

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-3689-F

Appeal MA16-737

Durham Regional Police Services Board

November 20, 2018

Summary: This final order involves a review of the exercise of discretion by the Durham Regional Police Services Board (the police) to withhold information under section 12 (solicitor-client privilege) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). In Interim Order MO-3635-I, the adjudicator upheld the police's application of section 12 to the records. However, she found that the police did not exercise their discretion with respect to the exempt information, and ordered the police to exercise their discretion. In this final order, the adjudicator upholds the police's exercise of discretion under section 12 and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 12.

OVERVIEW:

[1] The Durham Regional Police Services Board (the police) received a request, pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for access to the following:

I seek a copy of any emails, including attachments, regarding media questions and/or articles by [a named reporter] sent to or from (including electronic CCs) any of the following Durham Regional Police Service members: Chief [named], [a named police personnel], [another named police personnel].

The request is between the dates of July 19, 2016 to present.

[2] The police found records responsive to the request and issued a decision granting partial access to them. Some records were disclosed in their entirety while the remaining records were withheld in their entirety. The police relied on section 12 of the *Act* (solicitor-client privilege) to deny access to the withheld records.

[3] The requester, now the appellant, appealed the police's decision to this office.

[4] As the appeal was not resolved at the mediation stage, it was moved to the adjudication stage, where an adjudicator conducts an inquiry under the *Act*.

[5] In Interim Order MO-3635-I, I upheld the police's application of section 12 to the records. I also found that the police did not exercise their discretion with respect to the exempt information, and ordered the police to exercise their discretion.

[6] In compliance with the interim order, the police exercised their discretion and submitted representations detailing their considerations in the exercise of that discretion. The police maintain their decision to withhold the information.

[7] I invited and provided the appellant with two opportunities to provide representations in response to the police's representations. He declined to provide any representations.

[8] In this final order, I uphold the police's exercise of discretion under section 12, and dismiss the appeal.

RECORDS:

[9] The records at issue consist of a number of email chains.

DISCUSSION:

Should the police's exercise of discretion under section 12 be upheld?

[10] In the interim order, I set out a list of the considerations generally applied to a review of the exercise of discretion by an institution, noting that additional unlisted considerations could also be relevant.¹ The list of relevant considerations includes:

- 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

¹ Orders P-344 and MO-1573.

- 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 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.

Parties' representations

[11] In their representations, the police submit that they considered a number of factors when exercising their discretion. They submit that they considered the purposes and principles of the *Act* when they concluded that the preservation of the solicitor-client relationship and maintaining the confidentiality of such communications outweighs the desire to make the records available to the public. The police also submit they considered the wording of section 12 and the interests it seeks to protect when they concluded that the solicitor-client relationship outweighs the interests expressed by the appellant.

[12] Finally, they submit that they considered whether the appellant has a sympathetic or compelling need to receive the information. They point out that in his reply representations, the appellant suggested that there is a significant public interest in the records requested, and, at the very least, the records should be disclosed for the sake of the appearance of transparency and accountability. In response, the police submit:

The fact that the requested records may be related to an incident that may be of interest to the public does not mean that the records being withheld are themselves of significant public interest. The [appellant] has not demonstrated a sympathetic or compelling need to receive the information...

[13] In addition, they submit that they considered whether disclosure of the records

will increase public confidence in the operation of the institution. The police state:

... The police have a responsibility to safeguard information crucial to its operations and individual privacy, whether it is related to a member of the [police] or a citizen. Where solicitor-client communications that are directly linked to the navigation of those responsibilities and obligations are requested by the public, it is imperative that solicitor-client privilege remains intact. The public should find confidence in the fact that the [police] takes its obligations under the *Act* seriously, and follows the law as appropriate in each circumstance. If this were not the case, the public would lose confidence in the [police's] ability to respect the privacy rights of individuals, and to protect information related to law enforcement matters including all investigations.

[14] As noted above, the appellant did not provide representations in response to the police's representations on their exercise of discretion. However, he provided representations on this issue in his reply representations during the initial inquiry in the appeal. In those representations, he submits that the records concern a matter of significant public interest. He also submits that the need to appear transparent and accountable is a compelling reason for the police to disclose the records. The appellant points out that his employer is a widely read news outlet, whose print editions are read by more than three million people weekly. He submits that the contents of the records should be shared with those readers, allowing them to scrutinize the operations of the police, which would increase public confidence in the police services. Finally, he submits that the significant public interest in the records outweigh the solicitor-client privilege exemption.

Analysis and findings

[15] I have considered the circumstances surrounding this appeal and the police's recent representations, which detail the factors that they considered when determining whether they should exercise their discretion to disclose the withheld information to which section 12 applies. I am satisfied that the police have not erred in their exercise of discretion with respect to their application of section 12 of the *Act* regarding the withheld information. I am also satisfied that they did not exercise their discretion in bad faith or for an improper purpose. The police have considered the purposes of the *Act*, and have given due regard to the nature and sensitivity of the undisclosed information in the context of this appeal. Accordingly, I find that the police took relevant factors into account and I uphold their exercise of discretion in this appeal.

ORDER:

I uphold the police's exercise of discretion to withhold the information to which section 12 applies.

Original Signed by: _____

November 20, 2018 _____

Lan An
Adjudicator