

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-4092-I

Appeal MA19-00470

City of Ottawa

August 3, 2021

**Summary:** This interim order deals with an appeal of an access decision made by the City of Ottawa (the city) under the *Municipal Freedom of Information and Protection of Privacy Act*. The request was for records of certain communications relating to the requester. The city granted partial access to the records, but withheld others, claiming the application of the discretionary exemption in section 12 (solicitor-client privilege). In this interim order, the adjudicator upholds the exemption in section 12. She defers making a finding regarding the city's exercise of discretion, pending receipt of representations as to whether the records contain the appellant's personal information and the possible application of section 38(a) to the records.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 12.

**Orders and Investigation Reports Considered:** Orders MO-2945-I, MO-3330 and MO-3919- I.

**Cases Considered:** *Privacy Commissioner of Canada v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574.

### OVERVIEW:

[1] This interim order disposes of some of the issues raised as a result of an appeal of an access decision made by the City of Ottawa (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for the following information, relating to the city's prosecution of an alleged red-light camera violation and the requester's appeal of his conviction:

1. Any and all correspondence between city employees, officials, agents, etc., more specifically, but not limited to certain named individuals or any other recipient concerning or referencing the requester, including emails, voicemails, text messages,

instant messages, handwritten or typed notes of in person conversations, memos, text messages, et cetera; and

2. Any and all correspondence addressed to city employees, officials, agents, etc., more specifically, but not limited to, certain named individuals concerning or referencing the requester, by anyone, including e-mails, voicemails, text messages, instant messages, handwritten or typed notes of in person conversations, memos, text messages, et cetera; and
3. Records regarding the city's soft or full enquiries made to the requestor's consumer credit report. This is to include information as to incidents of when the enquiries were made by the city, whom the requests were initiated by, and the content of the information received from the [named organization] regarding the requestor.

[2] The request was for records over a specified time period.

[3] In response, the city located records and issued a decision letter to the requester, granting partial access to them. The city withheld 10 records in whole, claiming the application of the discretionary exemption in section 12 (solicitor-client privilege), as well as two records, in part, claiming the mandatory exemption in section 14(1) (personal privacy).

[4] The requester, now the appellant, appealed the city's decision to the Information and Privacy Commissioner/Ontario (the IPC).

[5] During the mediation of the appeal, the appellant advised the mediator that he was seeking access to the withheld information and that, as a result of not receiving an index of records, he was unable to determine what records were denied.

[6] The mediator conveyed the appellant's concerns to the city. The city agreed to provide the appellant with a copy of a detailed index of records outlining the records and exemptions. The appellant subsequently advised the mediator that he was seeking access to the withheld information. The city advised the mediator that it maintained its decision to deny access to the withheld information.

[7] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. I provided the city, initially, with the opportunity to provide representations. The city provided representations to the IPC. In its representations, the city advised that it had issued a revised decision letter to the appellant, disclosing further information, and as a result was no longer relying on the personal privacy exemption in section 14(1). That exemption, therefore, is no longer at issue in this appeal.

[8] I then sought and received representations on the application of section 12 from the appellant as well as reply representations from the city. Portions of the appellant's representations were withheld, as they met the IPC's confidentiality criteria set out in *Practice Direction 7*. However, I have taken them into consideration in this order.

[9] For the reasons that follow, I find that the records are exempt from disclosure under section 12 of the *Act*. However, I defer making a finding regarding the city's exercise of discretion, pending receipt of representations as to whether the records contain the appellant's personal information and the possible application of section 38(a) to them.

**RECORDS:**

[10] There are 10 records at issue, consisting of emails, some with attached notes, letters, transcripts and Court preparation documents, as follows:

<b>Page Number</b>	<b>Record details</b>
7	Internal correspondence in preparation for Court.
36	Internal correspondence requesting and assigning legal assistance.
49-51	Internal correspondence requesting and assigning legal assistance.
203	Internal correspondence requesting legal assistance.
210-211	Internal correspondence. Provision of legal advice.
260-266	External correspondence. Confidential correspondence with the Ministry of the Attorney General regarding conduct of prosecution with constitutional issues.
271-273	Internal correspondence. Provision of appeal materials requested by counsel. Provision of legal advice by counsel.
285-287	Internal correspondence – review of legal file with counsel. Provision of legal advice by counsel.
289-296	Notes and working papers created by counsel in preparation for appeal litigation. Notes provided to client.
297	Internal correspondence. Review of legal file with counsel. Provision of legal advice by counsel.

**ISSUES:**

- A: Does the discretionary exemption at section 38(a), read with section 12, or the section 12 exemption on its own, as the case may be, apply to the records?
- B: Did the city exercise its discretion under section 38(a), read with section 12 or section 12 standing alone, as the case may be? If so, should this office uphold the exercise of discretion?

**PRELIMINARY ISSUE**

[11] The records may contain the appellant’s personal information. The parties were not asked to provide representations on this issue, although I note that the city submits that the records do not contain the appellant’s personal information, and the appellant has not made specific representations on that issue.

[12] I will not be making a finding on whether the records contain the appellant's personal information in the absence of representations on that issue. However, if the records contain the appellant's personal information, the relevant exemption would be section 38(a) and, as seen below, I am deferring my findings on the city's exercise of discretion pending further representations on whether the records contain the appellant's personal information and my findings on that issue.

**Issue A: Does the discretionary exemption at section 38(a), read with section 12, or the section 12 exemption on its own, as the case may be, apply to the records?**

[13] As stated above, section 38(a) may be a relevant exemption in this appeal. Section 38(a) reads:

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

if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[14] In this case, section 38(a) may be relevant in conjunction with section 12.

[15] 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.

[16] 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. Here, the city relies on both branches.

**Branch 1: common law privilege**

[17] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. The city asserts that both types of privilege are relevant in this appeal.

[18] 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>1</sup> The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.<sup>2</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>3</sup>

[19] The privilege may also apply to the legal advisor's working papers directly related to

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<sup>1</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>2</sup> Orders PO-2441, MO-2166 and MO-1925.

<sup>3</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

seeking, formulating or giving legal advice.<sup>4</sup>

[20] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.<sup>5</sup> The privilege does not cover communications between a solicitor and a party on the other side of a transaction.<sup>6</sup>

[21] 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>7</sup> Litigation privilege protects a lawyer’s work product and covers material going beyond solicitor-client communications.<sup>8</sup> 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>9</sup> The litigation must be ongoing or reasonably contemplated.<sup>10</sup>

### ***Loss of privilege - waiver***

[22] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege knows of the existence of the privilege, and voluntarily demonstrates an intention to waive the privilege.<sup>11</sup>

[23] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.<sup>12</sup>

[24] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.<sup>13</sup> However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.<sup>14</sup>

[25] Common law litigation privilege generally comes to an end with the termination of litigation.<sup>15</sup>

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

[26] 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

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<sup>4</sup> *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

<sup>5</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

<sup>6</sup> *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

<sup>7</sup> *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

<sup>8</sup> *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

<sup>9</sup> *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

<sup>10</sup> Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

<sup>11</sup> *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

<sup>12</sup> *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

<sup>13</sup> J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

<sup>14</sup> *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

<sup>15</sup> *Blank v. Canada (Minister of Justice)*, cited above.

contemplation of or for use in litigation.” The statutory and common law privileges, although not identical, exist for similar reasons. The city asserts that both the statutory communication and litigation privileges are relevant here.

[27] Like the common law solicitor-client communication privilege, this privilege under Branch 2 covers records prepared for use in giving legal advice.

[28] The statutory 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.<sup>16</sup>

[29] The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.<sup>17</sup>

[30] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.<sup>18</sup>

### ***Representations***

[31] The city advises that the records arose from an appeal of a red-light camera conviction filed by the appellant. The city submits that both Branch 1 of section 12, namely common law solicitor-client privilege and litigation privilege, as well as Branch 2, namely statutory privilege apply, to the records at issue.

[32] The city further submits that the records include legal recommendations and advice, working papers and materials related to the provision of legal advice, and records created or provided for use in litigation. In addition, the records placed in the red-camera light appeal file were done so by counsel, requested by counsel or sent to counsel for the purposes of the prosecution.

[33] The city provided evidence by way of an affidavit sworn by one of its lawyers employed in its legal services department. The affiant submits that she has reviewed the records that were identified as responsive to the access request and that these records were all retrieved from the city’s legal appeal file. She states:

The records consist of internal correspondence, working papers, and notes of counsel subject to litigation privilege. The records also contain requests for, and provision of legal advice, and information passed between solicitor and client for the purpose of providing advice in the ongoing litigation. These latter records being subject to solicitor-client privilege and litigation privilege.

[34] As part of her affidavit, the affiant provided a table,<sup>19</sup> detailing the types of records for which the city applied section 12, as follows:

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<sup>16</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>17</sup> *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

<sup>18</sup> *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

<sup>19</sup> For ease of reference, I am including additional information provided by the city in its Index of Records, a copy of which was provided to the appellant.

<b>Page Number</b>	<b>Creator</b>	<b>Recipient</b>	<b>Record details</b>	<b>Type of privilege</b>
7	Legal staff	Provincial Offences staff	Internal correspondence in preparation for Court.	Litigation privilege
36	Legal staff	Legal staff	Internal correspondence requesting and assigning legal assistance.	Solicitor-client privilege and litigation privilege
49-51	Provincial Offences	Legal staff	Internal correspondence requesting and assigning legal assistance.	Solicitor-client privilege and litigation privilege
203	Provincial Offences	Legal staff	Internal correspondence requesting legal assistance.	Solicitor-client privilege and litigation privilege
210-211	Provincial Offences	Legal staff	Internal correspondence. Provision of legal advice.	Solicitor-client privilege and litigation privilege
260-266	Legal staff	Provincial Offences staff	External correspondence. Confidential correspondence with the Ministry of the Attorney General regarding conduct of prosecution with constitutional issues.	Litigation privilege
271-273	Legal staff	Provincial Offences staff	Internal correspondence. Provision of appeal materials requested by counsel. Provision of legal advice by counsel.	Solicitor-client privilege and litigation privilege

285-287	Provincial Offences	Legal staff	Internal correspondence – review of legal file with counsel. Provision of legal advice by counsel.	Solicitor-client privilege and litigation privilege
289-296	Legal staff	Legal staff	Notes and working papers created by counsel in preparation for appeal litigation. Notes provided to client.	Solicitor-client privilege and litigation privilege
297	Legal staff	Provincial Offences staff	Internal correspondence. Review of legal file with counsel. Provision of legal advice by counsel.	Solicitor-client privilege and litigation privilege

[35] The affiant goes on to submit that the records have remained strictly confidential and that she has reviewed the sender, recipient and all those copied on each email listed above. She argues that with the exception of the records at pages 260-266, all correspondence is between the city’s legal services department and staff at the city’s Provincial Offences Court.<sup>20</sup> She also submits that as counsel in the appeal matter, she conferred only with internal city staff with direct involvement in the matter.

[36] With regard to the records at pages 260-266, the affiant advises that the Ministry of the Attorney General (the ministry) must be notified of appeals where constitutional questions are raised. It is at the discretion of the ministry whether it wishes to make submissions on those constitutional questions. The affiant argues that the city and the ministry, as respondents in the litigation retain a common interest, and that the city’s correspondence with the ministry concerns the conduct of the litigation and is subject to litigation privilege.

[37] The affiant further submits that at no time did she receive instructions waiving solicitor-client or litigation privilege on the records at issue.

[38] The city goes on to submit that, in general, the IPC has found that section 12 is a “class exemption,” meaning that it is generally appropriate for the entire record to be withheld, rather than severed in a piecemeal manner.

[39] The appellant submits that the city has failed to establish a sufficient nexus between

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<sup>20</sup> IPC staff contacted the city, who confirmed that the Provincial Offences staff in this appeal are City of Ottawa employees.



the records and which Branch of section 12 applies to them, and that its representations are vague and broad.

[40] Concerning the common law solicitor-client privilege in Branch 1, the appellant submits that it applies only to confidential communications between a solicitor and client, and exists any time a client seeks legal advice from their solicitor, whether litigation is involved or not. The appellant further submits that the city's evidence that all correspondence for which it has claimed this Branch is between the city's legal services department and staff at the city's provincial offences Court. The appellant's position is that this description is vague and does not disclose the role of the senders or receivers, and whether these individuals form part of the solicitor-client relationship. For example, it is unclear whether the parties to the emails are municipal prosecutors and/or clerks who serve an entirely different function than those employed by the municipal prosecutor's office, and who do not have the same interests.

[41] The appellant relies on Order PO-1846-F, in which the adjudicator found that a solicitor-client relationship cannot be established simply on the basis that two "institutions" are part of a single government. While that matter dealt with privilege between a Crown corporation and a ministry, the appellant submits that it stands for the principle that the solicitor-client privilege exemptions cannot be established if two parties do not have the same interests in the matter.

[42] The appellant further submits that it is impossible to ascertain whether the records are protected by common law solicitor-client privilege in Branch 1 without the IPC obtaining the records and making that determination, and he requests that the IPC examine the records.

[43] Turning to the common law litigation privilege in Branch 1, the appellant submits that litigation privilege applies only in the context of litigation. In other words, the dominant purpose of the records must be preparation in contemplation of litigation, and that there is a reasonable prospect of such litigation. In addition, the appellant submits that litigation privilege is temporary and lapses when the litigation ends.

[44] Concerning the appeal of the red-light camera conviction, which the appellant advises he initiated, he argues that the city has failed to provide further details as to whether the appeal proceeded, whether there was a reasonable prospect of any litigation, what the disposition of the appeal was, and/or details as to whether the litigation is ongoing. The appellant then goes on to submit that he won the appeal of his conviction and as a result, as stated above, the common law litigation privilege attached to the records is temporary and lapsed when the litigation ended.

[45] Regarding the statutory solicitor-client privilege in Branch 2 of section 12, the appellant submits that this privilege is not intended to enable government lawyers to assert a privilege which is more expansive or durable than which is available at common law to other solicitor-client relationships.<sup>21</sup> The appellant goes on to submit that it is possible that the withheld records contain information that was not prepared by or for counsel employed or retained by the city, and may be outside of the context of use in giving legal advice. The appellant reiterates his request that the IPC obtain copies of the records to examine them and ascertain whether they are exempt under the solicitor-client communication privilege under either Branch 1 or Branch 2.

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<sup>21</sup> *Ontario (Attorney General v. Big Canoe)* [1997] O.J. No. 4995 (Div. Ct.).

[46] Turning to the statutory litigation privilege in Branch 2, the appellant submits that, similar to common law litigation privilege, it requires that the withheld record(s) be prepared by or for counsel employed or retained by an institution for the dominant purpose in contemplation of, or for use in litigation. The appellant further submits that the dominant purpose of the records may not be contemplated litigation of the red-light camera conviction appeal, but that it is possible they were created for some other purpose or outside the "zone of privacy." The appellant goes on to argue that in assessing whether a record was created for the dominant purpose of litigation, each case must be analyzed on its own facts, requiring an inquiry into the purpose for which each record was created.

[47] In support of his position, the appellant relies on *Ontario (Liquor Control Board) v. Magnotta Winery Corp.*<sup>22</sup> In *Magnotta*, the appellant submits, the Ontario Court of Appeal held that simple correspondence is not a document that is prepared for use in litigation. Instead, simple correspondence is prepared during the course of litigation and, as such, is not litigation privileged. In this case, the appellant argues that the records do not meet the dominant purpose test and were not prepared "for use in the litigation," but rather "during the course of the litigation," and that it is not indicated in the city's affidavit that the records to which litigation privilege is purported to attach were prepared for use in the appeal of the red camera light conviction. As an example, the simple correspondence between the city and the Ministry of the Attorney General at pages 260-266 could not have been created within a zone of privacy. At most, the appellant argues, this correspondence was prepared during the course of litigation but not for use in the litigation.

[48] With respect to waiver of privilege, the appellant's position is that the city has waived its privilege in the following ways:

- It disclosed pages 138-155, which form part of the city's "legal appeal file" and/or contain internal correspondence, working papers and notes of counsel, their agents or employees, legal advice and/or information passed between solicitor and client;
- It included or copied parties in withheld correspondence who were not the client and/or did not have a sufficient common interest with the client, i.e. staff of the Provincial Offences Court; and
- It disclosed records which form part of the "legal appeal file" and/or contain internal correspondence, working papers and notes of counsel, their agents or employees, legal advice and/or information passed between solicitor and client with the Ministry of the Attorney General.

[49] The appellant also submits that the city has not made any representations regarding whether the records contain legal billing information that may reveal any communications protected by privilege.

[50] In reply, the city submits that its affidavit regarding the nature of the records and the exemption claimed is not vague. The city states:

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<sup>22</sup> 2010 ONCA 681 (*Magnotta*). The appellant also relies on *Waugh v. British Railway Board* [1979] 3 W.L.R 150 and Order PO-2733.

While solicitor-client and litigation privilege are distinct branches of legal privilege, they may be co-terminus in a document. A record may be both solicitor-client and litigation privileged. Further . . . common-law litigation privilege applied to a record prepared by or for counsel employed or retained by the institution when a legal proceeding was contemplated or ongoing is continued through the application of statutory litigation privilege established under MFIPPA once the litigation is complete.

[51] The city reiterates that statutory litigation privilege continues to apply even when the litigation is no longer ongoing. The city further submits that the city is not required to use the phrase "prepared for use in the appeal" in its arguments as alleged by the appellant. The city's language of "preparation for court" in its representations, it argues, has the same meaning as the phrase "prepared for use in the appeal."

[52] With respect to the appellant's assertion that solicitor-client privilege cannot apply to communications where multiple individuals at the city were copied, the city submits that an institution can establish a solicitor-client relationship with counsel. In doing so, counsel may provide advice to multiple employees of the institution as representatives of the institutional client. Individual employees, the city argues, do not have interests separate from each other or the institution and the legal advice given is to the institution, not the individual employees. In addition, the city submits, the responsibility to administer Provincial Offences Court and prosecute most offences under the *Provincial Offences Act*<sup>23</sup> was transferred from the province to municipalities around the year 2000.

[53] With respect to the communication between the city and the Ministry of the Attorney General (the ministry), where a constitutional question is raised, the ministry must be notified. As a result, the ministry and the city are not opposing parties in the proceeding and retain a common interest in the litigation. The city argues that the communication is not mere correspondence created in the course of litigation.

[54] The city then address the appellant's request that copies of the records be sent to the IPC to be examined. The city submits that it fulfilled the requirement of the IPC's Notice of Inquiry by providing a sufficiently detailed affidavit and that this approach has been accepted in numerous appeals, including the appeal leading to Order MO-3919-I.

[55] The city submits that privilege is not waived by mere mistake or inadvertence, and in this case was not waived either explicitly or implicitly. The city also disagrees with the appellant that the disclosure of portions of the appeal file constitutes a waiver of privilege over the entire file. The disclosure of certain records to the appellant was indicative of its exercise of discretion in relation to the discretionary section 12 exemption (see below). In addition the city argues that copying staff of the Provincial Offences Court or the Ministry of the Attorney General does not constitute a waiver of privilege.

[56] Lastly, the city submits that none of the records at issue contain any information about legal billing.

[57] In sur-reply, the appellant submits that the city has failed to meet its burden of proof with respect to its application of section 12, and that its case rests on conjecture in providing

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<sup>23</sup> R.S.O. 1990, c. P.33.

an affidavit that simply states that the privilege applies, along with a "cryptic" notation surrounding the underlying records. The appellant further submits that I should not accept the city's statements, because to do so would render the burden of proof in section 42 ineffective, and in future institutions would claim section 12 with impunity.

[58] The appellant further submits that the city has failed to specify each Branch of privilege, instead simply referring to solicitor-client privilege or litigation privilege. Section 12, he argues, contains two Branches, namely the common law and statutory privileges. He goes on to submit that the onus rests on the city to establish that one or the other (or both) Branches apply,<sup>24</sup> and that the city has not done so.

[59] The appellant also submits that in previous IPC orders, the affidavits provided by the institutions had more detail than in this case. For example, in Order MO-3919-I, the adjudicator found that she had sufficient information as it related to some of the withheld records, but not others. The affidavit in that appeal set out the dates of the emails, the subject lines, and particulars as to the roles of the senders and receivers. In Order MO- 3330, the affidavit provided the subject line and the names and titles of the senders and recipients of the withheld emails. In Interim Order MO-2945-I, the affidavit identified the person creating the record, their position and/or the capacity in which they were acting, the recipient and that person's title/capacity and the general subject matter of the correspondence. Conversely, in Order MO-3085, while the affidavit described the records in some detail, the IPC requested the institution provide copies of the records because the affidavit was inadequate to determine whether the exemption applied.

[60] With respect to communications where multiple individuals were copied on the emails, the appellant states:

The respondent [the city] states that the solicitor may provide advice to multiple employees of the corporation, but the employees are each representative of the institutional client. However, in this case, and as acknowledged in the respondent's reply, paragraph 6 and 7 of the affidavit of [the affiant] confirms that with the exception of pages 260-266 all communications at issue in this matter were internal correspondence between the City of Ottawa's Legal Services and staff at the City of Ottawa's Provincial Offences Court. The "City of Ottawa's Provincial Offences Court" despite the transfer agreement raised by the respondent in their reply, is a branch of the Ontario Court of Justice.<sup>25</sup> The Ontario Court of Justice is a court of record being a continuation of the Court of Ontario and the Ontario Court (Provincial Division). The Ontario Court of Justice is an institution of its own right and a separate and independent entity from the respondent, the City of Ottawa. It is additionally the subject of the concept of judicial independence.

[61] The appellant goes on to argue that the city's Provincial Offences Court is not a client department that would traditionally give rise to solicitor-client privilege, and that it is also possible that the withheld records contained policy advice, rather than legal advice.

[62] With respect to the communication between the city and the Ministry of the Attorney,

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<sup>24</sup> See, for example, Order MO-2049-I.

<sup>25</sup> *Courts of Justice Act* R.S.O. 1990, c. C. 43 and *Provincial Offences Act* R.S.O. 1990, c. P. 33.

the appellant submits that whether or not they had a common interest in the litigation is not relevant as to whether that correspondence is privileged.

[63] Concerning waiver, the appellant submits that if the disclosure of records to him by the city did not constitute an express waiver, it constituted an implied waiver.

### ***Analysis and findings***

[64] The city declined to provide this office with copies of any of the records in reliance on *Privacy Commissioner of Canada v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574 ("*Blood Tribe*"), because it is claiming that the records are subject to solicitor-client communication and litigation privilege.

[65] The appellant's position is that the IPC is required to have copies of the records at issue in order to determine if section 12 applies, but refers to no law or statutory authority in support of this position. The appellant is also of the view that, in the absence of having the records, the IPC has insufficient evidence before it to make a determination whether the records are exempt from disclosure.

[66] The city has provided to the IPC its representations, an affidavit, and an index of records, all of which the appellant received, and all of which I have reviewed. Based on the information provided by the city, I am satisfied that it has provided sufficient information to enable me to adjudicate the question of whether the records are exempt under section 12 of the *Act*.

[67] Mindful of the categories identified by the city, I first considered whether any of the withheld records consist of internal communications from or to the city's legal counsel that qualify as communications for the purpose of giving or obtaining legal advice. This type of information would qualify as solicitor-client communication privileged under Branch 1 and Branch 2, outlined above.

[68] As a starting point, I am satisfied that the Provincial Offences staff in this appeal are employees of the city. Although not every communication between a city's legal counsel and its staff will automatically qualify as solicitor-client privileged communications, I am satisfied that the information on the following pages qualifies: 36, 49-51, 203, 210-211, 271-273, 285-287 and 297. Based on the evidence provided by the city, I find that these pages consist of communications whose purpose is seeking or providing legal advice in relation to the appellant's appeal of a red-light camera conviction. I also find that the city has not waived its privilege with respect to these records, either explicitly or implicitly. The fact that the city disclosed other records to the appellant in relation to the red-camera conviction appeal does not constitute a waiver with respect to the records at issue in this appeal. As a result, I find that this information is solicitor-client communication privileged and exempt from disclosure under both Branches 1 and 2 of section 12.

[69] The remaining records at issue are at pages 7, 260-266 and 289-296. Page 7 consists of internal correspondence between the city's legal counsel and Provincial Offences staff in preparation for court. I find that this correspondence qualifies for exemption under Branch 2 of section 12, as it was prepared for the dominant purpose of the litigation of the appeal of the red-light camera conviction. I find that this communication occurred within the "zone of privacy," and is, therefore, subject to litigation privilege and exempt from disclosure.

[70] Pages 260-266 consist of external correspondence between the city's legal counsel and the Ministry of the Attorney General regarding the conduct of the prosecution (the appeal of the red-light camera conviction), in which the appellant raised constitutional issues. Where a constitutional issue is raised, the Ministry of the Attorney General is notified. In this case, I find that the city's and the Ministry of the Attorney General's interests were aligned such that there existed a "zone of privacy" between their communications. In addition, I find that the dominant purpose for which the correspondence was created was existing litigation, and was made with an intention that it be kept confidential in the course of the litigation. As a result, I find that litigation privilege attaches to the communications between the city's legal counsel and the Ministry of the Attorney General as they were intended to occur within the "zone of privacy" for use by the city's legal counsel in litigation. Consequently, these pages are exempt from disclosure as they are subject to the litigation privilege in Branch 2 of section 12.

[71] The records at pages 289-296, which are notes and working papers created by legal counsel in preparation for the appeal I find also qualify for exemption under the statutory litigation privilege in Branch 2 of section 12, as they were prepared to assist legal counsel in the red-light camera appeal.

[72] As I noted above, the statutory (Branch 2) litigation privilege does not end when the litigation ends. I further find that the city has not waived its privilege, either explicitly or implicitly with respect to these records.

[73] As a result, I find that pages 7, 260-266 and 289-296 are litigation privileged and exempt from disclosure under Branch 2 of section 12. As a result of this finding, I do not need to decide whether these records also qualify for the solicitor-client communication privilege in either Branch 1 or Branch 2.

**Issue B: Did the city exercise its discretion under section 38(a), read with section 12 or section 12 standing alone, as the case may be? If so, should this office uphold the exercise of discretion?**

[74] 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.

[75] 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; or
- it takes into account irrelevant considerations; or
- it fails to take into account relevant considerations.

[76] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>26</sup> This office may not, however, substitute its own

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<sup>26</sup> Order MO-1573.

discretion for that of the institution.<sup>27</sup>

[77] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>28</sup>

- 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 is seeking his or her own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;
- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information; and
- the historic practice of the institution with respect to similar information.

### ***Representations***

[78] The city submits that it maintains its prosecution and appeal files in a strictly confidential manner, taking into consideration that the records in these files are considered by the city to be solicitor client and/or litigation privileged, and that the city takes its obligation to maintain the confidentiality seriously. The city submits that none of the records at issue contain the appellant's personal information, and that hundreds of pages of records, other than the ones at issue in this appeal, have been disclosed to the appellant.

[79] The city argues that there is no evidence that it exercised its discretion in bad faith or for an improper purpose, or that it took into account irrelevant considerations. The city further states:

The Courts have consistently upheld the principle of solicitor-client and litigation privilege in order to ensure that legal advice may be freely sought and given, and litigation conducted effectively within a zone of privacy. The City's application of s. 12 of MFIPPA to these records upholds that legal principle.

[80] As previously stated, the appellant's representations on this issue will not be

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<sup>27</sup> Section 43(2).

<sup>28</sup> Orders P-344 and MO-1573.

reproduced due to confidentiality concerns.

[81] In reply, the city submits that it has attempted to exercise its discretion by disclosing as many records as possible to the appellant without waiving legal privilege over the records at issue. It further submits that it exercised its discretion in a reasonable manner and made the appropriate considerations. Lastly, the city argues that there is no sympathetic or compelling need for the disclosure and there is no public policy or greater public interest in the disclosure of the records.

### ***Analysis and findings***

[82] An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law.<sup>29</sup> It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.<sup>30</sup>

[83] If the records contain the appellant's personal information, section 38(a) would be the relevant exemption to consider, in addition to the city's exercise of discretion under section 38(a). As a result, I defer my findings regarding the city's exercise of discretion, pending receipt of representations as to whether the records contain the appellant's personal information and the possible application of section 38(a) to them.

### **ORDER:**

1. I uphold the application of the exemption in section 12 to the records.
2. I defer my findings regarding the city's exercise of discretion, pending receipt of representations as to whether the records contain the appellant's personal information and the possible application of section 38(a) to the records.
3. I remain seized of this matter until I make findings on the issues of whether the records contain the appellant's personal information, whether section 38(a) applies to the records and whether the city properly exercised its discretion.

Original Signed by: \_\_\_\_\_

Cathy Hamilton  
Adjudicator

August 3, 2021 \_\_\_\_\_

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<sup>29</sup> Order MO-1287-I.

<sup>30</sup> Order 58.