

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER MO-3749-I

Appeal MA14-30-3

Niagara District Airport Commission

April 5, 2019

**Summary:** The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Niagara District Airport Commission (the commission) for access to a number of categories of records relating to his dealings with it. The commission relied on the exemptions at sections 6 (draft by-law/closed meeting), 7(1) (advice or recommendations), 10(1) (third party information) and 12 (solicitor-client privilege), either alone or in conjunction with section 38(a) (discretion to refuse requester's own information) of the *Act* to deny access to the requested information. The appellant appealed the commission's decision and challenged the reasonableness of its search for responsive records. The commission's position on a number of records changed in the course of adjudication, resulting in some of the records being disclosed to the appellant. In this interim order, the adjudicator orders the disclosure of certain records that the commission did not disclose to the appellant but are no longer claimed to be exempt, upholds the reasonableness of the commission's search for responsive records and finds that section 12 applies to all but two of the remaining records for which it is claimed. He orders that these two records be disclosed to the appellant. Finally, he defers a determination on two attachments to a record.

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

**Orders and Investigation Reports Considered:** Orders MO-3065, MO-3131 and MO-3360.

**Cases Considered:** *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

## **BACKGROUND:**

[1] The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) to the Niagara District Airport Commission (the commission) for access to a number of categories of records relating to his dealings with it. In his request, the appellant advised that responsive records should include, but are not necessarily limited to, the following:

1. All records that have been directly or indirectly referred to in correspondence from [named commission chair] to [the requester] or the Office of the Information and Privacy Commissioner of Ontario relating to [the appellant] or on behalf of any corporation to be formed by [the appellant].
2. All records that have been directly or indirectly referred to in records that are referred to in paragraph [1].
3. This request also includes communications between the Niagara District Airport Commission and any third parties that relate to [the appellant] or on behalf of any corporation to be formed by [the appellant].
4. Records to include; but are not limited to, hand written notes, correspondence, reports, electronic files, emails, voicemail messages, handwritten notes, telephone logs or any record of any type that refers to [the appellant] or on behalf of any corporation to be formed by [the appellant].

[2] The commission initially claimed that the request was frivolous or vexatious, a claim that was not upheld in Order MO-3131, which ordered the commission to produce an access decision. In response to Order MO-3131, the commission produced an interim access decision and fee estimate.

[3] The appellant took issue with the adequacy of the interim access decision and disputed the fees charged in the estimate. During mediation of the appeal, the commission produced a revised fee estimate. In Order MO-3360, Adjudicator John Higgins found that the interim access decision was inadequate. Adjudicator Higgins ordered the commission to prepare a final access decision and statement of fees and to invite comment from the appellant during its preparation.

[4] The commission met with the appellant and then issued an access decision granting partial access to the responsive records it located. The commission relied on sections 10(1) (third party information) and 12 (solicitor-client privilege) to deny access to the portions it withheld. The appellant appealed the access decision, and this appeal file (PA14-30-3) was opened.

[5] At mediation, the appellant took the position that other responsive records ought to exist. Accordingly, the reasonableness of the commission's search for responsive records was added as an issue in the appeal.

[6] As mediation did not resolve the appeal, it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. Shortly thereafter, the commission forwarded a letter to this office indicating that it was seeking to raise the possible application of additional discretionary exemptions to specific records as set out in the letter. Those additional exemptions included sections 6 (draft by-law/closed meeting), 7(1) (advice or recommendations) and 38(a) (discretion to refuse requester's own information). Although this was identified in the Notices of Inquiry (discussed below) as raising an issue of whether the commission can claim the application of additional discretionary exemptions at that stage of the proceeding, the commission actually raised the potential application of these exemptions by the date set out to do so in the Notice of Mediation this office sent to the commission. Accordingly, the late raising of these discretionary exemptions is no longer an issue in the appeal.

[7] I commenced my inquiry by sending a Notice of Inquiry to the commission setting out the facts and issues in the appeal. The commission provided responding representations. The commission asked that portions of its representations be withheld due to confidentiality concerns. In response to an enquiry from this office regarding why a number of records were not addressed in its representations, the commission advised that it was prepared to disclose those records to the appellant and issued a supplementary decision letter disclosing those records to him, in full. In addition, in its representations, the commission indicated that it was withdrawing its reliance on sections 10(1) and/or 12, either alone or in conjunction with section 38(a), with respect to a number of records. These were the only exemptions that the commission had claimed for these records. It is not clear to me, however, whether these records were also disclosed to the appellant. Accordingly, in the order that follows, if they have not yet been provided to the appellant, I will order that those records, being records B155, B164, B167, B180, B191, B193, B194, B207, B211, B212, B224, B231, B232 and B277 be disclosed to him.

[8] I then sent a Notice of Inquiry to the appellant along with a copy of the commission's non-confidential representations. The appellant provided responding representations which were shared with the commission for reply. The commission provided reply representations.

[9] In the course of adjudication, the commission issued a revised decision letter disclosing records B162, B209, B252, B272, B274 and B275 to the appellant. Accordingly, those records are also no longer at issue in the appeal.

[10] As a result, only records B24, B44 to B46, B67, B107, B121, B138, B154, B161, B168, B171, B173, B176, B182, B184, B186, B195, B208, B210, B220, B221, B222, B223, B225, B226, B227, B228, B229, B230, B233, B235, B237, B239, B241, B242, B244, B245, B249, B251, B253, B257, B260, B261, B264, B265, B268, B270, B276 and B278 remained at issue in the appeal.

[11] In this interim order, I order the disclosure of certain records that the commission did not disclose to the appellant but are no longer claimed to be exempt

and uphold the reasonableness of the commission's search for responsive records. I also find that section 12 applies to all but two of the remaining records for which it is claimed and order that these records be disclosed to the appellant. Finally, I defer a determination on two attachments to record B44.

## **RECORDS:**

[12] As set out above, only records B24, B44 to B46, B67, B107, B121, B138, B154, B161, B168, B171, B173, B176, B182, B184, B186, B195, B208, B210, B220, B221, B222, B223, B225, B226, B227, B228, B229, B230, B233, B235, B237, B239, B241, B242, B244, B245, B249, B251, B253, B257, B260, B261, B264, B265, B268, B270, B276 and B278 remain at issue in the appeal.

## **ISSUES:**

- A. Did the institution conduct a reasonable search for records?
- B. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the discretionary exemption at section 12 apply to the information at issue?
- D. Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

## **PRELIMINARY MATTER**

[13] Four of the records at issue, being records B44 to B46 and B121, consist of a letter to a mediator of this office from the commission along with nine attachments (B44), a duplicate copy of the letter on commission letterhead without attachments (B45) and a duplicate copy of the letter not on commission letterhead and without attachments (B46 and B121).

[14] The Mediator's Report in Appeal File MA13-136 (which involved the same parties and resulted in Order MO-3065) confirms that, with the consent of the commission, the appellant received a copy of the original letter, without the attachments, in the course of mediation.

[15] The appellant was subsequently provided access to copies of six of the attachments to record B44 in the course of the mediation of Appeal MA13-136, which resulted in Order MO-3065. In addition, in that order Adjudicator Justine Wai addressed one of the three remaining attachments and found that the last two were not responsive to the request at issue in the appeal before her.

[16] Accordingly, as access has already been provided to the letter to the mediator and seven of the nine attachments have been addressed, only the two attachments that Adjudicator Wai found to be non-responsive to the request before her remain at issue in this appeal. Accordingly I will not address the other documents which comprise records B44 to B46 and B121 in this appeal.

[17] Turning now to the two remaining attachments to record B44, which involve individuals who have not been notified of this proceeding, and which the commission claims are subject to section 38(a) in conjunction with sections 6 and 7(1), I have decided, in all the circumstances to defer a determination on the possible application of section 38(a) in conjunction with sections 6 and 7(1) to those two attachments after I have sought representations from affected parties on these issues. As the two attachments may contain information that qualifies as personal information, I will also seek representations from the affected parties I notify on the possible application of sections 14(1) or 38(b) (personal privacy) to these attachments.

[18] I will now address the balance of the records remaining at issue in this appeal.

## **DISCUSSION:**

### **Issue A: Did the institution conduct a reasonable search for records?**

[19] 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.<sup>1</sup> If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[20] 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.<sup>2</sup> To be responsive, a record must be "reasonably related" to the request.<sup>3</sup>

[21] 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.<sup>4</sup> A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable

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<sup>1</sup> Orders P-85, P-221 and PO-1954-I.

<sup>2</sup> Orders P-624 and PO-2559.

<sup>3</sup> Order PO-2554.

<sup>4</sup> Orders M-909, PO-2469 and PO-2592.

effort to identify and locate all of the responsive records within its custody or control.<sup>5</sup> 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.<sup>6</sup>

### **The commission's representations**

[22] The commission submits that experienced employees knowledgeable in the subject matter of the request expended reasonable efforts to locate responsive records. The commission adds:

The commission's current complement of office staff is comprised of four individuals. Two of these individuals, the Chief Executive Officer and the Airport Executive Assistant completed the search, review and indexing of those responsive records.

These two individuals were knowledgeable in terms of available records and the broad scope of the request itself and were the most qualified to perform a reasonable search.

The reasonable search consisted of a sample search and a complete search pursuant to order MO-3360.

As part of the commission's complete search, based on Order MO-3360's instruction to invite comment from the requestor concerning the records he was to receive, meetings were held with the requestor at the commission on [three specified dates].

As of [the date of the last meeting], the employees had already spent approximately 25.75 on the search which search was only approximately 50% complete.

This is documented through the commission's request and subsequent granting of an extension of the deadline ordered. The relevant correspondence has been included in the affidavits of [...], Chief Executive Officer of the Niagara District Airport Commission and [...], the Niagara District Airport Executive Assistant included herein which provide further details of efforts taken in furtherance of their search.

[23] The commission provided affidavits of the two individuals confirming its submissions.

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<sup>5</sup> Order MO-2185.

<sup>6</sup> Order MO-2246.

### **The appellant's representations**

[24] The appellant takes the position that the commission "did a reasonable search when it located an estimated 5570 pages of responsive records". However, he queries, "[w]ith the latest index of records showing 824 pages, the real issue is how did 4746 pages disappear?"

### **The commission's reply**

[25] In reply, the commission explains in its introduction that:

Early in the process, the commission produced an interim access decision and a fee estimate based upon a sample search for responsive records which estimated over 5,000 pages of responsive records. An adjudicator for the Information and Privacy Commissioner ("IPC") determined that this interim access decision was inadequate and an overestimation and ordered the commission to produce a final access decision.

In order to produce a final access decision, the commission conducted an actual search for responsive records. This actual search yielded 284 responsive records comprised of the 824 pages now in question.

Of the 284 responsive records found, 214 have now been disclosed to the requester and just 70 responsive records remain undisclosed on the basis of applicable exemptions.

[26] In the body of its reply representations the commission adds:

The estimate of 5557 pages of responsive records was the result of a sample search conducted by the commission when producing an interim access decision, not an actual search for responsive records. [...]

In contrast, the index of 284 responsive records, consisting of approximately 824 pages, was the result of the actual search for responsive records conducted by the commission to produce the final access decision ordered by the IPC.

### **Analysis and finding**

[27] Although the appellant takes issue with the reasonableness of the commission's search for responsive records, in my view he has failed to provide sufficient evidence to challenge the evidence or submissions they provided in support of the reasonableness of their search.

[28] In that regard, I find that the commission has provided a sufficient explanation for the difference between the number of records generated by its sample search and the number of actual responsive records it located after Adjudicator Higgins concluded

in Order MO-3360 that its interim access decision was inadequate. I also accept the commission's explanation that as a result of the subsequent disclosure, only the records listed above remain at issue in this appeal.

[29] In all the circumstances, I am satisfied that the commission's representations and the affidavits it filed in support of its position demonstrate that its search for responsive records is in compliance with its obligations under the *Act*. Accordingly, I conclude that the commission conducted a reasonable search for responsive records.

**Issue B: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?**

[30] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. 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;

[31] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.<sup>7</sup>

[32] 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.

[33] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.<sup>8</sup> Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.<sup>9</sup> To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>10</sup>

### **The commission's representations**

[34] The commission submits that certain records contain information pertaining to identifiable individuals other than the appellant.

### **The appellant's representations**

[35] The appellant submits that his request relates to him or any corporation to be formed by him. He adds that "the matter of personal information" was previously dealt

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<sup>7</sup> Order 11

<sup>8</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>9</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>10</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

with in the prior orders dealing with the request before me.

### **Analysis and finding**

[36] I have deferred a determination on whether the two attachments to Record B44 may contain personal information and I will not address them here.

[37] I disagree with the appellant that prior orders relating to his request dealt with a determination of whether the remaining records now before me contain personal information. In Order MO-3131 Adjudicator Wai only addressed whether the request was frivolous or vexatious. In Order MO-3360 Adjudicator Higgins simply ordered the commission to produce an interim access decision. Although he made certain general comments, he left to another day the determination of whether responsive records contained personal information<sup>11</sup>.

[38] In my view, with limited exceptions, all of the information in the records remaining at issue relates to the individuals mentioned in them, including the appellant, in a professional, official or business capacity rather than a personal capacity. I further find that, except with respect to a limited number of records, disclosing the information in them would not reveal something of a personal nature about the individuals.

[39] The limited exceptions relate to some records remaining at issue that contain information about an individual who died and the nature of certain dealings with that individual's estate, including the identity of their personal representative, that may qualify as personal information of identifiable individuals other than the appellant. However, because I find below that these records qualify for exemption under section 12, it is not necessary for me to also make a determination whether the information in them is personal information of other identifiable individuals that may be subject to exemption under section 38(b) of the *Act*.<sup>12</sup>

[40] As I have found that the records remaining at issue do not contain the appellant's personal information, and I need not address the potential application of section 38(b) in this interim order, I will consider access to the records under Part I of the *Act*, as explained in more detail below.

### **Issue C: Does the discretionary exemption at section 12 apply to the information at issue?**

[41] The legislative scheme established by the *Act* contains different entitlements to

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<sup>11</sup> See the discussion at paragraphs 110 to 114 of Adjudicator Higgins' order

<sup>12</sup> Section 38(b) provides that a head may refuse to disclose to the individual to whom the information relates personal information, if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

information, depending on whether the request is for an individual's own personal information, or for general records. In the former situation, requests would be processed under Part II of the *Act* as the right of access is found in Part II. In the latter case, requests would be treated under Part I of the *Act*.<sup>13</sup>

[42] Section 38(a) applies if a record contains the requester's own personal information. If it does, the analysis is conducted under Part II of the *Act*. If a record does not contain the requester's own personal information the analysis is conducted under Part I of the *Act*, and, in the circumstances of this appeal, only 12 of the *Act* is considered.

[43] As I have found that the records remaining at issue do not contain the appellant's personal information, I will consider access to the records under Part I of the *Act*.

[44] 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.

[45] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution...") is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

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

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

#### ***Solicitor-client communication privilege***

[47] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.<sup>14</sup> The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.<sup>15</sup> 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

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<sup>13</sup> Order M-352.

<sup>14</sup> *Descôteaux v. Mierzewski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>15</sup> Orders MO-1925, MO-2166 and PO-2441.

keeping both informed so that advice can be sought and given.<sup>16</sup>

[48] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.<sup>17</sup> The privilege does not cover communications between a solicitor and a party on the other side of a transaction.<sup>18</sup>

### **Loss of privilege**

[49] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.<sup>19</sup>

[50] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.<sup>20</sup>

[51] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.<sup>21</sup> However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.<sup>22</sup>

### **Branch 2: statutory privileges**

[52] Branch 2 is a statutory privilege that applies where the records were 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.” The statutory exemption and common law privileges, although not identical, exist for similar reasons.

### **The commission’s representations**

[53] The commission submits that the discretionary exemption at section 12 applies to records B24, B67, B107, B138, B154, B161, B168, B171, B173, B176, B182, B184, B186, B195, B208, B210, B220, B221, B222, B223, B225, B226, B227, B228, B229,

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<sup>16</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

<sup>17</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

<sup>18</sup> *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

<sup>19</sup> *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

<sup>20</sup> *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

<sup>21</sup> Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

<sup>22</sup> *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

B230, B233, B235, B237, B239, B241, B242, B244, B245, B249, B251, B253, B257, B260, B261, B264, B265, B268, B270, B276 and B278.

[54] The commission submits that the records are direct and confidential communications between a solicitor and client, made for the purpose of giving professional legal advice. The commission further submit that the records are also subject to statutory solicitor-client communication privilege because they were prepared by counsel retained by the commission for use in giving legal advice.

[55] The commission submits that record B235 is also subject to common law and statutory litigation privilege because it was prepared in contemplation of or for use in litigation.

[56] The commission submits that it has not waived privilege.

### **The appellant's representations**

[57] The appellant submits that except for records B67 and B138, which he submits were over eight years old, the balance of the records relate to records from 1994 and earlier and that the commission has conceded that there is no chance of litigation on the contained information at this time.

### **Analysis and finding**

[58] I find that the disclosure of the information in records B24, B67, B107, B138, B154, B161, B168, B171, B173, B182, B184, B186, B195, B208, B210, B220, B221, B222, B223, B225, B226, B227, B228, B230, B233, B235, B237, B239, B241, B242, B244, B245, B249, B251, B253, B257, B260, B261, B264, B265, B268, B270, B276 and B278 would reveal 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 and aimed at keeping both informed so that advice can be sought and given or would reveal the substance of the confidential communication or legal opinion provided, and/or would qualify as a record prepared by or for counsel employed or retained by an institution for use in giving legal advice. In light of this conclusion, it is not necessary for me to determine whether record B235 is also subject to the common law or statutory litigation privilege. On the facts before me, I am satisfied that no waiver of privilege has occurred with respect to this information. As a result, I find that this information qualifies for exemption under section 12 of the *Act*.

[59] However, I find that records B176 and B229 do not qualify for exemption under section 12. This is because record B176 simply consists of notes written by the then Airport Manager and record B229 is a copy of a letter sent from the commission's solicitor to the appellant's solicitor and another solicitor and therefore did not originate in confidence. As I have found these records do not qualify for exemption under section 12 of the *Act* I will order that they be disclosed to the appellant.

**Issue D: Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?**

[60] The section 12 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[61] 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.

[62] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>23</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>24</sup>

**The commission's representations**

[63] The commission submits that in exercising its discretion it considered the purposes of *MFIPPA*, the wording of potential exemptions and the interests those exemptions seek to protect, as well as the nature of the information sought and the extent to which it is significant to the commission and other affected persons.

[64] With respect to the records which I have found to be subject to section 12 of the *Act*, the commission submits that it considered that the records represent direct communications between the commission and its solicitor, all made for the purpose of giving or obtaining legal advice regarding a variety of matters.

[65] The commission submits that it did not exercise its discretion in bad faith or for an improper purpose and took all relevant factors into account when exercising its jurisdiction regarding the records that I have found to qualify for exemption under section 12 of the *Act*.

**The appellant's representations**

[66] The appellant submits that the commission did not properly exercise its

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<sup>23</sup> Order MO-1573.

<sup>24</sup> Section 43(2).

discretion under section 12 and that the commission's exercise of discretion should not be upheld. The appellant further states that the commission has withheld entire records when only a portion of the record may actually qualify for exemption.

[67] The appellant submits that he is seeking his own information, and that he should have the right to access his own information regardless of source. He adds that any exemption from this right should be limited and that specific, rather than generic, reasons for such limitation should be provided by the commission.

[68] He submits that:

... The commission has not provided any specific reasons to support the exercise of its discretion. The commission did not provide any viable reason for the appellant not to have access to his own information. Most of the records withheld are well over 20 years old and well beyond any useful limitation period. Although the commission made a general statement that it considered all relevant factors, it failed to provide any details or evidence of what factors or how it took those factors into account.

### **The commission's reply representations**

[69] In reply, the commission states that it understands that where an exemption is applicable to a record it is able to withhold portions of the records rather than whole records, however, the commission submits that due to the nature of the documents withheld and the basis for withholding them, supplying partial records was not feasible.

### **Analysis and finding**

[70] I have considered the representations provided by the commission and the appellant on the commission's exercise of discretion. I am satisfied that in all the circumstances, the commission properly exercised its discretion under section 12 of the *Act*. It should be noted that the Supreme Court of Canada has stressed the categorical nature of the privilege when discussing the exercise of discretion in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*.<sup>25</sup>

[71] I have also considered whether the records that I have found to be subject to section 12 can be severed and portions of the withheld information be provided to the appellant. In my view, in light of the appellant's familiarity with underlying matters in the records at issue, I am satisfied that the records cannot be severed without disclosing information that I have found to fall within the scope of section 12. Furthermore, as identified in previous orders, an institution is not required to sever the

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<sup>25</sup> 2010 SCC 23, [2010] 1 S.C.R. 815 at paragraph 75.

record and disclose portions where to do so would reveal only "disconnected snippets," or "worthless" or "meaningless" information.<sup>26</sup>

## CONCLUSION

[72] In this interim order, I order the disclosure of certain records that the commission did not disclose to the appellant but are no longer claimed to be exempt and uphold the reasonableness of the commission's search for responsive records. I also found that section 12 applies to all but two of the remaining records for which it is claimed and order that these records be disclosed to the appellant.

[73] As noted, regarding the two remaining attachments to record B44, which involve individuals who have not been notified of this proceeding, and which the commission claims are subject to section 38(a) in conjunction with sections 6 and 7(1), I have decided, in all the circumstances to defer a determination on the possible application of section 38(a) in conjunction with sections 6 and 7(1) to those two attachments until after I have sought representations from affected parties on these issues. As the two attachments may contain information that qualifies as personal information, I will also seek representations on the possible application of sections 14(1) or 38(b) (personal privacy) to these attachments.

## ORDER:

1. If they have not yet been provided to the appellant, I order the commission to disclose to the appellant records B155, B164, B167, B180, B191, B193, B194, B207, B211, B212, B224, B231, B232 and B277 by sending him a copy by , 2019, but not before , 2019.
2. I order the commission to disclose records B176 and B229 to the appellant by sending him a copy by **May 13, 2019**, but not before **May 9, 2019**.
3. I uphold the reasonableness of the commission's search for responsive records.
4. I uphold the commission's decision that records B24, B67, B107, B138, B154, B161, B168, B171, B173, B182, B184, B186, B195, B208, B210, B220, B221, B222, B223, B225, B226, B227, B228, B230, B233, B235, B237, B239, B241, B242, B244, B245, B249, B251, B253, B257, B260, B261, B264, B265, B268, B270, B276 and B278 qualify for exemption under section 12 of the *Act*.

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<sup>26</sup> See Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, (1997), 192 O.A.C. 71 (Div. Ct.).



5. In order to ensure compliance with paragraphs 1 and 2, I reserve the right to require the commission to send me a copy of the pages of records as disclosed to the appellant.

Original signed by \_\_\_\_\_  
Steve Faughnan  
Adjudicator

\_\_\_\_\_ April 29, 2019