

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3849

Appeal MA18-486

City of Ottawa

October 21, 2019

Summary: This appeal deals with an access request for all information relating to complaints about a specified property. The city located records responsive to the request and granted partial access to the records. The city withheld portions of the records, claiming the application of the discretionary exemptions in sections 7(1) (advice or recommendations) and 8(1)(d) (law enforcement), as well as the mandatory exemption in 14(1) (personal privacy) of the *Municipal Freedom of Information and Protection of Privacy Act*. During the mediation of the appeal, the mediator raised the possible application of sections 38(a) (discretion to refuse requester's own information) and 38(b) (personal privacy), as the records appeared to contain the appellant's personal information. Also during mediation and after the deadline for raising further discretionary exemptions, the city raised the possible application of section 12 (solicitor-client privilege) to portions of the records.

In this order, the adjudicator allows the late raising of a discretionary exemption. She also upholds the city's application of the discretionary exemptions in section 38(a), in conjunction with sections 8(1)(d) and 12, as well as section 38(b). The city's exercise of discretion is upheld and the appeal is dismissed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of personal information), 7, 8(1)(d), 12, 38(a) and 38(b).

Orders and Investigation Reports Considered: Orders MO-2070 and PO-3052.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the City of Ottawa (the city) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for: all information related to a complaint alleging by-law infractions regarding a fence, grading, and/or damage; all information relating to a complaint regarding building a structure (gazebo); and all information relating to a fence (adjacent to a specified road).

[2] The city acknowledged receipt of the request and sought clarification from the requester. The requester confirmed that he was seeking records over a specified time period that related to a specific address. He also requested records related to a complaint about a lamppost, or a light stand, in the front yard of the same address from a specified time period.

[3] The city notified individuals who might have an interest in the records (the affected parties). Some of the affected parties did not provide their consent to disclose the records, while others did not respond or were unable to be notified. The city then issued a decision granting partial access to records responsive to the request. It withheld some information, claiming the application of the discretionary exemptions in sections 7(1) (advice or recommendations) and 8(1)(d) (law enforcement), as well as the mandatory exemption in 14(1) (personal privacy) of the *Act*.

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

[5] During the course of mediation, the mediator noted that the withheld information contained the personal information of both the appellant and a number of other individuals (the affected parties). As a result, sections 38(a) (discretion to refuse requester's own information) and 38(b) (personal privacy) of the *Act* were added as issues in this appeal.

[6] Also during mediation, the city revised its decision and granted further access, in part, to the responsive records. It continued to deny access to the remaining withheld information under sections 7(1), 8(1)(d) and 14(1). The city also claimed, for the first time, the application of the discretionary exemption in section 12 (solicitor-client privilege).

[7] The mediator advised the appellant of the results of notification and advised that the city had raised section 12 at a late stage. The appellant confirmed that he wished to pursue access to all of the withheld information and advised the mediator that the late raising of the discretionary exemption in section 12 was also at issue.

[8] The file was then transferred to the adjudication stage of the appeals process, where an adjudicator may conduct a written inquiry under the *Act*. The adjudicator assigned to the file began this inquiry by inviting representations from the city and the affected parties. She received representations from the city and one affected party. She

then sought, and received, representations from the appellant. The file was then transferred to me to continue the inquiry.

[9] For the reasons that follow, I allow the late raising of a discretionary exemption. I uphold the city's application of the discretionary exemptions in section 38(a), in conjunction with sections 8(1)(d) and 12, as well as section 38(b). I also uphold the city's exercise of discretion and dismiss the appeal.

RECORDS:

[10] There are 35 pages of records called Service Requests, which were generated as a result of complaints made to the city about a specified property. Only portions of these records have been withheld.

ISSUES:

- A. Can the city raise a discretionary exemption late?
- 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 7(1) apply to the records?
- D. Does the discretionary exemption at section 38(a), in conjunction with section 8(1)(d) apply to the records?
- E. Does the discretionary exemption at section 38(a), in conjunction with section 12 apply to the records?
- F. Does the discretionary exemption at section 38(b) apply to the records?
- G. Did the city exercise its discretion under sections 38(a) and (b)? If so, should this office uphold the exercise of discretion?

DISCUSSION

Issue A: Can the city raise a discretionary exemption late?

[11] During the mediation of the appeal, the city raised the application of the discretionary exemption in section 12 to two portions of one record. The appellant takes issue with the city's late raising of section 12 to deny access to a record.

[12] The *Code of Procedure* (the *Code*) provides basic procedural guidelines for

parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal.

[13] Section 11.01 states:

In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[14] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.¹

[15] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.² The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.³

[16] The city submits that it raised the additional discretionary exemption after the 35-day deadline, but before the deadline for advising the mediator of any revisions to the mediator's report. The city further submits that the appellant has not been prejudiced, as the late raising has not delayed the appeals process other than the few days required for the mediator to issue a revised mediator's report. It goes on to argue that it may be prejudiced if not afforded the opportunity to apply section 12(1), given the purpose of the solicitor-client privilege exemption, and the importance the courts have ascribed to the principle of solicitor-client privilege. Lastly, the city states:

. . .[T]he City submits that the appeals process has not been harmed in any way. Nothing in this derogates from or otherwise prejudices the position of the appellant under this appeal as the appellant has the

¹ *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

² Order PO-1832.

³ Orders PO-2113 and PO-2331.

opportunity to make submissions regarding the application of discretionary exemptions and review the submissions of the City concerning the applicability of the section 12 discretionary exemption, prior to providing the appellant's submissions in this appeal.

[17] The appellant submits that this office should deny the city's late raising of section 12 to deny access to a record.

Analysis and finding

[18] In Order MO-2070, Adjudicator Catherine Corban explained the purpose of this office's policy on the late raising of discretionary exemptions. She stated:

Previous orders issued by the Commissioner's office have held that the Commissioner or his delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to establish time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter, subject, of course, to a consideration of the particular circumstances of each case.

The objective of the policy is to provide government institutions with a window of opportunity to raise new discretionary exemptions, but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant in the release of the information prejudiced. In my view, the objective of the policy is applicable to this situation. This approach was upheld by the Divisional Court in the case of *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg*.⁴

In adjudicating the issue of whether to allow the City to claim this discretionary exemption at this time, I must weigh the balance between maintaining the integrity of the appeals process against any evidence of extenuating circumstances advanced by the City.⁵ I must also balance the relative prejudice to the City and the appellant in the outcome of my ruling.

...

Earlier identification of an exemption claim permits the appellant time to consider and reflect on its application, consult on the issue if it deems it necessary and gives the appellant an opportunity to address the

⁴ (21 December 1995) Toronto Docket 220/89.

⁵ Order P-658.

exemption claim in mediation. In some situations, as well, failure to claim a discretionary exemption in a timely manner may have an effect on whether all relevant evidence or information is retained by the appellant for use in the appeal. In my view, these considerations relate to the overall integrity of the appeals process and must be taken into account by an Adjudicator in deciding whether to grant a request for the late raising of a new discretionary exemption.

[19] I adopt Adjudicator Corban's approach to this office's policy on the issue of late raising of discretionary exemptions. I have decided to permit the city to claim section 12 because I am not satisfied that any of the factors identified above as supporting the application of the policy are present in this case. Most importantly, I have also concluded that the appellant will not be prejudiced by the late raising of section 12, as another discretionary exemption (section 7(1)) was claimed for the same information, which he was able to consider during mediation. In addition, the appellant has been given an opportunity to address the section 12 exemption claim during this inquiry, and no delay has resulted from the additional claim.

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

[20] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "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;

[21] 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.⁶

[22] Section (2.1) also relates to the definition of personal information, and states:

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.

[23] 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.⁷

[24] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁸

[25] The city submits that the records relate to complaints made to it, and that they contain the personal information of identifiable individuals, including their name, address, telephone number, municipal address and other identifying information pertaining to complainant(s), which qualifies as their personal information as defined in section 2(1) of the *Act*. In addition, the city submits that the complaint(s) were all made in a personal, rather than a professional, official or business capacity.

[26] One affected party submits that the records contain their personal information, including their name and address and that the information about them is in their

⁶ Order 11.

⁷ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁸ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

personal capacity.

[27] The appellant's representations do not directly address this issue.

Analysis and findings

[28] On my review of the records, I find that they contain the personal information of a number of individuals, including the appellant. I find that the information that qualifies as the appellant's personal information includes his address, which falls within paragraph (d) of the definition of personal information in section 2(1) of the *Act*, as well as appellant's name where it appears with other personal information relating to him, falling within paragraph (h) of the definition.

[29] I also find that the records contain the personal information of a number of other individuals, including their name, address, telephone number (paragraph (d) of the definition), as well as their name with other personal information relating to them (paragraph (h) of the definition).

[30] Lastly, I find that the records contain the personal information of one city staff member and one staff member of the Rideau Valley Conservation Authority. The information about the city staff member relates to an absence from work. While this information is in the context of him in his professional capacity, I find that it also reveals something of a personal nature about that staff member. Finally, the information of the staff member of the Rideau Valley Conservation Authority qualifies as her personal information because it contains her personal cell phone number, which falls within paragraph (d) of the definition of personal information.

[31] Having found that the records contain the personal information of the appellant and other individuals, I will now determine whether the discretionary exemptions in sections 38(a) or 38(b) apply to the portions of the records the city withheld from disclosure.

Issue C: Does the discretionary exemption at section 38(a), in conjunction with 7(1) apply to the records?

[32] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[33] 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.

[34] 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.⁹

[35] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[36] In this case, the institution relies on section 38(a) in conjunction with sections 7(1), 8(1)(d) and 12.

[37] Section 7(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[38] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.¹⁰

[39] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[40] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.¹¹

[41] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[42] Advice or recommendations may be that the information itself consists of advice or recommendations, or the information, if disclosed, would permit the drawing of

⁹ Order M-352.

¹⁰ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

¹¹ See above at paras. 26 and 47.

accurate inferences as to the nature of the actual advice or recommendations.¹²

[43] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 7(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.¹³

[44] The city submits that two portions of one of the records are exempt under section 38(a), in conjunction with section 7(1), as they contain advice provided by staff during deliberations about the city's response to complaint(s) made about the appellant's property. The city further submits that the records were used by a city by-law officer to document his daily work when responding to a complaint. In this case, a meeting took place between a number of city staff members and the Rideau Valley Conservation Authority staff members. The information that the city has withheld, it argues, summarizes actual staff advice that was given. The city also submits that none of the exceptions in sections 7(2) and 7(3) apply.

[45] The appellant's representations do not address this issue.

Analysis and finding

[46] Having reviewed the representations of the parties and the portions of the record that were withheld, I find that the exemption in section 7(1) does not apply to this information. Past orders of this office have found that advice or recommendations qualify for exemption under section 7(1) where either are prepared in order to be provided to a government decision or policy maker. In addition, the intent of this exemption is to protect advice or recommendations that "flow upwards" to the ultimate decision maker who is in a position to accept or reject it.¹⁴

[47] I find that in the present appeal, the information that was withheld under this exemption is not advice or recommendations that were provided to, or intended to be provided to the ultimate decision maker and is, therefore not exempt from disclosure. The city is also claiming the application of the solicitor-client privilege exemption in section 12, which I consider below.

¹² Order P-1054

¹³ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

¹⁴ See, for example, Order PO-3052.

Issue D: Does the discretionary exemption at section 38(a), in conjunction with section 8(1)(d) apply to the records?

[48] Section 8(1)(d) reads:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

[49] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b)

[50] The term "law enforcement" has covered a municipality's investigation into a possible violation of a municipal by-law.¹⁵

[51] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.¹⁶ It is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.¹⁷ The institution must provide evidence about the potential for harm, demonstrating a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹⁸

[52] With respect to section 8(1)(d) in particular, the institution must establish a

¹⁵ Orders M-16 and MO-1245.

¹⁶ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

¹⁷ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

¹⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances.¹⁹

[53] The city submits that the disclosure of the information it withheld under section 8(1)(d) would result in the disclosure of the identity of a confidential source in respect of a law enforcement matter, which includes a municipality's investigation into a possible violation of municipal by-laws. In this case, the city argues, the name of the complainant(s) relates to alleged infractions of the *Building Code Act* and municipal by-laws, including zoning by-laws and the city's property standards by-law.

[54] The city goes on to state:

Similar to other municipalities and law enforcement organizations, it is the standard practice of the City by-law and regulatory services to not identify individual sources without obtaining prior consent of informant(s) their identity (sic) in respect of law enforcement matters as to do so would discourage individuals from registering potential complaints and providing information in aid of an investigation. . . . The City submits that if it were to fail to keep confidential the identity of the sources, it would jeopardize the ability of by-law officers to carry out their mandate including investigating and proceeding with charges under City by-laws. In sum, the City submits that it is reasonable and necessary for the identity of complainant(s) remain confidential as the City By-law and Regulatory Services Department relies on confidential sources to provide information about by-law infractions.

[55] The appellant's representations do not address the possible application of section 8(1)(d).

Analysis and finding

[56] As noted above, previous orders of this office have determined that a municipality's by-law enforcement process qualifies as a "law enforcement" matter for the purposes of section 2(1) of the *Act*.²⁰ I agree with those orders and adopt their finding for the purposes of this appeal.

[57] I have reviewed the records and considered the representations of the parties to the appeal. The records relate to complaints made about possible infractions of the *Building Code Act*, municipal by-laws, including zoning by-laws and the property standards by-law. On the evidence provided, I accept that, at the time the complainant(s) submitted their complaints, they had a reasonable expectation that their

¹⁹ Order MO-1416.

²⁰ See footnote 15, above.

identity would remain confidential.²¹ Finally, I find that disclosure of the names, addresses, telephone numbers of the complainant(s), as well as other information that was withheld, would disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source. Accordingly, I find that this information qualifies for exemption under section 38(a) of the *Act*, in conjunction with section 8(1)(d), subject to my finding regarding the city's exercise of discretion.

Issue E: Does the discretionary exemption at section 38(a) in conjunction with section 12 apply to the records?

[58] 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.

[59] 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.

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

[61] 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.²² The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.²³ 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.²⁴

[62] 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.²⁵ The privilege does not cover communications between a

²¹ See, for example Orders MO-2238 and MO-2272.

²² *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

²³ Orders PO-2441, MO-2166 and MO-1925.

²⁴ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

²⁵ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

solicitor and a party on the other side of a transaction.²⁶

[63] 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.²⁷ 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.²⁸ Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.²⁹ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.³⁰

[64] The city submits that it withheld a portion of one entry made by a by-law and regulatory services officer under section 12 because it is subject to solicitor-client privilege under the common-law and under statute. The discussion contained in the records was the result of a meeting between a by-law and regulatory officer, the city's legal counsel, city planning staff and a representative of the Rideau Valley Conservation Authority. The advice was provided by legal counsel to his client, namely the by-law and regulator services officer and certain of the city's planning staff, who were resolving a complaint that involved structures built on residential properties that were adjacent to a river.

[65] The city further argues that both this office and the Courts have affirmed that solicitor-client privilege applies to the entire continuum of communications between a solicitor and client. In other words, the privilege not only applies to the advice provided, but also applies to instances when the advice is repeated, when advice is sought, and when the advice provided by legal counsel is strategic advice.

[66] Lastly, the city submits that it has not waived the privilege, and that the city staff and the Rideau Valley Conservation Authority had a common interest in ensuring that structures along the river comply with applicable legislation, including provincial environmental and municipal by-laws. The city argues that both this office and the Courts have recognized that multiple parties may share legal opinions in an effort to address a common goal, while at the same time maintaining an expectation of confidentiality vis-à-vis others.³¹

²⁶ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

²⁷ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

²⁸ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

²⁹ 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.).

³⁰ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

³¹ *Pitney Bowes of Canada Ltd. v. Canada*

[67] The appellant representations do not address the possible application of the exemption in section 12.

Analysis and finding

[68] Having reviewed the parties' representations and the record for which section 12 was claimed, I find that the two portions of this record that the city withheld are exempt from disclosure under branch 1 (solicitor-client privilege) of section 12, subject to my finding regarding the city's exercise of discretion. It is clear from the city's representations and from a portion of the record that was disclosed to the appellant that a meeting took place between city staff, including the city's legal counsel, and the Rideau Valley Conservation Authority (the conservation authority) staff. I find that the two portions at issue form part of the continuum of confidential communications between the city's legal counsel and staff of both the city and the conservation authority, in which legal advice is sought and subsequently provided.

[69] I further find that there is no evidence that the city has waived its solicitor-client privilege, and I accept the city's evidence that it had a common interest with the conservation authority to the extent that the solicitor-client privilege attached to the communications that took place at the meeting was not waived.

Issue F: Does the discretionary exemption at section 38(b) apply to the information at issue?

[70] 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.

[71] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.³²

[72] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy. In this case, I find none of these paragraphs in section 14(1) apply. Sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 14(4) lists situations that would not be

³² See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

an unjustified invasion of personal privacy.

[73] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.³³

[74] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 38(b).

[75] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.³⁴ The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).³⁵

[76] If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[77] The city's and the appellant's representations on the application of section 38(b) focus on the personal information of the complainant(s). In particular, the city submits that the presumption in section 14(3)(b) applies because the complainant(s) personal information was collected as part of an investigation into a possible violation of law. The appellant submits that he requires the names of the complainant(s) because he has been harassed with improper complaints about his property, and wishes to have information about the complainant(s) in order to determine whether to proceed with legal proceedings against him/her or them. The appellant further submits that the factor in section 14(2)(d), which favours disclosure, applies.

Analysis and findings

[78] As stated above, both the city's and the appellant's representations address the personal information of the complainant(s). I note that all of the appellant's personal information has been disclosed to him. In addition, I have already found the personal information of the complainant(s) to be exempt under section 38(a), in conjunction with section 8(1)(d). Further, I have found a portion of one page to be exempt under section 38(a), in conjunction with section 12. On my review of the records, I find that the only remaining personal information at issue is the cellular telephone number of a staff

³³ Order MO-2954.

³⁴ Order P-239.

³⁵ Order P-99.

member from the Rideau Valley Conservation Authority and the work absence of a city staff member.

[79] I find that the disclosure of the cellular telephone number of the staff member of the Rideau Valley Conservation Authority and the work absence of the city staff member would constitute an unjustified invasion of their privacy and is, therefore, exempt under section 38(b), subject to my findings regarding the city's exercise of discretion. Although I find that none of the presumptions in section 14(3) applies to this personal information, I also find that none of the factors weighing in favour of disclosure applies to this particular personal information, including the factor in section 14(2)(d), given the appellant's statement that any proceedings he may initiate would be with respect to the complainant(s).

Issue G: Did the city exercise its discretion under sections 38(a) and (b)? If so, should this office uphold the exercise of discretion?

[80] The sections 38(a) and (b) 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 Commissioner may determine whether the institution failed to do so.

[81] 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, or it fails to take into account relevant considerations.

[82] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.³⁶ This office may not, however, substitute its own discretion for that of the institution.³⁷

[83] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:³⁸

- 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, and the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;

³⁶ Order MO-1573.

³⁷ Section 43(2).

³⁸ Orders P-344 and MO-1573.

- 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.

[84] The city submits that it applied the discretionary exemptions in accordance with the purposes of the *Act*, it took into account all relevant considerations, and it did not take into account irrelevant or improper considerations. The city further submits that in exercising its discretion under section 12, it considered the importance of protecting solicitor-client privileged communications, while at the same time exempting only those portions of the record that contained legal advice.

[85] Turning to the city's exercise of discretion under section 38(a) in conjunction with section 8(1)(d), the city submits that it took into consideration the fact that disclosure of the withheld portions would result in disclosure of the identity of confidential source(s) in a law enforcement matter.

[86] Lastly, the city submits that it disclosed as much of the responsive records as possible to the appellant, without disclosing exempt information.

[87] The appellant's position is that he has been the target of harassment since moving into his home, and that the city has been complicit in this harassment by allowing persons to hide behind legislation that was never designed to allow private citizens to commit torts against others with impunity.

Analysis and finding

[88] An institution's exercise of discretion must be made in full appreciation of the

facts of the case, and upon proper application of the applicable principles of law.³⁹ It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the city to reconsider the exercise of discretion.⁴⁰

[89] I am satisfied that the city properly exercised its discretion, in good faith, in not disclosing the information I found exempt under the solicitor-client, law enforcement and personal privacy exemptions. I find that the city took relevant factors into consideration, including one of the purposes of the law enforcement exemption, which is to ensure that certain kinds of law enforcement activity must be conducted under conditions of confidentiality. I further find that the city took into consideration the importance of the confidentiality of communications between a solicitor and his/her client. With respect to the discretionary exemption in section 38(b) (personal privacy), I find that the city properly exercised its discretion in balancing the appellant's interest in the disclosure of the records, with the privacy of other individuals and that the city, in fact, disclosed as much of the appellant's personal information as possible, withholding only small portions of the records. Finally, I find that the city did not take irrelevant factors into consideration when exercising its discretion.

ORDER:

I allow the late raising of a discretionary exemption. I uphold the city's application of the discretionary exemptions in sections 38(a), in conjunction with sections 8(1)(d) and 12, as well as section 38(b) to the records. I uphold the city's exercise of discretion and dismiss the appeal.

Original signed by _____
Cathy Hamilton
Adjudicator

October 21, 2019 _____

³⁹ Order MO-1287-I.

⁴⁰ Order 58.