

Information and Privacy Commissioner,  
Ontario, Canada



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

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## **FINAL ORDER MO-3509-F**

Appeal MA14-542

Regional Municipality of Waterloo

October 25, 2017

**Summary:** The appellant made a request to the Regional Municipality of Waterloo (the region) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the possibility of making a complaint about the appellant to the Law Society of Upper Canada. The region identified records responsive to the request and denied access to them, citing the exemptions for solicitor-client privilege (section 12 of the *Act*) and closed meetings (section 6(1)(b)). In Interim Order MO-3449-I, the adjudicator found that the exemption at section 38(a) (discretion to refuse requester's own personal information) in conjunction with section 12 applies to Records 1-6 and ordered the region to exercise its discretion under section 38(a). She found that section 38(a) in conjunction with section 12 does not apply to Records 7-9, and remained seized to address outstanding issues relating to those records. The region then revised its decision to disclose Records 7-9 to the appellant.

In this final order, the adjudicator upholds the region's exercise of discretion in deciding to withhold Records 1-6 pursuant to section 38(a) of the *Act* in conjunction with section 12.

### **BACKGROUND:**

[1] This order disposes of the outstanding matters relating to the records at issue in this appeal following the release of Interim Order MO-3449-I.

[2] The appellant is a lawyer who was involved in an application for judicial review of the Regional Municipality of Waterloo's (the region) decision to replace the board of directors of a housing co-operative. Following the termination of the application for

judicial review, a complaint about the appellant was made to the Law Society of Upper Canada (the Law Society).

[3] The appellant then submitted an access request to the region pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The appellant's request was for the following information:

All records related to the possibility of making a complaint to the Law Society of Upper Canada about my law firm, ... or myself

I request that the Regional Municipality of Waterloo release to me any and all records that refer or [relate] to the possibility of commencing a complaint to the Law Society of Upper Canada about my law firm ... or myself.

[4] The region located a total of nine records responsive to the request and issued decisions denying access to them. The region relied on the discretionary exemption at section 6(1)(b) (closed meeting) as well as the discretionary exemption at section 12 (solicitor-client privilege).<sup>1</sup> The appellant appealed the region's decision to this office.

[5] A mediator was assigned to the appeal, but no mediated resolution was reached and the appeal was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. Because it appeared to me that the records may contain the appellant's personal information, I added the definition of personal information and section 38(a) (discretion to refuse requester's own personal information) as issues on appeal.

[6] In Order MO-3449-I, I found that the records contain the appellant's personal information. I found that the discretionary exemption at section 38(a) in conjunction with section 12 applies to Records 1-6, and ordered the region to exercise its discretion with respect to those records, taking into account relevant considerations including the fact that the records contain the appellant's personal information.

[7] I also found that the section 38(a) exemption in conjunction with section 12 does not apply to Records 7-9 and I remained seized to address outstanding issues relating to those records.

[8] Following the release of Interim Order MO-3449-I, the region revised its decision with respect to Records 7-9 and disclosed those records to the appellant. Access to Records 7-9 is therefore no longer an issue in this appeal.

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<sup>1</sup> Six records were initially located, and another three were identified during the adjudication stage of this appeal. The region initially relied on section 6(1)(b) to withhold the records, then added section 12 as an additional exemption claimed.

[9] The region also provided me with a letter outlining how it exercised its discretion in favour of withholding Records 1-6. I provided a copy of the region's letter to the appellant and invited his representations on the region's exercise of discretion. The appellant did not file representations.

[10] In this final order, I uphold the region's exercise of discretion with respect to Records 1-6.

## **RECORDS:**

[11] The records remaining at issue are as follows:

1. Email from region counsel
2. Email from region counsel
3. Closed report prepared by region counsel
4. Email from region counsel
5. Email from region counsel
6. Email from region counsel

## **DISCUSSION:**

[12] The only issue remaining in this appeal is whether this office should uphold the region's exercise of discretion in withholding Records 1-6.

[13] The exemption at section 38(a) in conjunction with section 12 is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[14] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[15] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>2</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>3</sup>

[16] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>4</sup>

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

## **Representations**

[17] The background to this matter is useful in order to place the parties' representations in context. This background is set out in more detail in paragraphs 15-

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<sup>2</sup> Order MO-1573.

<sup>3</sup> Section 43(2).

<sup>4</sup> Orders P-344 and MO-1573.

20 of Interim Order MO-3449-I. Briefly, the region, relying on its statutory authority under the *Housing Services Act*, removed the board of directors of a housing co-operative (the co-op) and replaced it with a new board of directors. A judicial review application challenging the region's legal authority to replace the board was brought by former board members in the name of the co-op. The appellant represented one of the parties involved in the litigation. Several months after the application for judicial review was abandoned, a complaint was made to the Law Society about the appellant. The records at issue are records relating to the possibility of making a Law Society complaint about the appellant.

[18] In its letter outlining how it exercised its discretion for Records 1-6, the region acknowledges that the appellant is acting as an individual requesting his own personal information. It submits, however, that solicitor-client privilege is a fundamental component of our legal system that should not be waived unless there is a "paramount situation" such as a criminal act.

[19] The region also notes that the complaint was made to the Law Society in June 2014 and has since been closed. The region submits that as the records can no longer be used in conjunction with the complaint, there is no sympathetic or compelling reason to waive privilege and provide the records to the appellant.

[20] The region submits, further, that it has maintained a consistent position of not disclosing records that contain solicitor-client privileged information. It submits that in this case, the disclosure of the closed meeting report, in particular, would reveal legal advice relating to litigation before an administrative tribunal, and disclosure would release the record from the region's control, in effect making it a public record.

[21] Although the appellant did not make representations in response to the region's letter explaining how it exercised its discretion, in his earlier representations on this appeal he submitted that the region decided on a course of intimidation during the application for judicial review and that the region's exercise of discretion has been tainted by the previous legal proceedings. He submitted that the region exercised its discretion for an improper purpose: to shield its involvement in the Law Society complaint.

### **Analysis and findings**

[22] I find that that the region's exercise of discretion should be upheld. The region took into account relevant factors, including the fact that the records contain the appellant's personal information and whether there was any sympathetic or compelling need to disclose the records to the appellant. The region also considered its interest in maintaining solicitor-client privilege. These are all relevant considerations.

[23] I have considered the appellant's submission that the region withheld the records in order to shield its involvement in the Law Society complaint. There is no information

before me that leads me to conclude that this is the case. In fact, the region, albeit only recently, has decided to disclose Records 7-9, which themselves relate to the possibility of bringing a Law Society complaint. This is some evidence that its decision to withhold Records 1-6 was not motivated by a desire to shield any involvement in the Law Society complaint. I find, therefore, that it has not been established that the region exercised its discretion in bad faith or for an improper purpose.

[24] I conclude that the region's exercise of discretion should be upheld.

**ORDER:**

I uphold the region's exercise of discretion in withholding Records 1-6.

Original Signed by: \_\_\_\_\_

Gillian Shaw  
Adjudicator

October 25, 2017 \_\_\_\_\_