Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3966

Appeal MA18-373

City of Toronto

October 23, 2020

Summary: This order deals with an access request for correspondence between the City of Toronto's (the city) sign by-law unit and a named company regarding billboards or signs along certain 400 series highways and/or the Gardiner Expressway. The city granted access to a number of records, either in whole or in part. The city denied access to other records, or portions thereof, claiming the application of the mandatory exemptions in section 10(1) (third party information) and section 14(1) (personal privacy), as well as the discretionary exemption in section 12 (solicitor-client privilege). The city also identified portions of certain records as not being responsive to the access request. In this order, the adjudicator upholds the city's access decision and dismisses the appeal.

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), 10(1), 12, 14(1) and 17.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the City of Toronto (the city). Initially, the city received a seven-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records involving the city's sign by-law unit, including named city staff and a specified third party, regarding particular signage.

[2] The requester subsequently clarified his request, seeking any correspondence between sign by-law unit staff [three named staff] and/or [a company name] in relation to billboards or signs along some of the 400 Highways (401, 400, 427) and the Gardiner

Expressway from [a specified year] to the date of the request.

[3] The city issued a decision providing partial access to the records it found to be responsive to the access request. The city withheld access to other information, claiming the discretionary exemption in section 12 (solicitor-client privilege) of the *Act* and the mandatory exemption in section 14(1) (personal privacy). In addition, some information was severed on the basis of being non-responsive to the request.

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

[5] During the mediation of the appeal, the appellant advised the mediator that he continued to pursue access to all of the information, including the information the city identified as being non-responsive to the request.

[6] Also during mediation, the city issued a supplementary decision advising that it was no longer relying on section 12 for pages 68, 69, 70, 71, 72, 80, 81, 82 and 87 of the records. The city disclosed these pages to the appellant, and they are no longer at issue in this appeal.

[7] The city's supplementary decision also advised that it was considering disclosing additional pages of the records and that it would be notifying a third party under section 21 of the *Act*. Following notification by the city, the third party consented to the partial disclosure of those pages. As a result, the city issued a second supplementary decision in which it granted access in full to pages 66, 73 and 77. These pages are no longer at issue. The city also advised that it was granting partial access to pages 74, 75, and 76. The city withheld portions of these pages, claiming the mandatory exemption in section 10(1) (third party information) of the *Act*.

[8] The appellant advised the mediator that he took issue with the application of section 10(1) of the *Act.* As a result, section 10(1) of the *Act* was added as an issue in this appeal.

[9] Regarding section 14(1) of the *Act*, the appellant advised the mediator that he did not want the mediator to notify any affected parties to attempt to gain their consent to disclose the information withheld based on that section. As a result, section 14(1) remains an issue on appeal. As well, during mediation, the city advised the mediator that it was now relying on the presumption in section 14(3)(b) of the *Act* in support of its section 14(1) claim.

[10] The file was then transferred to the adjudication stage of the appeals process where an adjudicator may conduct a written inquiry under the *Act.*

[11] The adjudicator assigned to the appeal sought, and received, representations from the city and the appellant. Some portions of the city's representations were withheld because they met the criteria for withholding representations in sections 5(a) and (b) of this office's *Practice Direction Number 7.*

[12] The file was then transferred to me to continue the inquiry. I note that in his representations, the appellant states that he was under the impression that this order will dispose of this appeal, as well as a second appeal the appellant has at this office. This order relates solely to appeal MA18-373.[1]

[13] By way of background, in its representations, the city advises that there are two active litigation matters involving a numbered company, with which the appellant is affiliated, and the city. The original application by the numbered company was subsequently converted into an application for judicial review in Divisional Court. A second application has been filed by the numbered company as a full civil action before the Ontario Superior Court of Justice.

[14] Also, in its representations, the city is no longer relying on the presumption in section 14(3)(b) to support its section 14(1) claim. Lastly, I note that in its representations, the city has requested a stay of this appeal, pending the disposition of the ongoing civil litigation referred to, above. Given my findings in this order, it is not necessary for me to consider the city's request for a stay, which I address below.

[15] For the reasons that follow, I uphold the city's access decision and dismiss the appeal.

RECORDS:

[16] There are 49 pages[2] remaining at issue, either in whole or in part. They are comprised primarily of emails, as well as a lease, an invoice, a cheque request, and a letter of credit.

Preliminary Issue

[17] In its representations, the city requested a stay of this appeal on the basis that, for several years, it has been involved in multiple litigation matters with a numbered company with which the appellant is affiliated. The city submits that due to the nature of the appellant's interest in the records, the court proceedings have overlapping jurisdiction with this office concerning production of the records. As a result, the city is requesting that this office stay this appeal until the litigation proceedings are concluded.

[18] The city then argues that it is unlikely the various litigation matters will proceed

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[1] The appellant has a second ongoing appeal at this office, which is separate from this appeal, and which is assigned to another adjudicator.

[2] In his representations, the appellant submits that there are over 500 pages of records responsive to his access request. The city provided an updated Index of Records to this office at the conclusion of mediation. The Index of Records indicates that there are 120 pages of records in total, with 49 pages remaining at issue.

in tandem with this appeal and, as such, there is the possibility of inconsistent results with respect to the records, which would result in delays of one or more proceedings. The city further argues that staying the current appeal will prevent unnecessary and costly duplication of judicial and legal resources.

[19] The city goes on to submit that the stay would eliminate the prejudice and harm to it having to participate in multiple proceedings, and also possibly eliminate the need for this office to utilize its resources to resolve this appeal.

[20] The appellant objects to the city's request for a stay of this appeal, submitting that the city's claim to be concerned about the duplicity of proceedings is a "smokescreen," as the freedom of information process should be completely independent of any ongoing litigation the city is involved in. The scheduling and process of any litigation is often unpredictable, and therefore should not act as a hindrance to the timely release of records being withheld by the city.

[21] I find that given the outcome of this appeal, it is not necessary to make a finding regarding the city's request for a stay. However, I note that were I to make a finding, I would have denied the request for a stay. One of the city's concerns is that in the absence of a stay, it would have to participate in the appeal. In fact, the city has already participated in this appeal by providing full representations on all of the issues arising out the appeal. In addition, I would have found that granting a stay would have caused prejudice to the appellant, as there would likely have been a lengthy delay in concluding the various court cases referred to by the city. Lastly, I would have found that the city's concern with the resources expended by this office in dealing with this appeal is not an appropriate consideration in whether or not to grant a stay.

ISSUES:

A. What records are responsive to the request?

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

C. Does the mandatory exemption at section 14(1) apply to the information at issue?

D. Does the mandatory exemption at section 10(1) apply to the records?

E. Does the discretionary exemption at section 12 apply to the records?

F. Did the city exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

DISCUSSION

Issue A: What records are responsive to the request?

[22] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

. . .

> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[23] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[3] To be considered responsive to the request, records must "reasonably relate" to the request.[4]

Representations

[24] The city submits it interpreted the request as seeking access to correspondence within the relevant time period involving the sign by-law unit and/or a named individual and/or a named company relating to correspondence concerning "First-party signs" or "Third-party signs" near the 400 series highways and/or the Gardiner Expressway. The city submits that it adopted an "exceptionally" broad scope to the request. For example, it states that it included correspondence that simply mentioned a sign that happened to be near 400 series highways and/or the Gardiner Expressway, even when the issue of the proximity of the sign to these roadways was not the subject matter of, or relevant to, the communication.

[25] The city goes on to state that the records at issue are largely comprised of back-and-forth email exchanges, or longer email chains. In some of these emails, there are

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[3] Orders P-134 and P-880.
[4] Orders P-880 and PO-2661.

shifts in focus, where portions of the conversations refer to a subject matter entirely unrelated to the subject matter of this access request. In other words, the city severed the emails that have nothing to do with signs near 400 series highways. The city argues that the non-responsive portions of the records are located at pages 9-11, 12-14, 15-16, 17-18, 19-20, 21, and 22-23.

[26] The city also notes that there is duplication of content in the email communications.

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

Analysis and findings

[28] I have reviewed the portions of the records, listed above, that the city has identified as not being responsive to the appellant's access request. To be clear, the pages identified above were disclosed to the appellant, with portions withheld. On my review of the records themselves, I find that these portions are not responsive to the access request. In particular, I find that the withheld information consists of email communications that refer to matters completely unrelated to the appellant's access requests. These communications, I find, do not relate to the company named in the request, the appellant, and any signs near the 400 series highways and/or the Gardiner Expressway. As a result, I uphold the city's decision to withhold this information from the appellant.

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

[29] 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;

[30] 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.[5]

[31] 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.

[32] 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.[6] 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.[7]

Representations

[33] The city submits that pages 47, 50 (duplication of content with page 47), and a

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[5] Order 11.
[6] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[7] Orders P-1409, R-980015, PO-2225 and MO-2344.

single line on page 51 contain the personal information of one individual identified as a complainant with respect to sign by-law violations at certain locations. The city argues that past orders of this office have considered identifying an individual as a complainant with respect to by-law infractions as qualifying as that individual's "personal information" for the purposes of the *Act*.

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

Analysis and findings

[35] I find that the withheld information at pages 47, 50 and 51 qualifies as the personal information of one identifiable individual. In particular, I find that this information consists of the individual's name, with their views and opinions, falling within paragraph (e) of the definition of personal information in section 2(1) of the *Act*, as well as their name with other personal information about them, falling within paragraph (h) of the same definition. I note that the pages referred to above do not contain the appellant's personal information.

[36] I will now determine whether the personal information at issue is exempt from disclosure under section 14(1) of the *Act*.

Issue C: Does the mandatory exemption at section 14(1) apply to the information at issue?

[37] Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

[38] In the circumstances, it appears that the only exception that could apply is section 14(1)(f), which allows disclosure if it would not be an unjustified invasion of personal privacy.

[39] The factors and presumptions in sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f). Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy.

[40] 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 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies.[8]

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[8] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

[41] Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2).[9] If no section 14(3) presumption applies and the exception in section 14(4) does not apply, 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.[10] In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring *disclosure* in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.[11]

Representations

[42] The city argues that none of the presumptions in section 14(3) apply and, likewise, the limitations in section 14(4) do not apply to the personal information at issue. Regarding the factors in section 14(2), the city submits that none of the factors favouring disclosure apply, and that two of the factors which do not favour disclosure apply; namely that the personal information is highly sensitive (section 14(2)(f)), and that the information was supplied in confidence (section 14(2)(h)) to it. As a result, the city argues, the disclosure of the personal information at issue would constitute an unjustified invasion of an individual's personal privacy, and must be withheld under section 14(1).

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

Analysis and findings

[44] I have reviewed the information at issue, and I find that it is exempt from disclosure under section 14(1). Section 14(1) is a mandatory exemption, unless one of the limitations in section 14(4) applies, or the public interest override in section 16 applies, or any of the factors in section 14(2), which favour disclosure apply. I find that neither section 14(4) nor section 16 applies in this appeal. I also find that none of the presumptions in section 14(3) are applicable. Turning to the city's arguments regarding the factors in sections 14(2)(f) and (h), which do not favour disclosure, while I accept the city's submission that the information provided by the individual identified in these records was supplied in confidence (section 14(2)(h)), I do not agree that the information is highly sensitive (section 14(2)(f)). As a result, I find that the factor in section 14(2)(h) applies, but the factor in section 14(2)(f) does not.

[45] For all of these reasons and as previously stated, given that section 14(1) is a mandatory exemption, and with no factors favouring disclosure, I find that this personal

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[9] *John Doe*, cited above.
[10] Order P-239.
[11] Orders PO-2267 and PO-2733.

information is exempt from disclosure.

Issue D: Does the mandatory exemption in section 10(1) apply to the records?

[46] The city is claiming the application of the mandatory exemption in section 10(1)(b) to portions of pages 74, 75 and 76. Section 10(1)(b) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> > (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

[47] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[12] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[13]

[48] For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraphs (a), (b), (c) and/or (d) of section 10(1) will occur.

[49] The appellant submits that he does not wish to review financial, tax or pricing information of private third-party businesses. As shown below, based on my review of the information withheld under section 10(1), I find that the appellant is not interested in pursuing access to this information and I will not be proceeding to consider the application of section 10(1) to it.

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[12] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[13] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[50] The types of information listed in section 10(1) have been discussed in prior orders, for example, the following types of information:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[14] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[15]
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[16]

Representations

[51] The city submits that the information that it has withheld is the total tax liability that an advertising company owed in a specific taxation year, with respect to all taxable third-party signs under the city's third-party sign tax. The city argues that the information at issue qualifies as financial and commercial information.

[52] In response, and as stated above, the appellant submits that he wants it "to be clear" that he does not wish to review financial, tax or pricing information of private third- party businesses.

Analysis and findings

[53] I have reviewed the information that the city withheld. I find that on all three pages, the information consists solely of a dollar figure (the same figure on each page). I accept the city's argument that this information represents the amount of a tax liability. I also accept the appellant's position that he does not seek tax information. As a result, I conclude that this information is no longer at issue and that it is, therefore, unnecessary to consider parts two and three of the three-part test in section 10(1) to this information.

Issue E: Does the discretionary exemption at section 12 apply to the records?

[54] Section 12 states as follows:

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[14] Order PO-2010.
[15] Order P-1621.
[16] Order PO-2010.

> 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.

[55] 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.

[56] 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 and common law privileges, although not identical, exist for similar reasons.

[57] Like the common law solicitor-client communication privilege, this privilege covers records prepared for use in giving legal advice.

[58] Litigation 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 litigation privilege, such as communications between opposing counsel.[17]

[59] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.[18]

Representations

[60] The city is applying section 12 to pages 78-79, 83-86, 88-89, and 90-115, and notes that there is extensive duplication of content. The city submits that the section 12 exemption can be considered to have two primary branches: a) solicitor-client communication privilege (both under the common-law and statutorily); and b) litigation privilege (also both under the common-law and statutorily), and the one or more of the versions of either the solicitor-client communication privilege or litigation privilege applies to the records.

[61] The city argues that the access request is an attempt by the appellant to obtain access to records created in relation to litigation between a numbered company, with which the appellant is affiliated, and the city. The records, the city goes on to submit, are copies of solicitor-client communications, as well as working papers used by the

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[17] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.

[18] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

city's legal department in relation to active litigation. Some of the records are portions of emails to and from legal counsel in the city's legal department in which legal advice is sought by city staff, information is provided by city staff to legal counsel, and legal advice is provided by legal counsel to city staff, forming part of a continuum of correspondence between a solicitor and client.

[62] Other records, the city argues, were created or are reasonably related to ongoing litigation, including legal counsel's working papers, such as their observations, thoughts, opinions, theories and strategy, or are records that would reveal the contents of legal counsel's working papers.

[63] Lastly, the city submits that there is no indication that there has been waiver of solicitor-client privilege by anyone authorized to act on behalf of the city with respect to any of the records at issue.

[64] The appellant submits that the city has applied the exemption in section 12 too broadly and that many of the records the city withheld consist of correspondence between city officials that took place many years before the contemplation of litigation. In addition, the appellant argues that many of the records consist of emails between staff members of the city's sign by-law unit, and not with legal counsel. The appellant states:

> . . . Any assertion that much of these correspondence was prepared by counsel or for counsel is also false. As stated above, much of the correspondence is between business folks and Sign By-Law folks, and not at all in contemplation of litigation or for the benefit of counsel.

[65] The appellant further argues that the city is attempting to use the current litigation as a reason for the non-disclosure of records and for preventing non-privileged records from being disclosed, and that many of the records do not contain any legal advice, nor do they even include the city's legal counsel.

Analysis and findings

[66] I find that the records, or the portions thereof for which the city claimed the application of the discretionary exemption in section 12 are exempt from disclosure under branch 2 of section 12.[19] As previously stated, 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."

[67] In particular, I find that some of the records consist of email communications between the city's legal counsel and city staff, in which the staff provide information to

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[19] I concur with the city that there is duplication of the content of these records.

the city's legal counsel for the purpose of seeking legal advice and, in return, legal advice is provided by legal counsel to city staff, forming part of a continuum of communication between a solicitor and a client that is privileged.

[68] Other records I find were prepared by or for the city's legal counsel in preparation for litigation, comprised of legal counsel's working papers, and records that would reveal the contents of legal counsel's working papers, which are subject to litigation privilege. Contrary to the appellant's argument that the records are old and not related to the ongoing litigation, I find that the records are in relation to the ongoing litigation between the city and the company with which the appellant is affiliated.

[69] I also note that the city indicated in its representations that it has not waived the solicitor-client communication privilege. Based on the evidence before me and my review of the records, I have no reason to believe that the privileges in branch 2 of section 12 have been waived.

[70] Accordingly, I find that these records are exempt from disclosure under branch 2 of section 12 of the *Act*.

Issue F: Did the city exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

[71] 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.

[72] 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.

[73] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[20] This office may not, however, substitute its own discretion for that of the institution.[21]

[74] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[22]

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[20] Order MO-1573.
[21] Section 43(2).
[22] Orders P-344 and MO-1573.

- 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;
- 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.

Representations

[75] The city submits that the head exercised her discretion in good faith and took into account all of the relevant considerations with respect to the application of section 12. These considerations included the following:

- the purposes and principles of the *Act*, including that information should be available to the public;
- exemptions to access should reflect the specific and limited circumstances where non-disclosure is necessary for the proper operation of municipal institutions;
- the wording of section 12 and the fundamental importance to Canadian society of the interest sought to be protected by the section 12 exemption;
- the information at issue cannot be considered to be the appellant's "own" information;
- the lack of a sympathetic or compelling need to receive the withheld information;
- disclosure of the information would not have any impact on increasing public confidence in the city's operation; and
- the information is highly sensitive and relates to active legal disputes currently before the courts.

[76] In addition, the city argues that there is a public interest in the non-disclosure of litigation/solicitor-client communications in active matters, as these privileges serve a function of fundamental importance to Canadian society, and disclosure of this information in the middle of active litigation would prejudice the city's and the public's interest in the effective and just resolution of the current litigation.

[77] The city goes on to submit that it used section 12 sparingly to deny access in a specific and limited fashion, severing limited portions of the privileged records, where possible, in an effort to maximize transparency. Lastly, the city submits that during the mediation of the appeal, it re-exercised its discretion and disclosed further records to the appellant, including an unprecedented access to the city's litigation related work product, as well as communications between the city and its internal legal counsel.

[78] The appellant submits that the city did not properly exercise its discretion, and is finding ways to hide, redact or simply not disclose correspondence that may show it in a bad light, or may be sensitive to them. This does not promote transparency in order to be able to hold government accountable.

Analysis and findings

[79] The only discretionary exemption claimed by the city is section 12, which is the solicitor-client privilege exemption. In this instance, I am satisfied that the city properly exercised its discretion in not disclosing the records that I have found to be exempt from disclosure under the section 12 exemption. I find that the city took relevant factors into consideration, including the purpose of the solicitor-client privilege exemption.

[80] Further, I find that other relevant factors were taken into consideration in the exercise of discretion. Based on the city's representations, I am satisfied that it took into consideration that the appellant is an individual who is not seeking his own personal information, the historic practice of the city with respect to similar information, and the importance of the solicitor-client privilege exemption in section 12. I also find that the city did not take any irrelevant factors into consideration in exercising its discretion, nor did it exercise its discretion in bad faith. I note that in its initial disclosure to the appellant, the city severed certain records for which it claimed section 12, disclosing the other portions to him. Lastly, during the mediation of the appeal, the city re-exercised its discretion and disclosed further records to him for which it had originally claimed section 12. As a result, I am satisfied that the city properly exercised its discretion.

ORDER:

I uphold the city's access decision and dismiss the appeal.

Original Signed by: October 23, 2020

Cathy Hamilton

Adjudicator