

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4089

Appeal MA19-00327

The Corporation of the City of Kingston

July 29, 2021

**Summary:** The appellant made two requests under the *Act* to the city for records relating to building permit applications for specified residential properties. After partially disclosing some records, such as the applications themselves, the city decided to withhold the remainder on the basis of the ongoing prosecution exclusion at section 52(2.1) of the *Act* and, alternatively, the discretionary law enforcement exemption at section 8(1) or the mandatory personal privacy exemption at section 14(1). The city made additional discretionary exemption claims at the adjudication stage of the appellant's appeal to the IPC.

In this order, the adjudicator determines that the ongoing prosecution exclusion does not apply. She upholds the city's decision to withhold information on the basis of the mandatory personal privacy exemption at section 14(1) but finds that the city may sever portions of those records to remove personal information from them. After determining that the city's alternative discretionary exemption claims do not apply, she orders the city to disclose the records with the exception of the personal information.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O., Ch. M.56, sections 52(2.1), "personal information," 14(1), 8(1)(b), 12.

**Orders Considered:** Orders MO-3480, P-23, MO-2053 and M-176.

### OVERVIEW:

[1] The requester (now the appellant) made two requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Corporation of the City of Kingston (the city) for records relating to building permit applications pertaining to specified residential properties. The city dealt with the two requests together.

[2] By way of background, under the *Building Code Act*<sup>1</sup> (the *BCA*), the city enacted the *By-Law For the Construction, Demolition, Change of use and Transfer of Permits* (the *Building By-Law*).<sup>2</sup> Among other things, this by-law sets out the requirements and obligations of property owners when carrying out work that requires a permit, including the city's rights of inspection and enforcement.<sup>3</sup>

[3] Initially, the city partially disclosed copies of the building permits and a committee of adjustment decision, withholding some information on the basis of the mandatory personal privacy exemption. After discussions with the appellant, the city then issued an access decision in which it denied access to several other responsive records, in full, claiming the application of the exclusion in section 52(2.1) (ongoing prosecution) of the *Act*. In the alternative, the city claimed the law enforcement exemption in section 8(1)(b) of the *Act*.

[4] The appellant appealed to the Information and Privacy Commissioner (the IPC).

[5] A mediated resolution was not possible, so the appeal was transferred to the adjudication stage of the appeal process and a written inquiry occurred. The appellant, the city and the owners of the properties in question (the affected parties) were invited to make representations. The appellant's and city's representations were shared between them in accordance with the IPC's *Code of Procedure and Practice Direction 7*.

[6] During the inquiry, the city issued a revised access decision that included two alternative exemption claims: the mandatory personal privacy exemption at section 14(1) of the *Act* for portions of two records; and, the discretionary exemption for solicitor-client privilege at section 12 of the *Act*. Sections 14(1) and 12 are therefore at issue in this appeal, as well as whether the city is permitted to raise section 12, a discretionary exemption, at this late stage.

[7] In this order, I find that the ongoing prosecution exclusion does not apply to the records. However, I uphold the city's decision to withhold significant portions of the records on the basis of the mandatory personal privacy exemption at section 14(1). I find that in some cases the city may sever the records in accordance with section 4(2) of the *Act* to remove any personal information.

[8] I considered the city's remaining discretionary exemption claims for law enforcement and solicitor-client privilege and find that they do not apply. I therefore order to the city to disclose the records except for the personal information contained within them.

## **RECORDS:**

[9] The records at issue consist of emails contained in the city's Building Division files for specified residential properties, consisting of correspondence between city officials and between city officials and individuals regarding the progress of work under issued building permits.

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<sup>1</sup> S.O. 1992, c.23.

<sup>2</sup> City of Kingston – By-Law 2005-99.

<sup>3</sup> See for example, sections 7, 8.

[10] There are a total of 16 records at issue. One of these records is a duplicate copy of a record already disclosed to the appellant, which is not at issue in this appeal. I have not enumerated or described the records further in this order to reduce the possibility of erroneous assumptions being made about the circumstances as they pertain to the properties.

## **ISSUES:**

- A. Does the prosecution exclusion at section 52(2.1) apply to exclude the records from the application of the *Act*?
- B. Do the records contain personal information?
- C. Would disclosure of the personal information constitute an unjustified invasion of personal privacy and be prohibited from disclosure by 14(1) of the *Act*?
- D. Does the discretionary exemption for law enforcement at section 8(1)(b) apply to the remaining information?
- E. May the city rely on the section 12 solicitor-client privilege exemption in this inquiry?
- F. Does the discretionary exemption at section 12 apply to the remaining information?

## **DISCUSSION:**

### **Issue A: Does the prosecution exclusion at section 52(2.1) apply to exclude the records from the application of the *Act*?**

[11] The city's main argument in this appeal is that the prosecution exclusion applies to exclude the records from the application of the *Act*, meaning that they may not be obtained through an access request made under *Act*. Section 52(2.1) states:

This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

[12] The term "prosecution" in section 52(2.1) of the *Act* means proceedings in respect of a criminal or quasi-criminal charge laid under an enactment of Ontario or Canada and may include regulatory offences that carry "true penal consequences" such as imprisonment or a significant fine.<sup>4</sup> The purposes of section 52(2.1) include protecting solicitor-client privilege and litigation privilege, and controlling the dissemination and publication of records relating to an ongoing prosecution.<sup>5</sup>

### ***Representations***

[13] The city says that the records are contained within its Building Division files and these files will remain open until final inspections are completed to confirm compliance

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<sup>4</sup> Order PO-2703.

<sup>5</sup> *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991, March 26, 2010, Tor. Doc. 34/91 (Div. Ct.).

with the *BCA*. The city says that as long as a Building Division file remains open, there is an "option for litigation."

[14] Regarding one property, the city explains and submits that the file remains open and there are "zoning issues being explored and corrected," which means that there "is a potential for prosecution under both the *Building Code Act* and the *Planning Act*."

[15] The city submits that the city prosecutor "may exercise his or her discretion to bring a prosecution at any time until the circumstances giving rise to a potential for a charge arising from an offence ends and any relevant limitation periods expire."

[16] The appellant says that the "option for litigation" is hypothetical and not based on any substantive evidence. The appellant points to Order MO-2630 as an example of a case where the IPC considered a records request pertaining to a building permit file that remained open. The appellant also disputes the city's evidence that there are ongoing "zoning issues."<sup>6</sup>

### ***Analysis and finding***

[17] The city bears the onus of proof to establish that the exclusion applies.<sup>7</sup> The city must establish that: there is a prosecution; there is some connection between the records and the prosecution; and, the prosecution is ongoing.

[18] Although a prosecution for a provincial offence under legislation such as the *BCA* may constitute a prosecution within the meaning of section 52(2.1),<sup>8</sup> there must also be a prosecution underway for the exclusion to apply. In Order MO-3294-I, the Adjudicator comprehensively examined and considered whether the prosecution exclusion can apply to *contemplated* prosecutions and concluded,

..., the exclusionary provision at section 52(2.1) removes from the public their positive right of access to information held by government as set out in section 4(1). In my view, had the legislature intended to fetter the public's right of access to records related to prosecutions that are merely contemplated as well those that are already underway, it would have specifically identified that in the wording of the exclusion.

[19] I agree with the analysis and conclusion of the Adjudicator in Order MO-3294-I and find it to be relevant to the circumstances of the present appeal.

[20] The city's strongest evidence in support of their exclusion claim is that there is a possibility of a prosecution. The city submits that the open Building Division files are evidence of the possibility of litigation.

[21] At best, the city's evidence is speculation. The records are not found within a prosecutor's file, nor have they been compiled or requested by a prosecutor. As is clear from the city's representations, a prosecutor has not been assigned and there is no evidence before me that any charges have been laid under either of the statutes cited by

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<sup>6</sup> Order MO-2630 did not deal with the possible application of the prosecution exclusion.

<sup>7</sup> Orders MO-3316, MO-2439, and MO-3294-I

<sup>8</sup> See Order MO-3480, for example.

the city. Considering this lack of evidence, I am unable to conclude that there is a prosecution underway, which means that the city has not established the first part of the test to establish that the prosecution exclusion applies.

[22] I therefore find that the section 52(2.1) exclusion does not apply to the records. Given my conclusion, the general right of access in section 4(1) applies to the records. I will now consider the city's arguments that certain exemption from that right of access apply.

### **Issue B: Do the records contain personal information?**

[23] If the records contain personal information of individuals other than the requester, the city may be required to withhold that information because of the personal privacy exemption at section 14(1) of the *Act*, which will be discussed at Issue C, below. In order to determine whether section 14(1) applies, it is first necessary to determine whether the records contain the personal information of individuals other than the requester.

[24] "Personal information" is defined in section 2(1) of the *Act* and means "recorded information about an identifiable individual." The *Act* contains a non-exhaustive list of examples of the types of personal information, such as information relating to an individual's family status, the individual's criminal or employment history, financial transactions in which the individual has been involved, identifying numbers assigned to an individual, or an individual's address.<sup>9</sup>

[25] As noted, the examples of personal information enumerated in the *Act* are not an exhaustive list so other identifying information may also qualify as personal information.<sup>10</sup> To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>11</sup>

### ***Representations***

[26] The city submits that the records contain personal information of the property owners, such as their names, together with their email addresses and phone numbers. It also submits that the records contain personal information that was compiled as part of an investigation into a possible violation of law, stating that there is a "realistic potential for prosecution." It also submits that the property owners had an expectation that their information would not be disclosed under the *Act* in reference to paragraph (f) of the definition of "personal information:"

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 that original correspondence,

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<sup>9</sup> Sections 2(2.1) and (2.2) also relate to the definition of personal information and clarify that personal information does not include the name, title, contact information or designation of individuals in their business or official capacity.

<sup>10</sup> Order 11.

<sup>11</sup> Order PO-1880, upheld on judicial review in Ontario (Attorney General) v. Pascoe, [2002] O.J. No. 4300 (C.A.).

[27] The affected parties do not consent to the disclosure of the records. I am not able to describe their arguments or concerns in any more detail due to the confidentiality criteria in *Practice Direction 7*.

[28] The appellant submits that he does not seek access to the names and contact information of the property owners in the records.<sup>12</sup> Regarding the other information, he disputes that it consists of personal information. Specifically regarding the possibility that the information was private or confidential in nature within the meaning of paragraph (f) of the definition of *personal information*, he submits that the requested information is not of a private or confidential nature.

### ***Finding***

[29] To begin, based on my review the records do not contain any personal information of the appellant.

[30] In the following discussion, I explain why I have found that several of the records contain the personal information of other individuals.

[31] Following Order P-23, several IPC adjudicators have held that there is a distinction between information *about an individual*, which may be personal information and information *about a building or a property*, which may not be personal information.<sup>13</sup> Orders P-23 and MO-2053 considered whether the addresses within aggregate lists of properties were personal information. In Order P-23, dealing with market value assessments, the commissioner concluded that the information was about the properties and not about any individual.<sup>14</sup> In Order MO-2053, dealing with information about which properties had applied for approval of a septic system, the adjudicator concluded that the information – including the addresses – was information about the properties and therefore not personal information.

[32] Each case must be assessed on its own circumstances and there are situations where information regarding properties has been found to consist of personal information. In Order M-176, dealing with weed inspector's reports for a two month time period, the adjudicator considered the distinction between information about a property and information about an individual and concluded, among other findings, that "the fact of being identified as responsible for the alleged unlawful condition of a property is 'other personal information' within the definition of personal information in section 2(1) of the *Act*," and that the names in the records were therefore personal information.

[33] The records in this appeal pertain to a limited number of properties; they are not aggregate lists of information about properties. Because the records pertain to specific addresses, the identities of the property owners are identifiable through public registries.

[34] The records consist mainly of email discussions between city staff and the residential property owners or the building contractors working for the owners. These emails are about whether the construction underway is compliant with issued building

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<sup>12</sup> A position that he has consistently maintained throughout the appeal.

<sup>13</sup> See Orders MO-2081 and MO-2053 for examples and a discussion of this distinction.

<sup>14</sup> There have been orders that reached an opposite conclusion in consideration of different records: see Orders PO-1786-I, PO-1847, M-800 for example.

permits or other requirements supervised by the city. There are also emails or brief reports written by city staff about similar topics, although these contain less detail than the emails between city staff and the owners. There are also records from other sources in the files containing information about the building projects.

[35] With the exception of four of them, the records pertain to whether the residential property owners are acting in compliance with the building permit or other relevant building requirements supervised by the city. These records reveal the approaches taken by, and priorities of, the property owners to comply with bylaw and permit obligations. In my view, this information reveals something personal in nature about identifiable individuals and it is personal information in that it is "recorded information about an identifiable individual."

[36] In the next section of this order I will consider whether disclosure of the personal information is prohibited by section 14(1) of the *Act* and whether any of it may be severed from the records to permit disclosure under section 4(2) of the *Act*.

*The four remaining records – not personal information*

[37] I will refer to the remaining four records collectively as the remaining records in this order.

[38] Two of the remaining records consist of email exchanges internal to the city. Based on my review of these records, I find that the information is about a *specified property*, not an individual, and that it does not reveal anything of a personal nature about an individual. It is therefore not personal information.

[39] One of the remaining records is not – on the face of it – related to the properties or any individual, or any other of the records, and I find that it does not contain personal information.

[40] The last remaining record is a cover letter issuing the committee of adjustment decision which has already been disclosed. This letter contains the name and contact information for the property owner, which the appellant does not seek access to and is not at issue in this appeal. If the name and contact information is severed, this letter contains information about a property and does not reveal anything of a personal nature about an individual, and I find that it does not contain personal information. I will indicate which parts of the cover letter should not be disclosed in the copy of the record provided to the city with this order.

[41] Having concluded that the remaining records do not contain personal information, section 14(1) is not applicable to them. I will therefore consider the city's other claims in relation to them at Issues D to F in relation to this information.

**Issue C: Would disclosure of the personal information constitute an unjustified invasion of personal privacy and be prohibited from disclosure by 14(1) of the *Act*?**

[42] 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. The only relevant exception in this appeal is section 14(1)(f) – that disclosure would not constitute an unjustified invasion of personal privacy.

[43] If disclosure would not be an unjustified invasion of personal privacy, section 14(1) does not apply and the information must be disclosed. Sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. (Section 14(4) lists situations that would not be an unjustified invasion of personal privacy; none of the situations in section 14(4) apply to this appeal.)

### ***Representations***

[44] As noted, the affected parties do not consent to disclosure of the records. Generally speaking, the access requests and possibility of disclosure of the records in general is perceived by the affected parties to be a violation of their privacy.

[45] In reference to section 14(3)(b), the city submits that the records have been compiled as part of an investigation into a possible violation of law, the *BCA*.<sup>15</sup> Section 14(3)(b) of the *Act* is a presumption that disclosure of personal information compiled and is identifiable as part of an investigation in to a possible violation of law is a presumed unjustified invasion of personal privacy.

[46] In reference to section 14(2)(h), the factor favouring privacy protection when information is supplied by the individual to whom it relates in confidence, the city submits that when property owners submit information to obtain building approvals, they are aware that the information will be used in the administration and enforcement of the *BCA* but not released in response to access requests made under the *Act*.

[47] The appellant submits that disclosure of the records would not constitute an unjustified invasion of personal privacy. He points out that the city does not directly argue that the presumption at section 14(3)(b) applies and he reiterates some of the arguments he made previously (and discussed above) that the city has not demonstrated that there is any investigation or prosecution underway.

[48] Regarding the city's section 14(2)(h) arguments, the appellant states that the city's argument is generic and does not include any information about specific statements made to any individuals about how information would be treated.

[49] Although not in relation to section 14(1), the appellant has also argued in the course of this appeal that disclosure of the records is necessary to bring scrutiny to the building permit process. In the appellant's words,

In a perfect world, building permit applications would be submitted truthfully and completely and building inspections would be carried out properly and free of persuasion. But we know this is not what actually happens. Public citizens must retain the right to provide a 'check and balance' system by having access to such records in order to ensure that building processes are conforming with the law.

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<sup>15</sup> Cited above.



[50] He also reiterates that he not seeking access to the names and contact information of the property owners in the records.

### ***Analysis and finding***

*Does the section 14(3)(b) presumption apply?*

[51] Section 14(3)(b) states,

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[52] If paragraph (b) of section 14(3) applies, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law<sup>16</sup> and can apply to a variety of investigations, including those relating to by-law enforcement<sup>17</sup> and violations of the *Ontario Human Rights Code*.<sup>18</sup>

[53] Having reviewed the information and the circumstances, I find that the section 14(3)(b) presumption does not apply. Although it is possible that section 14(3)(b) could apply to an investigation of a by-law or provincial offence, I am unable to conclude based on the evidence that there was any investigation of any kind underway. There are activities related to ensuring compliance with issued building permits, but no suggestion of any investigation into a possible violation of law.

*Do any of the section 14(2) factors apply?*

[54] 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 constitutes an unjustified invasion of personal privacy.<sup>19</sup> In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors 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.<sup>20</sup>

[55] In my view, there are no section 14(2) factors favouring disclosure and I therefore conclude that disclosure of the personal information would constitute an unjustified invasion of personal privacy.

[56] In reaching this conclusion, I considered carefully whether disclosure was necessary

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<sup>16</sup> Orders P-242 and MO-2235.

<sup>17</sup> Order MO-2147.

<sup>18</sup> Orders PO-2201, PO-2419, PO-2480, PO-2572 and PO-2638.

<sup>19</sup> Order P-239.

<sup>20</sup> Orders PO-2267 and PO-2733.

to subject the city's activities to public scrutiny (section 14(2)(a)). Section 14(2)(a) states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny.

[57] I took into account the appellant's important point that by allowing citizens access to government information, the *Act* properly facilitates and enables citizens to act as a "check and balance" over government activities.

[58] However, despite this important objective, based on my review of the personal information, the only scrutiny that disclosure in this appeal would advance is scrutiny over the property owners' actions, not the city's. I therefore concluded that section 14(2)(a) does not apply in this appeal.

[59] Having found that no factors favour disclosure, it is not necessary for me to determine whether paragraph 14(2)(h), a factor favouring privacy protection, applies.

[60] I find that disclosure of the personal information would constitute an unjustified invasion of personal privacy and that therefore the mandatory personal privacy exemption at section 14(1) applies, which means that the city is prohibited from disclosing the records to the appellant under the *Act*.

[61] Section 4(2) of the *Act* requires that an institution disclose as much of a record that may reasonably be severed without disclosing information that falls under one of the exemptions – such as the personal privacy exemption in section 14(1) that I have found applies to some of the information in this appeal.<sup>21</sup>

[62] I have therefore considered whether any of the records that contain personal information may be severed so that the personal information is withheld but other portions of the records are disclosed. In my view, it is possible to sever some of the records to enable the city to disclose them without revealing any personal information. I will indicate which portions of the records must not be disclosed under section 14(1) in the copy of the records provided to the city with this order.

[63] I will now consider whether section 8(1) applies to the remaining information.

**Issue D: Does the discretionary exemption for law enforcement at section 8(1)(b) apply to the remaining information?**

[64] Section 8(1)(b) states:

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

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<sup>21</sup> The city did not make representations about the possible application of section 4(2) to information exempt under section 14(1). The appellant did not make representations about section 4(2).

(b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

[65] The term "law enforcement" is defined in section 2(1) and, among other meanings, means "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...." Prior IPC orders have determined that law enforcement includes a municipality's investigation into a possible violation of a municipal by-law.<sup>22</sup>

[66] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.<sup>23</sup>

[67] To establish that section 8(1)(b) applies, the city must provide detailed evidence<sup>24</sup> that establishes that disclosure could reasonably be expected to interfere with an investigation leading to a law enforcement proceeding. It must demonstrate 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.<sup>25</sup>

[68] The law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the alleged interference is with "potential" investigations;<sup>26</sup> the investigation in question must be ongoing or in existence.<sup>27</sup>

### ***Representations***

[69] The city's arguments in relation to section 8(1) are similar to those it made in relation to section 52(2.1) (Issue A, above). It submits that the records relate to investigations undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result, and that disclosure could reasonably be expected to interfere with those proceedings.

[70] To this end, city submits that the Building Division is responsible for law enforcement activities related to ensuring property owners are in compliance with the *BCA*. It explains that under the *BCA*, it has powers to issue orders about building violations that may result in further investigations or prosecutions. The city says that the entire Building Division file is an investigative file on the basis that there is a "realistic potential for prosecution under the *Building Code Act* and the *Planning Act*."

[71] The city also provided some other information to suggest that there is a greater likelihood that there will be permit compliance issues regarding certain of the properties as opposed to others.

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<sup>22</sup> Orders M-16 and MO-1245.

<sup>23</sup> *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

<sup>24</sup> Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

<sup>25</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

<sup>26</sup> Order PO-2085.

<sup>27</sup> Order PO-2657.

[72] The appellant disputes that section 8(1)(b) applies, arguing that the city has not provided any basis to support its contention that disclosure of the records could reasonably be expected to interfere with an investigation. He submits that the hypothetical possibility that litigation might ensue does not meet the standard necessary to establish the exemption.

### ***Analysis and finding***

[73] Based on my review of the records, they are not investigatory in nature. In the case of one record, it is not clear how it relates to the property or the progress of the construction project. Another record relates to a committee of adjustment decision, not any investigation. The remaining records deal with compliance with the building permit and contain varying degrees of information about details of the construction projects. Based on the information before me, none of these records were created because of a complaint or a concern but rather because of routine engagement between agents of the property owner(s) and the city with a view to obtaining a routine approval and closure of a building permit.

[74] The city's position that every Building Division file may result in an order or, eventually, a prosecution is insufficient to establish that there is an investigation with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result. Although the city has indicated that there is greater chance that there may be compliance issues with respect to certain of the properties, it has provided no evidence that any investigations are actually under way.

[75] Without there being any underlying investigation, I find that section 8(1)(b) does not apply to the remaining information.

[76] The only exemption left to be considered for the remaining information is the discretionary solicitor-client privilege exemption; however, I must first consider whether the city is entitled to raise the exemption because it chose to rely on it at a late stage in the appeal.

### **Issue E: May the city rely on the section 12 solicitor-client privilege exemption in this inquiry?**

[77] As indicated, it was not until the adjudication stage that the city decided to rely on the discretionary solicitor-client exemption at section 12. The IPC *Code of Procedure* provides basic procedural guidelines for parties involved in appeals. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal.

[78] Section 11.01 permits an institution to make a new discretionary exemption claim within 35 days after the institution is notified of the appeal and provides adjudicators with discretion not to consider new discretionary claims made outside of the 35 day window. 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.

[79] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, I must balance the relative prejudice to the

institution and to the appellant.<sup>28</sup> The city and the appellant were invited to provide their views about this issue.

### ***Representations***

[80] The city submits that because it withheld access to the records in their entirety, the appellant is not prejudiced by the additional claim that section 12 applies. It submits that the city itself would suffer prejudice if I do not consider its section 12 claim because, it says, it is a valid claim.

[81] The appellant submits that the city's late-raising of section 12 prejudices him because it resulted in further delays.

### ***Finding***

[82] I acknowledge that the appellant argues that he is prejudiced because of further delays. However, the inclusion of section 12 did not result in any further delay because the city raised the issue in its initial representations and the issue was able to be incorporated into the inquiry at an early stage, including an opportunity for the appellant to respond in his initial representations.

[83] Further, the city's arguments under section 12 are similar in nature to the other arguments that it has made in relation to the prosecution exclusion and section 8(1) claims so the appellant has not had to contend with an entirely distinct topic while engaging in this appeal. Lastly, the city's section 12 claim pertains to all of the records at issue, all of which have been withheld in their entirety.

[84] Taking these circumstances into account, and considering the nature of the exemption claim and that the city's arguments are similar to the other arguments made in this appeal, I have decided to consider the city's section 12 claim.

### **Issue F: Does the discretionary exemption for solicitor-client privilege at section 12 apply to the remaining information?**

[85] The city claims that section 12 applies to the remaining information. Section 12 states:

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.

[86] 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 city claims the application of both branches to the records at issue.

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<sup>28</sup> Order PO-1832.

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

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

#### *Communication privilege*

[88] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.<sup>29</sup> The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.<sup>30</sup> Confidentiality is an essential component of the privilege.<sup>31</sup>

#### Representations and finding about common law solicitor-client communication privilege

[89] The city submits that “if there were a contravention of the [BCA] of one of the [city’s] by-laws, an open building file would be transferred to the [city’s] Legal Counsel” and that communications between lawyer and client are generally privileged, pointing to the Supreme Court of Canada cases that underline the importance of solicitor-client privilege and its role in the administration of justice.

[90] The city argues that records from an open building file “form part of the municipal prosecutor’s file as long as there is a potential for a contravention of” the BCA or one of the city’s by-laws.

[91] The appellant submits that the city has failed to demonstrate that any solicitor-client relationship exists at all and, similar to his arguments made in relation to Issues A and D, the risk of a prosecution is speculative only.

[92] Based on my review of the records, none of them contain communications between city staff and legal counsel, nor do they contain information that would reveal such communications. The possibility that records may in the future be transferred to the city’s lawyer is not sufficient to demonstrate that records reveal common law solicitor-client privileged information and I find that they do not.

#### *Litigation privilege*

[93] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a “zone of privacy” in which to investigate and prepare a case for trial.<sup>32</sup> Litigation privilege protects a lawyer’s work product and covers material going beyond

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<sup>29</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>30</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

<sup>31</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.) (“*Chrusz*”); Order MO-2936.

<sup>32</sup> *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4<sup>th</sup>) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39) (“*Blank*”).

solicitor-client communications.<sup>33</sup>

[94] 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.<sup>34</sup> The litigation must be ongoing or reasonably contemplated.<sup>35</sup>

#### Representations and finding about common law litigation privilege

[95] The city refers to *Blank*<sup>36</sup> and states the purpose of common law litigation privilege. It submits that the records were “prepared in relation to pending or apprehended litigation and ultimately for no other purposes. They are therefore privileged.”

[96] The appellant generally disputes the city’s claims of privilege for the reasons stated in response to its common law solicitor-client privilege claims.

[97] Based on my review of the records and the representations of the parties, there is no current ongoing prosecution or litigation, or reasonably contemplated litigation. At best, there is a general possibility of litigation that is not related to the specific circumstances of the permits in question. In consideration of the city’s representations and my review of the records themselves, I am unable to conclude that the records were prepared for the dominant purpose of reasonably anticipated litigation. Indeed, the city has also stated that the Building Division is responsible for monitoring adherence to building permit requirements, a purpose unrelated to litigation.

[98] The records are not protected by common law litigation privilege.

#### ***Branch 2: statutory privilege***

[99] 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.

#### *Statutory solicitor-client communication privilege*

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

#### Representations and finding about statutory solicitor-client communication privilege

[101] The city submits that the records contained in the Building Division files are “collected and maintained for the use of the city Building Inspectors, By-Law enforcement Officers, the Chief Building Officer, and the Corporation’s Legal Counsel” and that disclosure of the file would “impose upon the prosecutor’s independent role.” Further, the city submits that the records are prepared for the enforcement of the *BCA* and various city by-laws, which is the responsibility of building inspectors, by-law enforcement officer and

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<sup>33</sup> *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

<sup>34</sup> *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

<sup>35</sup> Order MO-1337-I and *Chrusz*, cited above; see also *Blank*, cited above.

<sup>36</sup> Cited above.

the Chief Building Official. The city says that if a property owner is in contravention of the *BCA* or a city by-law, "then the Corporation's Legal Counsel requires the records in order to provide legal advice." The city says that as long as a Building division file is "open" there is a potential for a contravention that could be prosecuted.

[102] The appellant states that the city has not established that any type of privilege applies to the records at issue.

[103] As stated already in relation to common law solicitor-client communication privilege, none of the records contain communications between city staff and legal counsel, nor do they contain information that would reveal such communications. The possibility that records may in the future be transferred to the city's lawyer is not sufficient to demonstrate that records contain statutory solicitor-client privileged information and I find that they do not.

#### *Statutory litigation privilege*

[104] 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 litigation privilege, such as communications between opposing counsel.<sup>37</sup>

[105] Records that form part of the Crown brief (in the criminal law context), including copies of materials provided to prosecutors by police, and other materials created by or for counsel, are exempt under the statutory litigation privilege.<sup>38</sup> Documents not originally created for use in litigation, which are copied for the Crown brief as the result of counsel's skill and knowledge, are also covered by this privilege.<sup>39</sup> However, the privilege does not apply to records in the possession of the police, created in the course of an investigation, just because copies later become part of the Crown brief."<sup>40</sup>

#### Representations and finding about statutory litigation privilege

[106] The city re-states its arguments stated above in response to this issue – that is, that the records are prepared for the enforcement of the *BCA* and other requirements and that any open file could potentially become a prosecution.

[107] The appellant disputes the city's claims.

[108] Although the statutory litigation privilege could in some circumstances include the types of records that are at issue in this appeal, there must first be an actual prosecution under way and the records would have to have been collected or gathered by the prosecutor. As is clear, there is no underlying prosecution and as a result, there can be no claim for statutory litigation privilege over the records.

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<sup>37</sup> See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.

<sup>38</sup> Order PO-2733.

<sup>39</sup> *Ontario (Ministry of Correctional Services) v. Goodis*, cited above, and Order PO-2733.

<sup>40</sup> Orders PO-2494, PO-2532-R and PO-2498, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952.



***Summary***

[109] For the reasons set out above, I find that the section 12 exemption for solicitor-client privilege does not apply to the remaining information. With no other exemption claims to consider, I will order the remaining information to be disclosed to the appellant.

**ORDER:**

1. I uphold the city's decision to withhold personal information contained in the records on the basis of the mandatory personal privacy exemption at section 14(1).
2. By **September 3, 2021** but not before **August 30, 2021**, I order the city to disclose to the appellant the information in the records that is not subject to section 14(1). For clarity, I will provide the city with an index to correlate these findings to the records and a copy of the records that may be severed indicating which portions are subject to section 14(1) and which therefore must not be disclosed.
3. Upon request, the city will provide the IPC with a copy of the records disclosed to the appellant.

Original signed by: \_\_\_\_\_

Valerie Jepson  
Adjudicator

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July 29, 2021