Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-3876-I

Appeal MA18-179-2

The Corporation of the City of North Bay

December 17, 2019

Summary: The city received a request from the appellant under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for emails relating to the appellant or his address. After a fee estimate was issued, the city granted partial access and relied on the exclusion at section 52(2.1) (ongoing prosecution) and the exemptions at sections 12 (solicitor-client privilege) and 14(1) (personal privacy) to withhold the remaining information. Subsequently, the city issued a revised decision granting partial access to further responsive records, and relied on sections 12 and 14(1) to withhold the remaining information. During mediation, the appellant advised he was only interested in the records withheld under sections 12 and 52(2.1). He also advised he was appealing the revised initial fee of $42.40. During the inquiry, the city confirmed that it was no longer relying on section 52(2.1) as the prosecution was completed.

In this order, the adjudicator upholds the city's decision, in part, that the records in the first two categories are subject to the solicitor-client privilege at section 12. She orders the city to disclose the non-exempt records in these two categories. Although she finds the city's revised initial fee should be $42.20, she did not order the city to reimburse the $0.20 as it is a negligible difference.

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 and 57(1).

Orders Considered: Orders MO-2474 and MO-3725.

Cases Considered: *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

OVERVIEW:

[1] The Corporation of the City of North Bay (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all emails between the requester and city staff and all emails from city staff, which mention the requester's name, or his specified address.

[2] The city acknowledged receipt of the request and twice requested that the requester narrow the scope of his request to a specific timeframe. However, the requester refused to narrow his request.

[3] As the city failed to issue an access decision, the requester (now the appellant) appealed to this office, which resulted in appeal MA18-179 being opened.

[4] Subsequently, the city issued a fee estimate in the amount of $4,609 and requested a 50% deposit of $2304.50.

[5] The appellant advised the mediator that he had issues with the fee estimate. After discussions between the mediator and the city regarding the fee estimate, the city issued a revised fee estimate in the amount of $42.40. It granted partial access to the responsive records, and relied on the exemptions at sections 12 (solicitor-client privilege), 14(1) (personal privacy) and the exclusion at section 52(2.1) (ongoing prosecution) of the *Act* to deny access to the withheld information.

[6] Once the access decision was issued, appeal MA18-179 was closed.

[7] The appellant subsequently paid the fee and the responsive records were disclosed to him. On receipt of the responsive records, the appellant contacted the city to advise it of records that he felt were omitted from the disclosed records. Subsequently, the city issued a revised decision granting partial access to further records responsive to the appellant's request. The city denied access to the withheld information pursuant to sections 12 and 14(1) of the *Act*. The city also assessed fees for the responsive records in the amount of $15.60.

[8] The appellant appealed the city's revised decision to this office, and Appeal MA18-179-2 was opened.

[9] During mediation, the appellant advised that he wishes to pursue access to the information withheld pursuant to sections 12 and 52(2.1), and the initial fee of $42.40. As such, I have removed the information withheld under section 14(1) from the scope of the appeal.

[10] As further mediation was not possible, the appeal was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[11] During the inquiry, I sought and received representations from the parties.

Pursuant to section 7 of this office's *Code of Procedure* and *Practice Direction Number 7*, a copy of the parties' representations were shared with the other party.

[12] The city confirmed that it was no longer relying on the exclusion at section 52(2.1) as all the North Bay Mattawa Conservation Authority (NBMCA) proceedings have been completed. The appellant also confirmed that the prosecution has resolved. As such, I have removed this issue from the appeal. The city still claims section 12 for these records.

[13] In this order, I uphold the city's decision, in part, that the records in the first two categories are subject to the solicitor-client privilege at section 12. I order the city to disclose the non-exempt records in these two categories. Although I find the city's revised initial fee should be $42.20. I do not order the city to reimburse the $0.20 as it is a negligible difference. I defer my determination of the application of section 12 to the remaining eight categories pending further information from the city.

RECORDS:

[14] The records at issue are emails, which fall into 10 categories:

- Emails received or sent by the Assistant City Solicitor to various city staff, various NBMCA staff, various environmental lawyers and paralegals (non-city staff), and the appellant's lawyer and paralegal.

- Emails received or sent by the City Solicitor to various city staff, various NBMCA staff, various insurer staff, a named lawyer (non-city staff), a named law clerk (non-city staff), and the police chief.

- Emails received or sent by the Court Clerk/Assistant to the Assistant City Solicitor to various city staff, various NBMCA staff, named individuals (positions unknown), Assistant City Solicitor, a named lawyer (non-city staff), a named law clerk (non-city staff), and the City Solicitor.

- Emails received or sent by the Assistant to the City Solicitor to various city staff, various NBMCA staff, the Assistant City Solicitor, and the City Solicitor.

- Emails received or sent by the Assistant to the City Clerk to various city staff, various insurer staff and the police chief.

- Emails received or sent by the Chief Plan Examiner to various city staff, various insurer staff, various NBMCA staff, the Assistant City Solicitor, and the City Solicitor.

- Email sent by a named insurer adjuster to the By-law Enforcement Officer.

- Emails categorized as "Financial Services" received or sent by various city staff to various city staff, various insurer staff, the City Solicitor, a named lawyer (non-city staff), and the police chief.

- Email sent from the Zoning Administrator to the Manager of Planning Services.

- Email sent from the Manager of Planning Services to the Zoning Administrator.

[15] A majority of these emails pertain to the prosecution of an offence under the *Conservation Authorities Act*[1] and the litigation of the appellant's lawsuit against the North Bay Police Services.

[16] During the inquiry, I specifically asked the city to provide me with a sworn affidavit in support of its reliance on the exemption at section 12 and the exclusion at section 52(2.1). The city was asked to assign a number, provide a description of the type of record and the content of its subject matter, and identify the sender and recipient(s) in the context of a solicitor-client privilege claim or ongoing prosecuted claim for each and every responsive record.

[17] In response, the city provided a Document Listings, which included the type of document, the date, and the names of individuals appearing in the "From" and "To" fields of the email strings.[2] It did not provide a sworn affidavit nor did it provide the content of the subject matter for each record. It also did not identify many of the people included in the communications, or explain whether they are city staff or third parties.

BURDEN OF PROOF:

[18] Under section 42 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution.

ISSUES:

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

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

---

[1] R.S.O. 1990, c. C.27.
[2] A copy of the Document Listings was shared with the appellant during the inquiry.

C. Did the city exercise its discretion under section 38(a)? If so, should this office uphold the exercise of discretion?

D. Should the revised initial fee be upheld?

DISCUSSION:

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

[19] In order to determine whether section 38(a) of the *Act* applies, it is necessary to decide whether the records contains "personal information" and, if so, to whom it relates.

[20] "Personal information" is defined in section 2(1) as recorded information about an identifiable 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.[3]

[22] In this case, the city submits that the records contain the personal information of identifiable individuals within the meaning of section 2(1). I accept the city's submissions. I also note that, due to the nature of the request, the records also contain information that qualifies as the personal information of the appellant. Accordingly, as the records contain the personal information of the appellant and other individuals, I will consider his access to the records under Part II of the *Act*.

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

[23] 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.

[24] Section 38(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,

[3] Order 11.

> 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.

[25] 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.[4]

[26] 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.

[27] In this case, the city relies on section 38(a) in conjunction with section 12, specifically statutory litigation privilege.

[28] 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.

[29] Section 12 consists of two branches: branch 1 ("subject to solicitor-client privilege") is based on the common law, while branch 2 ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege. Branch 2 of section 12 is a statutory exemption that is available in the context of counsel employed by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons. Given my finding in this order, I will only address the second branch.

Branch 2: statutory privilege

[30] 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."

Statutory litigation privilege

[31] This privilege applies to records prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the

---

[4] Order M-352.

litigation privilege, such as communications between opposing counsel.[5]

[32] The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.[6]

[33] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.[7]

Representations

[34] The city submits that section 38(a) in conjunction with section 12 applies to the records at issue. It explains that the appellant was charged with an offence under the *Conservation Authorities Act*. The Assistant City Solicitor, who is counsel for the city, prosecuted the offence. The city submits that the records in question contain communications with the Assistant City Solicitor, and were prepared by or for the Assistant City Solicitor in contemplation of, or for use in, that litigation. It also submits that the records were created within the zone of privacy that facilitates preparation for the adversary process. The city further submits that the statutory litigation privilege created by section 12 does not end when the litigation ends; it is a permanent exemption. As such, the city submits that, notwithstanding the fact that the proceedings are now complete, the statutory litigation privilege for these records continues.

[35] In addition, the city submits that similar reasoning about the Assistant City Solicitor applies to the City Solicitor with respect to statutory litigation privilege. As well, it submits that the City Solicitor provides legal services to the North Bay-Mattawa Conservation Authority (NBMCA) besides providing guidance and support to the Assistant City Solicitor with respect to the prosecution of the offence under the *Conservation Authorities Act*.

[36] The appellant submits that the city should not be able to rely on the statutory litigation privilege to withhold communications between his lawyers and/or named paralegals and the Assistant City Solicitor or the City Solicitor. He also submits that he has a right to the records containing conversations about him. The appellant further submits he is concerned that the city would carbon copy or always have legal counsel be part of every email about him in order to rely on solicitor-client privilege.

---

[5] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.) [*Big Canoe*]; *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC) [*Goodis*].
[6] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.
[7] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

Analysis and findings

[37] For the reasons below, I find that the city has demonstrated that the majority of the emails sent or received by the Assistant City Solicitor and the City Solicitor were in contemplation of or for use in litigation, and as such, are exempt from disclosure pursuant to the statutory litigation privilege of branch 2 of section 12 of the *Act*.

[38] Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation.

[39] In this case, it is clear that the group of emails received or sent from the Assistant City Solicitor, who is a Crown counsel, pertained to her prosecution of an offence under the *Conservation Authorities Act*. As such, I am satisfied that the majority of these emails were prepared in contemplation of or for use in that litigation. I am also satisfied, based on my review of the parties to the emails, that the communications took place within the requisite zone of privacy. Accordingly, they are exempt under the statutory litigation privilege.

[40] Although all the proceedings relating to that prosecution has ended, the statutory litigation privilege over those records does not end with the termination of the litigation.[8]

[41] However, I find that the statutory litigation privilege does not apply to some of the emails received or sent from the Assistant City Solicitor as they include the appellant's paralegal or lawyer as the recipient or the sender on those emails. As stated by the Divisional Court in *Ontario (Attorney General) v. Big Canoe*,[9] statutory litigation privilege does not apply to records created outside of the "zone of privacy", such as communications between opposing counsel. As such, I am not satisfied that the emails in which the appellant's lawyer or paralegal is the recipient or the sender took place within the requisite zone of privacy.

[42] I am also not satisfied that the emails involving a named associate and a named law clerk at the appellant's lawyer's law firm took place within the requisite zone of privacy. They are communications between the Assistant City Solicitor and the appellant's legal representatives to the litigation. Accordingly, I do not find those emails to be exempt under the statutory litigation privilege.

[43] With respect to the group of emails received or sent from the City Solicitor, who the city notes is also a Crown counsel, I find that they can be grouped into three categories: (1) relating to the prosecution of an offence under the *Conservation Authorities Act*; (2) relating to the appellant's lawsuit against the North Bay Police

---

[8] *Big Canoe*, cited above.
[9] *Big Canoe*, cited above.

Services (the police); and (3) relating to potential litigation.

[44] The city explains that the City Solicitor provided guidance and support to the Assistant City Solicitor on the prosecution of the offence. The city also explains that the appellant and his partner have commenced a lawsuit against the police, including a number of named police officers. As such, the City Solicitor provided legal services to the police and liaised with the city's insurer and defence counsel in relation to these matters.

[45] In addition, the city explains that, at one point, the appellant threatened to seek indemnification from it if the release of the NBMCA's report harmed his property value. Specifically, the appellant's counsel wrote:

> Should the NBMCA prepare a report setting out the negative inferences about the [appellant's] property, which inferences harm the property value, the [appellant and his partner] will have no alternative but to seek indemnification from the [city] based on the negligence of its inspectors.

[46] As such, given that the appellant was contemplating bringing a lawsuit against it, the city had its insurer placed on notice. The city submits that these emails are communications between the City Solicitor, his client and third parties for the dominant purpose of this contemplated litigation.

[47] After reviewing the evidence and the parties' representations, I am satisfied that the group of emails received or sent from the City Solicitor were prepared in contemplation of litigation, or for use in the prosecution of an offence or in defending the lawsuit commenced by the appellant and his partner. I am also satisfied that the communications took place in the requisite zone of privacy. Accordingly, I find that those emails are exempt under the statutory litigation privilege.

[48] With respect to waiver, there is no evidence before me to suggest that the city has waived its privilege. Accordingly, I find that there has not been a waiver of solicitor-client privilege in relation to the exempt records.

[49] With respect to the remaining eight categories of emails, I have reviewed the Document Listing and conclude that I am unable to make a determination on the application of section 12 to these remaining records based on the information the city provided during the inquiry. As such, I will require additional information from the city about these emails before I am able to make a determination on the application of section 12 to them.

[50] I will now turn to the city's exercise of discretion in withholding the records that are exempt under the statutory litigation privilege.

C: Did the city exercise its discretion under section 38(a)? If so, should this office uphold the exercise of discretion?

[51] The section 38(a) 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.

[52] 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.

[53] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[10] This office may not, however, substitute its own discretion for that of the institution.[11]

[54] The city submits that it properly exercised its discretion. It submits that it considered all of the factors listed in the Notice of Inquiry, and in particular, found that the wording of the exemption and the protection of the litigation privilege was most compelling. The city also submits that it was acting and continues to act in good faith. It finally submits that it took into account all relevant factors and did not take into account any irrelevant factors.

[55] Based on my review of the parties' representations and the exempt records, I find that the city properly exercised its discretion. I find that the city took into account the above-noted two factors. It also appears that the city took into consideration the privacy rights of the appellant and other identifiable individuals. I am satisfied that the city did not act in bad faith or for an improper purpose. I am also satisfied from my review of the city's representations that the city took into account the fact that the records contain the personal information of the appellant. Accordingly, I uphold the city's exercise of discretion in deciding to withhold the exempt records pursuant to the section 38(a) in conjunction with section 12.

D: Should the fee be upheld?

[56] An institution must advise the requester of the applicable fee where the fee is

---

[10] Order MO-1573.
[11] Section 43(2).

$25 or less.

[57] Where the fee exceeds $25, an institution must provide the requester with a fee estimate [Section 45(3)].

[58] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.[12]

[59] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.[13]

[60] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[14]

[61] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823, as set out below.

[62] More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 823. Relevant to this appeal is section 6.1, which reads as follows:

> 6.1 The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act for access to personal information about the individual making the request for access:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For records provided on CD-ROMs, $10 for each CD- ROM.
>
> 3. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
>
> 4. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

[63] In the city's revised decision, the city states that the fee is $42.40. In bracket besides the fee amount, the city wrote: "copies 211 @ $0.20 per page."

[64] Although the appellant questioned the reasonableness of the city's revised initial fee, his representations did not address this issue or why he believed the fee was not

---

[12] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[13] Order MO-1520-I.
[14] Orders P-81 and MO-1614.

reasonable.

[65] Under 6.1 of the Regulations, institutions are permitted to charge $0.20 per page for photocopying. As such, I find that the city's fee is reasonable but not accurate. It should be $42.20. Accordingly, I will reduce the city's fee by $0.20. Given the negligible difference and the fact that the administrative cost of reimbursing the $0.20 would exceed the $0.20, I will not order the city to reimburse the $0.20.

ORDER:

1. I uphold the city's decision, in part, that the records in the first two categories are subject to section 38(a) in conjunction with section 12.

2. I also order the city to disclose the non-exempt records to the appellant by **January 24, 2020** but not before **January 21, 2020** in accordance with the copy of the highlighted Document of Listing enclosed with the city's copy of this order. To be clear, the highlighted records should be disclosed to the appellant.

3. I reserve the right to require the city to provide me with a copy of the records disclosed to the appellant.

4. I defer my findings on the application of section 12 to categories 3-10 of the records.

Original Signed By: December 17, 2019

Lan An
Adjudicator