

Information and Privacy Commissioner,  
Ontario, Canada



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

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## FINAL ORDER MO-4096-F

Appeal MA18-00863

Waterloo Regional Police Services Board

August 20, 2021

**Summary:** This final order determines whether the discretionary solicitor-client privilege exemption at section 12 of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) applies to the information remaining at issue as the Waterloo Regional Police Services Board (the police) claims. In Interim Order MO-4067-I, the adjudicator partially upheld the police's access decision, and deferred her decision about the section 12 claim pending receipt of additional evidence from the police. In this order, the adjudicator finds that section 12 applies to the remaining withheld information to exempt it from disclosure under the *Act*, and dismisses the appeal.

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

**Orders Considered:** Orders MO-4067-I and MO-1663-F.

**Case Considered:** *R. v. Campbell*, [1999] 1 S.C.R. 565.

### OVERVIEW:

[1] This final order addresses the issue of access to portions of a police record dealing with criminal harassment. The Waterloo Regional Police Services Board (the police) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

Any and all records, notes, photographs, diagrams, correspondence, audio/visual recordings, documents and/or materials and information concerning me.

Any and all occurrence reports, investigation reports, witness statements, crown briefs, police briefs, records of arrest, officers notes, and police-related calls.

Any and all records of the nature stated.

[2] After receiving the request, the police notified a third party and requested their consent to disclose their information to the requester. The third party consented to disclosure of their information to the requester under the section 14(1)(a) consent exception to the personal privacy exemption.<sup>1</sup> The police then issued a decision to the requester granting partial access to the responsive records with severances under:

- Section 38(a) (discretion to refuse access to requester's own personal information) in conjunction with sections 8(1)(a) (law enforcement matter), 8(1)(c) (reveal investigative techniques and procedures), 8(1)(d) (confidential source of information), 8(1)(g) (intelligence information), 8(1)(l) (facilitate commission of an unlawful act), and 12 (solicitor-client privilege); and
- Section 38(b) (personal privacy) of the *Act*.

[3] The requester, now the appellant, appealed the police's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution.

[4] During the course of mediation, the police issued a revised decision, adding the application of section 9(1)(a) (relations with other governments) to the withheld information, in addition to the previously claimed exemptions. The appeal proceeded to the adjudication stage, and I conducted an inquiry.

[5] In Interim Order MO-4067-I, I partially upheld the police's access decision, finding that the exemptions in section 38(b) and section 38(a), in conjunction with section 8(1)(c), applied to the information for which those exemptions were claimed. I did not make a determination on the application of section 9(1)(a), because I found that the portions of the records the police claimed section 9(1)(a) over were already exempt under section 38(b) and section 38(a) in conjunction with section 8(1)(c). I deferred my decision about the police's section 12 claim pending receipt of additional evidence from the police about the information withheld on that basis. Only section 12

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<sup>1</sup> 14(1)(a) states: a head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access.

remains at issue in this appeal.

[6] I requested from the police a detailed affidavit outlining the reasons why it claims portions of record 3 are subject to the solicitor-client privilege exemption in section 12 of the *Act*. I referred the police to the IPC guidance document, *IPC protocol for appeals involving solicitor-client privilege claims where the institution does not provide the records at issue to the IPC*. I received the affidavit from the police. On review of the affidavit, I find it to be confidential according to the confidentiality criteria in the IPC's *Practice Direction 7: Sharing of Representations*, and I provide only a general summary of its contents in my reasons below.

[7] In this order, I uphold the police's decision to withhold portions of record 3 under the discretionary solicitor-client privilege exemption at section 12 of the *Act*.

## **RECORD:**

[8] The information remaining at issue in this appeal consists of severed portions of record 3, the handwritten notes of Detective D.G., which the police withheld under section 12 of the *Act*.

## **ISSUES:**

- A. Does the discretionary exemption at section 38(a), in conjunction with section 12 (solicitor-client privilege), apply to the information at issue?
- B. Did the police exercise their discretion under section 38(a)? If so, should the exercise of discretion be upheld?

## **DISCUSSION:**

### **A. Does the discretionary exemption at section 38(a), in conjunction with section 12 (solicitor-client privilege), apply to the information at issue?**

[9] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right. Section 38(a), in particular, provides that the head of an institution may refuse to disclose to the individual to whom the personal information in a record relates if certain exemptions, including section 12, would apply to the disclosure of that personal information.<sup>2</sup>

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<sup>2</sup> Section 38(a) lists the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15.

[10] In Order MO-4067-I, I found that record 3 (among others) contains the appellant's personal information. The police argue that section 38(a), in conjunction with the section 12 solicitor-client privilege exemption, applies to portions of record 3, because they contain legal advice provided to the police by Crown counsel.<sup>3</sup>

[11] 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.

[12] 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. My analysis in this order takes place under branch 1. Given my finding that branch 1 applies to the withheld information, it is not necessary for me to consider the application of branch 2.

### ***Solicitor-client communication privilege***

[13] 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>4</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>5</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>6</sup>

[14] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.<sup>7</sup>

[15] 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>8</sup> The privilege does not cover communications between a solicitor and a party on the other side of a transaction.<sup>9</sup>

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<sup>3</sup> Only section 12 remains at issue in this appeal.

<sup>4</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>5</sup> Orders PO-2441, MO-2166 and MO-1925.

<sup>6</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

<sup>7</sup> *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

<sup>8</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

<sup>9</sup> *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

### ***Representations, analysis and findings***

[16] The appellant's representations do not specifically address section 38(a) in conjunction with section 12.

[17] I sought additional affidavit evidence from the police because the police did not provide a complete unredacted copy of record 3 to the IPC. I am now satisfied, based on the additional affidavit evidence submitted by the police following Interim Order MO-4067-I, that I have sufficient evidence upon which to base a decision about the application of section 12 of the *Act* to the portions of record 3 withheld on that basis.

[18] Based on the police's affidavit and representations, I find that the information in record 3 withheld under the common law solicitor-client privilege exemption at section 12 of the *Act* is exempt from disclosure. In particular, I am satisfied that these withheld portions of record 3 represent, or would reveal, confidential communications between solicitor and client, or their agents or employees, for the purpose of seeking or giving legal advice.

[19] The police argue that section 38(a), in conjunction with section 12, applies to the portions of record 3 withheld on that basis, because these portions contain legal advice provided to the police by Crown counsel. In support of their argument, the police rely on the Supreme Court of Canada (SCC) decision in *R. v. Campbell*.<sup>10</sup> In *Campbell*, the SCC ruled that advice given to the Royal Canadian Mounted Police by a Department of Justice lawyer over the legality of a proposed "reverse sting" operation was protected by solicitor-client privilege. The SCC observed, however, that:

[w]hether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

[20] In Order MO-1663-F, former Assistant Commissioner Sherry Liang reviewed the IPC's application of *Campbell*. She states:

*R. v. Campbell* has been applied in orders of this office, such as in PO-1779, PO-1931 and MO-1241. In each of these orders, a solicitor-client privilege was found on the basis that the police (a municipal police service or the Ontario Provincial Police) sought legal advice from Crown counsel. All communications within the framework of this relationship were found to qualify for solicitor-client privilege under either section 12 of the *Act*, or section 19 of the provincial *Act*.

[21] I note that a municipal police force is not considered a "client department" of the Crown and, generally, there is no solicitor-client relationship between Crown counsel

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<sup>10</sup> *R. v. Campbell*, [1999] 1 S.C.R. 565. (*Campbell*).

and the police. However, whether a solicitor-client relationship can be established in a particular instance depends on the application of the functional definition set out in *Descôteaux v. Mierzwinski* and approved in *Campbell*. Based on *Campbell* and the IPC orders noted above, I accept that legal advice sought from Crown counsel by a municipal police service can be covered by section 12 depending on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

[22] In this appeal, I accept the evidence provided by the affidavit of the police's Access to Information Analyst. Based on this evidence, I find that the relationship between the police (through the detective) and Crown counsel in this appeal to be one of solicitor and client. Specifically, I accept that the information in record 3 withheld under section 12 is legal advice provided by Crown counsel to the police relating to the prosecution of the criminal harassment matter, and this advice was communicated to the detective investigating the matter. I also accept that the withheld portions reflect confidential communications between Crown counsel and the police, and that the portions withheld under section 12 were meant to be confidential.

[23] Regarding the issue of waiver, there is no indication that the police have waived privilege over the information that it has claimed to be solicitor-client privileged. Based on the police's evidence and the circumstances of this appeal, I find that the police have not waived privilege over the information in record 3 that it withheld under section 12.

[24] Accordingly, subject to my finding on the police's exercise of discretion below, I uphold the police's application of section 38(a), in conjunction with the section 12 solicitor-client privilege exemption, to the portions of record 3 withheld on that basis.

**B. Did the police exercise their discretion under section 38(a)? If so, should the exercise of discretion be upheld?**

[25] The section 38(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[26] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[27] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>11</sup> The IPC may not, however, substitute its own discretion for that of the institution.<sup>12</sup>

[28] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>13</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
  - 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
- the historic practice of the institution with respect to similar information.

***Representations, analysis and findings***

[29] The police submit that they exercised their discretion under section 38(a)

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<sup>11</sup> Order MO-1573.

<sup>12</sup> Section 43(2).

<sup>13</sup> Orders P-344 and MO-1573.

appropriately. The police refer to most of the considerations listed above, and submit that that all relevant factors, but no irrelevant factors, were taken into account in exercising their discretion. The police also submit that they did not exercise their discretion in bad faith.

[30] The appellant's representations did not specifically address the police's exercise of discretion.

[31] I find that the police did not err in their exercise of discretion with respect to their decision to deny access to the information in record 3 withheld under section 38(a) in conjunction with section 12 of the *Act*. I am satisfied that they did not exercise their discretion in bad faith or for an improper purpose.

[32] I am also satisfied that the police took into account relevant factors, and did not take into account irrelevant factors in the exercise of discretion. In particular, it is evident that the police considered the fact that the records contain the appellant's own personal information, and I am satisfied that the police provided him with access to as much information as possible by applying the exemptions in a limited and specific manner.

[33] Accordingly, I find that the police exercised their discretion in an appropriate manner in this appeal, and I uphold it.

**ORDER:**

I uphold the police's decision and dismiss the appeal.

Original Signed by: \_\_\_\_\_  
Anna Truong  
Adjudicator

\_\_\_\_\_ August 20, 2021