared with the appellant in paragraphs 14, 16, 22, 23, 24 and 26 of its submissions. In my view, these paragraphs contain a general description of the records at issue and do not reveal the actual substance or contents of these records. In addition, they contain evidence that underpins some of the legal arguments that the city is asking me to rely upon in reaching my decision in this matter. I find that this information does not fit into the confidentiality criteria in sections 5(a) or (b) of *Practice Direction Number 7*. In addition, I find that this information does not have the detail required to fit within my findings above with respect to the confidentiality criterion in section 5(c).
>
> Given that the shaded information in paragraphs 14, 16, 22, 23, 24 and 26 does not fit within the confidentiality criteria in sections 5(a), (b) or (c) of *Practice Direction Number 7*, I have decided to share these parts of the city's representations with the appellant. In my view, the general description of the records at issue and other evidence in these paragraphs, coupled with the rest of the city's non-confidential representations, is sufficient to enable him to make full representations to me about whether the records are exempt from disclosure under the *Act*.

[31] I would emphasize that the findings in my sharing decision should not be viewed as derogating from the general principle that during an appeal, an institution should provide a requester with an index of records that provides some basic information about the withheld records, including those subject to a section 12 solicitor-client privilege exemption claim.[2] My reasons for not sharing the city's index of records and other parts of the city's representations with the appellant are based on the exceptional fact circumstances in this particular appeal, which are briefly summarized in my sharing decision but are also set out in greater detail in the "Overview" section at the beginning of this order. In particular, the records at issue in this appeal that are being sought by the appellant are found in the files of the legal counsel who represented the city in a lawsuit brought by appellant that was struck by the courts in its entirety without leave

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[2] Order PO-3098 at para 17. See also Order MO-2282-I.

to amend.

[32] In short, I find that fair procedure does not require that the appellant be provided with additional parts of the city's representations.

PERSONAL INFORMATION

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

[33] In its decision letter to the appellant, the city claimed that the records at issue are exempt from disclosure under section 12 of the *Act*. However, during mediation, the city acknowledged that some of the records might contain the appellant's personal information and therefore be exempt from disclosure under the discretionary exemption in section 38(a) in conjunction with section 12 of the *Act*.

[34] Given that section 38(a) of the *Act* only applies to records that contain a requester's "personal information," it must first be determined whether any of the records contain the appellant's "personal information." 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;

[35] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[3]

[36] Sections 2(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.

[37] In addition, the IPC has found that 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.[4] 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.[5]

[38] For the reasons that follow, I find that the records contain the appellant's personal information.

[39] In his representations, the appellant cites some previous IPC orders and repeats the statutory provisions and principles set out above, but does not take a clear position on whether the records at issue contain his personal information.

[40] The city's position is that most of the records do not contain the appellant's

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

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

[5] Orders P-1409, R-980015, PO-2225 and MO-2344.

personal information. It claims that the majority of references to the appellant or information about him in the responsive records do not relate to him in personal capacity but are about his actions in representing himself in his lawsuit. It submits that although certain records might contain information about the appellant in a passing or incidental manner, the records are about the lawsuit, not about the appellant as an individual.

[41] The city provided its representations to the IPC before this appeal was sent back to mediation, which resulted in the appellant agreeing not to pursue access to records already in his possession, such as his statement of claim, the city's statement of defence, his notice of appeal and any letters, emails or attached materials that he received from, or sent to, another party. Consequently, although the city suggests that many of the references to the appellant in the records are not his personal information, because they identify him in a representative (i.e., official) rather than a personal capacity, most of those records are no longer at issue in this appeal.

[42] With respect to the records remaining at issue, I am not persuaded by the city's argument that they are about the appellant's lawsuit rather than about him as an individual. In my view, this is a false distinction. The information in each of the records that reveals that the appellant sued the city and other parties is clearly "recorded information about an identifiable individual," as set out in the opening words of the definition of "personal information" in section 2(1) of the *Act*. In addition, given that he brought these legal proceedings in his personal capacity and not in a business, professional or official capacity, such information clearly qualifies as his "personal information."

[43] In short, I find that the records at issue contain the appellant's personal information. I will now determine whether the information in these records is exempt from disclosure under section 38(a) in conjunction with section 12 of the *Act*.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/ SOLICITOR-CLIENT PRIVILEGE

C. Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the information at issue?

[44] 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. 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.

[45] The city submits that the records are all exempt from disclosure under the discretionary exemption in section 12 of the *Act*. However, I have found that the records at issue contain the appellant's personal information. As a result, it must be determined whether these records are exempt under section 38(a), read in conjunction with section 12 of the *Act*.

[46] 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.

[47] 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 city must establish that one or the other (or both) branches apply.

[48] I have decided to start my analysis by determining whether the records are exempt from disclosure under the statutory privilege (branch 2) set out in section 12, which gives the city the discretion to refuse disclosure of a record 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."

[49] The statutory privilege in section 12 encompassess two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Statutory solicitor-client communication privilege

[50] This privilege applies to a record that "was prepared by or for counsel employed or retained by an institution for use in giving legal advice."

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

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

[7] Orders PO-2441, MO-2166 and MO-1925.

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

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

[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.[10] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[11]

[54] The city has claimed that two sets of records are exempt from disclosure under section 12 of the *Act*: (1) those records in the files of the legal counsel representing the city and the police against the lawsuits brought by the appellant; and (2) the note to file from the city's Human Resources Division relating to the appellant's lawsuit against the city.

[55] For the reasons that follow, I find that many of the records in the files of the city's legal counsel are exempt from disclosure under the statutory solicitor-client communication privilege in section 12. In addition, I find that parts of the last paragraph of the note to file from the city's Human Resources Division are exempt under the same privilege.

[56] The city states that the statutory solicitor-client communication privilege in section 12 applies to a "continuum of communications" between a solicitor and client, which means that this privilege attaches not only to a record containing legal advice but also other communications between a solicitor and client requiring advice. It states that its legal counsel provided legal advice to both the city and the police, and that many of the records represent a continuum of communications in which a variety of legal advice, opinions and suggestions were either requested or provided about legal issues relating to the litigation taking place.

[57] The appellant acknowledges that the statutory solicitor-client communication privilege applies to confidential communications between a solicitor and client in the course of seeking or giving legal advice. However, he submits that this privilege does not apply to the records at issue in this appeal because it does not protect communications that are "criminal in themselves" or that were used "to obtain legal advice to facilitate the commission of a crime."[12] He submits that the torts committed against him by the defendants (including the city) were under the "criminal activities of a shadow government."

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

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

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

[12] He cites the Supreme Court of Canada's decision in *Descôteaux.* See note 6 above.

[58] Many of the records at issue are emails and other correspondence between the city's legal counsel and the employees of his clients (the city and police). I find that this correspondence constitutes direct communications of a confidential nature between a solicitor and client made for the purpose of obtaining or giving professional legal advice.

[59] I am not persuaded by the appellant's argument that these communications are not protected by the statutory solicitor-client communication privilege in section 12 because they were used to obtain legal advice to facilitate the commission of a crime. He has not provided me with any evidence to support this assertion, and I find that it does not apply to any of the records at issue.

[60] In short, subject to my analysis of waiver below, I find that the emails and other correspondence between the city's legal counsel and the employees of his clients, which make up many of the records at issue, are exempt from disclosure under the statutory solicitor-client communication privilege in section 12, because they were prepared by or for counsel employed by the city for use in giving legal advice.

[61] Most of the note to file from the city's Human Resources Division is a summary of a conversation that a city employee had with the appellant's former mentor. I find that the majority of this record is not exempt from disclosure under the statutory solicitor-client communication privilege in section 12, because it does not constitute direct communications of a confidential nature between a solicitor and client made for the purpose of obtaining or giving professional legal advice.

[62] However, parts of the last paragraph of this note to file refer to an opinion that the city's legal counsel provided to the appellant's former mentor and communications between them. I find that these parts fall under the statutory solicitor-client communication privilege in section 12, because they reveal not only the legal advice provided but also describe the information passed between a client and a solicitor.

[63] I will now determine whether the remaining records at issue are exempt from disclosure under the statutory litigation privilege in section 12.

Statutory litigation privilege

[64] This privilege applies to records prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation."

[65] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[13] It protects a lawyer's work product and covers material going beyond

[13] *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

solicitor-client communications.[14] It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[15]

[66] The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.[16]

[67] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.[17]

[68] For the reasons that follow, I find that the remaining records at issue in the files of the city's legal counsel are exempt from disclosure under the statutory litigation privilege in section 12. However, I find that the note to file from the city's Human Resources Division is not exempt from disclosure under that particular privilege.

[69] The city states that the records in the files of the legal counsel representing the city and the police in the lawsuits brought by the appellant are that legal counsel's "working papers" for the purpose of preparing a defence for those clients. It submits that all of these records were created for the dominant purpose of litigation.

[70] The appellant makes a variety of arguments about why the records in the files of the city's legal counsel are not subject to statutory litigation privilege. For example, he reiterates his argument that the city has engaged in misconduct and submits that even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed.[18]

[71] I have already found that many of the records at issue are exempt from disclosure under the statutory solicitor-client communication privilege in section 12, because they were prepared by or for counsel employed by the city for use in giving legal advice. In my view, the remaining records at issue, which are also found in the files of the city's legal counsel, are exempt from disclosure under the statutory litigation

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[14] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

[15] *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

[16] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

[17] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited in note 14 above.

[18] He cites the Supreme Court of Canada's decision in *Blank* to support this argument. See note 13 above.

privilege in section 12, because they were prepared by or for him "in contemplation of or for use in litigation."

[72] This legal counsel's files contain records that he prepared for the purpose of defending the city and the police against the appellant's lawsuit. They include emails, draft pleadings, facta, memoranda, documents required under the *Rules of Civil Procedure*, handwritten notes and other documents prepared by him.[19] I find that all of these records were created for the dominant purpose of litigation.

[73] I am not persuaded by the appellant's argument that these records are not protected by the statutory litigation privilege in section 12 because the city has engaged in "actionable misconduct." He has not provided me with any credible evidence to support this assertion, and I find that it does not apply to any of the records at issue.

[74] In short, subject to my analysis of waiver below, I find all of the remaining records in the files of the city's legal counsel, are exempt from disclosure under the statutory litigation privilege in section 12, because they were prepared by or for counsel employed by the city "in contemplation of or for use in litigation." The fact that this litigation may now be over is not relevant, because the termination of litigation does not end the statutory litigation privilege in section 12.[20]

[75] As noted above, the note to file from the city's Human Resources Division is a summary of a conversation that a city employee had with the appellant's former mentor. The city located this record in the record holdings of the city's Human Resources Division, not the files of the city's legal counsel. Although this record contains references to the fact that the appellant was suing the city, it was not created for the dominant purpose of litigation. As a result, I find that this record is not exempt from disclosure under the statutory litigation privilege in section 12, because it was not prepared by or for counsel employed by the city "in contemplation of or for use in litigation."

Loss of privilege – Waiver

[76] The statutory privilege in section 12 may be lost through waiver. An express waiver of privilege will occur where the holder of the privilege:

- knows of the existence of the privilege, and

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[19] Some records at issue also include emails and other documents that the city's legal counsel both sent to and received from the other parties being sued by the appellant. These records will be addressed under the discussion about the "common interest" exception to waiver below.

[20] See para 67 above.

- voluntarily demonstrates an intention to waive the privilege.[21]

[77] 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.[22]

[78] With the exception of the records discussed below, there is no evidence before me to suggest that the city or the police, which are the legal counsel's clients, expressly or implicitly waived the statutory privilege in section 12 with respect to any of the records at issue. Although the appellant refers to the concept of implied waiver and cites the Supreme Court of Canada's decision in *R. v. Campbell*,[23] he does not explain how that particular case applies to the records in this appeal.

[79] Some of the records at issue are emails and other documents that the city's legal counsel both sent to and received from the other parties being sued by the appellant. Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[24] However, waiver may not apply where the record is disclosed to another party that has a "common interest" with the disclosing party.[25]

[80] The city submits that all of the individuals and entities being sued by the appellant had a common interest in the legal issues raised in the lawsuit.

[81] The appellant appears to acknowledge that all of the defendants had a common interest, because he argues that they "were united under the City program to implicate their illegal and unconstitutional agenda that caused victimization of the appellant." However, he then goes on to argue, without elaboration, that there has been a "severing" of the common interest shared by these defendants.

[82] The emails and other documents that the city's legal counsel sent to the other parties being sued by the appellant are exempt under the statutory litigation privilege in section 12, because they were prepared by counsel employed by the city "in contemplation of or for use in litigation." The appellant sued the city, the police and these other parties simultaneously and for interconnected reasons. It is clear that these parties had a common interest in the legal issues raised in the appellant's lawsuit, which

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

[22] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

[23] [1999] 1 S.C.R. 565.

[24] 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.).

[25] *General Accident Assurance Co. v. Chrusz,* cited in note 10 above; Orders MO-1678 and PO-3167.

was confirmed when a motions judge of the Ontario Superior Court of Justice struck the appellant's claims against all of them based on his finding that these claims were frivolous, vexatious and an abuse of process. Consequently, I find that the statutory privilege in section 12 was not waived when the city's legal counsel disclosed these records to the other defendants because these parties all had a common interest with his clients.

[83] The files of the city's legal counsel also include emails and documents that he received from the other parties being sued by the appellant. It must also be determined, therefore, whether the common interest exception to waiver also applies to those particular records.

[84] The parties that sent these emails and documents to the city's legal counsel include a public body that qualifies as an "institution" under the *Act* and some community organizations and individuals that do not qualify as an "institution" under the *Act*. With respect to the latter parties, the IPC has previously found that the common-law solicitor-client privilege in section 12 is not waived when a non-institution sends a privileged record to an institution in circumstances in which those parties share a common interest.[26]

[85] In my view, the emails and documents that the parties who are not institutions sent to the city's legal counsel are covered by the common-law solicitor-client privilege in section 12, while those sent by the public body that is an institution are covered by the statutory litigation privilege in that exemption. I find that because these parties all had a common interest in the legal issues raised in the appellant's lawsuit, both the common-law and statutory privileges in section 12 that apply to these records were not waived when these other defendants sent them to the city's legal counsel.

Conclusion

[86] I find that the records in the files of the legal counsel who defended the city and the police against the appellant's lawsuit are exempt from disclosure under the statutory privilege in section 12 because they were prepared by or for counsel employed by the city for use in giving legal advice or in contemplation of or for use in litigation. In addition, I find that parts of the last paragraph of the note to file from the city's Human Resources Division are exempt from disclosure under the statutory solicitor-client communication privilege in section 12, because they reveal legal advice

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[26] The common-law privilege in section 12 is set out in the opening words of that exemption, which state, "A head may refuse to disclose a record that is subject to solicitor-client privilege . . ." In Interim Order MO-3253-I, the adjudicator found that the common-law solicitor-client communication privilege that applied to a legal opinion that the Ontario Public School Boards' Association (which is not an institution under the *Act*) sent to various school boards (which are institutions under the *Act*) was not waived because these parties all had a common interest in the information in that legal opinion.

that this legal counsel provided to a city employee and also describe information that was communicated between these two individuals.

[87] Because these records all contain the appellant's personal information, I find that they are exempt from disclosure under section 38(a), in conjunction with section 12 of the *Act*.

[88] I will now determine whether the city exercised its discretion in applying the section 38(a) exemption in conjunction with section 12, and if so, whether it did so properly.

EXERCISE OF DISCRETION

D. Did the city exercise its discretion under section 38(a) and 12? If so, should the IPC uphold the city's exercise of discretion?

[89] The sections 38(a) and 12 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 IPC may determine whether the institution failed to do so.

[90] In addition, the IPC 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.

[91] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[27] The IPC may not, however, substitute its own discretion for that of the institution.[28]

[92] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[29]

- the purposes of the *Act*, including the principles that:

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[27] Order MO-1573.

[28] Section 43(2).

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

    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking his or her own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;
- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information; and
- the historic practice of the institution with respect to similar information.

[93] The city states that it exercised its discretion in good faith and took into account all relevant considerations in withholding the records under section 12, including:

- the purposes of the *Act*;
- the wording of the relevant exemptions in section 12;
- the fundamental interests that the section 12 exemption seeks to protect;
- the fact that the appellant could be considered to have an interest in the information in the records;
- the fact that the has not stated a sympathetic or compelling need to receive the information;
- the fact that disclosing the contents of a solicitor's working papers would decrease public confidence in city operations;
- the nature of the information, which is sensitive;

- the recent "vintage" of the information; and
- the historic practice of the city of not disclosing solicitor-client privilege materials or actual working papers being utilized by a solicitor in defence of an actual litigation matter.

[94] In his representations on exercise of discretion, the appellant lists some of the relevant considerations listed above but does not respond to the city's claim that it exercised its discretion in good faith in denying access to the records under section 12.

[95] I find that the city exercised its discretion under section 12 and did so in a proper manner. It only took into account relevant factors and did not consider any irrelevant factors in exercising its discretion to withhold the records. There is no evidence before me to suggest that it exercised its discretion in bad faith or for an improper purpose.

[96] I note that the city states that it exercised its discretion under section 12 alone rather than under section 38(a), in conjunction with section 12, because it claims that the records at issue do not contain the appellant's personal information. However, I have found that each of the records contain the appellant's personal information, and that they are exempt from disclosure under section 38(a), in conjunction with section 12. They are not exempt from disclosure under section 12 alone.

[97] This is a flaw in the city's overall exercise of discretion, because 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.[30] In my view, however, the city's failure to exercise its discretion under section 38(a) is not fatal, because in exercising its discretion under section 12, it considered the fact that the appellant could be considered to have an interest in the information in the records.

[98] I am also cognizant that almost all of the records at issue in this appeal are found in the files of the legal counsel who was assigned to defend the city and the police against the lawsuit commenced by the appellant. It would only be in the rarest of cases that an institution would conclude that these types of records are exempt from disclosure under section 38(a), in conjunction with section 12, but then exercise its discretion to disclose them to a requester.

[99] In my view, ordering the city to re-exercise its discretion under section 38(a) in conjunction with section 12, would almost certainly result in the same outcome, specifically a denial of access to these records. Consequently, there would be no useful purpose in ordering the city to re-exercise its discretion under section 38(a) in

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[30] Order M-352.

conjunction with section 12. In short, I uphold the city's exercise of discretion.

RESPONSIVENESS OF INFORMATION

E. Is the phone number that the city severed from two records responsive to the appellant's access request?

[100] After receiving the Notice of Inquiry, the city notified the IPC that it had located additional records that are responsive to the appellant's access request. It then issued a supplementary decision letter to the appellant, which stated that it was disclosing these records in full to him, except for some non-responsive information (a handwritten phone number) that it removed from two pages (the appellant's résumé and an email chain about the appellant's participation in the mentorship program). The appellant advised the IPC that he is seeking access to this information.

[101] The IPC has found that 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.[31] To be considered responsive to the request, records must "reasonably relate" to the request.[32]

[102] The city states that it was unable to ascertain the owner of the phone number because there was no name attached to it. As a result, it deemed this information to not be responsive to the appellant's access request. It further states that if the appellant can provide his phone numbers to the city and one of them matches the handwritten one on the records, it will disclose this phone number to him.

[103] Although the city claims that it was unable to ascertain the owner of the phone number, I have reviewed the access request form that the appellant submitted to the city. On this form, he lists an alternative phone number that is the same number that is written in hand on the two pages of records. Consequently, I find that this phone number belongs to the appellant and is responsive to his access request.

[104] Given that this city has not claimed any exemptions for this phone number, I will order it to disclose this information to the appellant.

SEARCH FOR RESPONSIVE RECORDS

F. Did the city conduct a reasonable search for records?

[105] The appellant claims that the city did not locate all records that are responsive to his access request.

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[31] Orders P-134 and P-880.

[32] Orders P-880 and PO-2661.

[106] 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.[33] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the city's decision. If I am not satisfied, I may order further searches.

[107] 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.[34] To be responsive, a record must be "reasonably related" to the request.[35]

[108] 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.[36]

[109] 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.[37]

[110] 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.[38]

[111] For the reasons that follow, I find that the city has conducted a reasonable search for records that are responsive to the appellant's access request.

[112] The city provided both submissions and an affidavit from an access and privacy officer that describe the searches that took place within various city divisions. It points out that the appellant had submitted an earlier access request to the city for records relating to his mental health and incidents of spousal abuse. In response, it conducted a search for responsive records in four city divisions, including Social Development, Finance and Administration; Shelter Support and Housing Administration; Toronto Employment and Social Services; and Public Health Vulnerable Persons Unit. In

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[33] Orders P-85, P-221 and PO-1954-I.

[34] Orders P-624 and PO-2559.

[35] Order PO-2554.

[36] Orders M-909, PO-2469 and PO-2592.

[37] Order MO-2185.

[38] Order MO-2246.

addition, a human resources consultant was asked to conduct a search for responsive records.

[113] Staff in these four divisions and the human resources consultant were not able to locate any records that were responsive to the appellant's access request. However, the city did locate a copy of the appellant's Ontario Works file, which it disclosed to him in part.

[114] With respect to the appellant's access request that is the subject of this appeal, the access and privacy officer asked staff in its Legal Services Division to search for responsive records, because the appellant had recently brought a lawsuit against the city. These staff located a large number of responsive records in the files of the legal counsel who was assigned to defend the city and the police against the lawsuit commenced by the appellant. The city denied access to these records in full under the discretionary exemption in section 12 of the *Act*.

[115] Because the appellant had participated in a city mentorship program, the access and privacy officer also asked staff in the city's Human Resources Division and the appellant's former mentor to search for responsive records. These staff also located records that are responsive to the appellant's access request, which it disclosed to him, except for a note to file relating to his lawsuit against the city, which it denied in full under section 12 of the *Act*.

[116] During the mediation stage of the appeal process, the city conducted another search for records relating to the appellant's participation in the city mentorship program but was not able to locate any additional records. However, during adjudication, the city notified the IPC that it had located additional records that related to the appellant's participation in the city mentorship program. It then issued a supplementary decision letter to the appellant, which stated that it was disclosing these records in full to him, except for some non-responsive information.

[117] The city also states that additional records relating to the appellant's wife are outside the scope of his access request, and that a previous access request had been filed for this information.

[118] The city submits that the numerous efforts that were undertaken by its staff in various divisions to locate records meet the threshold for establishing that it conducted a reasonable search for records that reasonably relate to the appellant's access request.

[119] In his representations, the appellant complains that the city only searched in six of its divisions. He submits that it must have additional records relating to his wife that were sent to the city by a community organization, and he cites an affidavit that a member of this organization provided as part of its defence against his lawsuit. He also submits that there must be "victimization" records relating to him in unnamed city departments and makes reference to "mind control" and "human experimentation."

[120] The evidence provided by the city shows that it undertook exhaustive efforts to locate records that are responsive to the appellant's access request. Although some of these searches were conducted in response to a previous access request that he submitted to the city, the two requests are interconnected. Overall, staff in six city divisions searched for responsive records.

[121] I am not persuaded by the appellant's allegation that the city must have additional records relating to the alleged abuse of his wife that were sent to the city by a community organization. Although he suggests that evidence proving the existence of such records in the city's record holdings is found in an affidavit filed by a member of the community organization as part of its defence against his lawsuit, he has not provided me with a copy of this affidavit. In addition, I find that there is no reasonable prospect that the city holds records relating to his "victimization" through "mind control" or "human experimentation."

[122] In my view, experienced city employees knowledgeable in the subject matter of the appellant's access request expended reasonable efforts to locate records which are reasonably related to that request. As a result, I find that the city conducted a reasonable search for records that are responsive to his access request.

OTHER ISSUES

Constitutional question

[123] In his representations, the appellant makes a series of constitutional claims under the *Charter of Rights and Freedoms* (the *Charter*). In particular, he appears to argue that the city's search for responsive records and its decision to apply the discretionary exemption in section 38(a), in conjunction with section 12 of the *Act*, constitute an infringement of his rights under sections 2(b), 7 and 8 of the *Charter*. He then asks, without elaborating, "If so, is the infringement a reasonable limit prescribed by law that can be justified in a free and democratic society under s. 1 of the Canadian Charter?"

[124] It is clear that the IPC has the authority to decide constitutional issues, including those arising under the *Charter*.[39] The rules governing the raising of constitutional

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[39] See Order PO-3686. In *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 at para. 3, the Court stated, in part: "Administrative tribunals which have jurisdiction — whether explicit or implied — to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision. This presumption may only be rebutted by showing that the legislature clearly intended to exclude Charter issues from the tribunal's authority over questions of law." The Commissioner's powers at sections 39 through 44 of the *Act* clearly include the power to decide questions of law including, for example, the interpretation and application of the exemptions at sections 6-15 and section 38, and the interpretation and application of the exclusions in section 52. There is no evidence that the legislature intended to exclude *Charter* considerations from the Commissioner's mandate.

questions in appeals are set out in section 12 of the IPC's *Code of Procedure* and *Practice Direction Number 9*. The latter practice direction states, in part:

> **Circumstances where notice required/to whom notice must be given**
>
> 2. Where a party intends,
>
> (a) to raise a question about the constitutional validity or applicability of legislation, a regulation or a by-law made under legislation, or a rule of common law, or
>
> (b) to claim a remedy under the *Canadian Charter of Rights and Freedoms*, notice of a constitutional question shall be served on the IPC.
>
> **Time limits**
>
> 3. An appellant will be permitted to raise a constitutional question at first instance or an additional constitutional question only within a 35-day period after giving the IPC notice of his or her appeal.
>
> 4. Any other party will be permitted to raise a constitutional question only within a 35-day period after receiving notice of the appeal.
>
> 5. The Adjudicator has the discretion not to consider a constitutional question raised after the applicable time limit if the appeal proceeds to inquiry.
>
> **Form of notice**
>
> 6. A notice of constitutional question shall be in the form attached to this *Practice Direction*, or in a similar form that contains the same information.
>
> 7. The party raising the constitutional question shall serve notice of the constitutional question on the IPC, leaving blank the dates when the constitutional question will be argued and when the Attorneys General of Canada and Ontario should notify the IPC of their intention to participate.

[125] The appellant notified the IPC that he wished to appeal the city's access decision in a letter. In this letter, he raised section 7 of the *Charter*, which means that he notified the IPC at first instance that he wished to raise a constitutional question. However, there is no evidence before me to show that he provided the IPC with a notice of constitutional question in the form required by section 6 of *Practice Direction Number 9*, or in a similar form that contains the same information. Neither the Attorney

Generals of Canada or Ontario were provided with a Notice of Constitutional Question.[40]

[126] In addition, it does not appear that this constitutional question was raised during the mediation stage of the appeal process. The mediator's report, which fixes the issues going forward to adjudication, does not identify any constitutional issues that must be resolved. Although the cover letter accompanying this report asked the appellant to identify any errors or omissions in the report within 10 days, he did not advise the mediator that there were any constitutional issues that were omitted. Consequently, no constitutional issues were included in the Notices of Inquiry that were sent to the parties during the adjudication stage of the appeal process.

[127] Although the appellant's raising of a constitutional question is procedurally flawed, I will briefly address his arguments. The appellant argues that the city's search for responsive records and its decision to apply the discretionary exemption in section 38(a), in conjunction with section 12 of the *Act*, constitute an infringement of his rights under sections 2(b), 7 and 8 of the *Charter*. These *Charter* rights state:

> 2. Everyone has the following fundamental freedoms:
>
> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 8. Everyone has the right to be secure against unreasonable search or seizure.

[128] In addition, he also refers to the "reasonable limits" clause in section 1, which states:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[129] The appellant's *Charter* arguments are set out in paragraphs 107-118 of his representations.[41] For the most part, they simply amount to quotes and paraphrasing

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[40] Section 12.02 of the IPC's *Code of Procedure* states that a party raising a constitutional question shall notify the IPC and the Attorneys General of Canada and Ontario of the question within the applicable 35‑day time period.

[41] The appellant also submitted another set of representations, dated March 17, 2017, that expand on his *Charter* arguments. I have decided not to consider these additional representations because he submitted

from law journal articles, speeches, and court decisions. He fails to provide any clear or coherent reasons to explain why the city's search for responsive records and its decision to apply the discretionary exemption in section 38(a), in conjunction with section 12 of the *Act*, constitute an infringement of his rights under sections 2(b), 7 and 8 of the *Charter*. In these circumstances, I find that the appellant has failed to establish that his *Charter* rights have been breached.

Requested order provisions

[130] In his representations, the appellant asks me to make a series of order provisions, including the following:

> 1. An interim order and as well as final order to provide the City job under the mentorship program.
>
> . . . .
>
> 5. An order to stop City/Police e.g. all investigation/harassment/ experimentation and remove all devices/hazards from the appellant's home . . .

[131] Section 40 of the *Act* provides the IPC with the power to review the decision of the head of an institution with respect to access to records. As a delegated decision-maker, I do not have the authority to order the city to provide an individual with a job or to stop the city or the police from investigating or allegedly harassing someone. Consequently, I cannot make the order provisions requested by the appellant.

ORDER:

1. I uphold the city's decision to deny access, under section 38(a), in conjunction with section 12 of the *Act*, to the records in the files of the legal counsel who was assigned to defend the city and the police against the lawsuit commenced by the appellant.

2. I order the city to disclose to the appellant the one-page note to file ("Summary Document") from the city's Human Resources Division relating to his lawsuit against the city, except for parts of the last paragraph, which are exempt from disclosure under section 38(a), in conjunction with section 12. I am providing the city with a copy of this record and have highlighted in green the parts of this paragraph that must not be disclosed to the appellant.

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them more than a week past the deadline of March 9, 2017 that was set out in the cover letter and Notice of Inquiry that was sent to him.

3. I order the city to disclose to the appellant the handwritten phone number on both the appellant's résumé and the email chain about his participation in the mentorship program.

4. I order the city to provide the appellant with copies of the records ordered disclosed in provisions 2 and 3 above by **November 23, 2017**.

5. I uphold the city's search for records that are responsive to the appellant's access request.

Original Signed by: October 23, 2017

Colin Bhattacharjee
Adjudicator