

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-4186-I

Appeal MA19-00470

City of Ottawa

April 12, 2022

Summary:

This interim order deals with an outstanding issue resulting from 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 Interim Order MO-4092-I, the adjudicator upheld the exemption in section 12 but deferred 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. In this interim order, the adjudicator finds that the records contain the personal information of the appellant and orders the city to re-exercise its discretion, taking into account the application of the discretionary exemption in section 38(a).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 38(a).

Orders and Investigation Reports Considered: Orders MO-1983, MO-2937 and MO-4092-I.

OVERVIEW:

[1] This interim order deals with an outstanding issue 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, over a specified period of time, 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] 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).

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

[4] During the adjudication stage of the appeals process, 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).

[5] After receiving representations from the city and the appellant, I issued Interim Order MO-4092-I, in which I found that the records were exempt from disclosure under section 12 of the *Act*. However, I deferred 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 the discretionary exemption in section 38(a) to them.¹ I subsequently sought and received representations from both the city and the appellant as to whether the records contain the appellant's personal information, the possible application of the discretionary

¹ See Order provision 2.

exemption in section 38(a) to them, as well as the city's exercise of discretion.²

[6] For the reasons that follow, I find that the records contain the appellant's personal information and that the discretionary exemption in section 38(a) applies to them. As a result, I do not uphold the city's exercise of discretion and order it to re-exercise its discretion as set out in Order provision 1.

RECORDS:

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

Page Number	Record details
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. Do the records contain the appellant's personal information? Does the discretionary exemption in section 38(a) apply to the records?

² See Order provision 3 of Order MO-4092-I.

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

DISCUSSION:

Issue A: Do the records contain the appellant's personal information? Does the discretionary exemption in section 38(a) apply to the records?

[8] In order to determine if section 38(a) may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[9] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as

personal information.³

[10] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

Representations

[11] The city advises that it completed an additional review of the records, and submits that the records do not contain the appellant's personal information, as they do not relate to the appellant in a personal capacity. In particular, the city submits that the records contain the appellant's name along with the court docket line number, providing a connection or common reference between the Provincial Offences Court and the prosecutor's legal file.

[12] However, the city further argues that under paragraph (h) of the definition of personal information in section 2(1) of the *Act*, an individual's name is only considered personal information where it appears with other personal information relating to the individual. The city goes on to state:

The information in the records relate to the conduct of the prosecution in which the requester was charged with an offence, and the legal issues raised in the prosecution. Any views or opinions expressed in the records relate to legal matters, and not to the requester in a personal capacity. Legal counsel may express a view or opinion about a legal issue raised by an opposing party in the course of a proceeding. This view or opinion will only qualify as the "personal information" of the other party if it is an opinion expressed about the individual themselves in a personal capacity. There are no views or opinions of a personal nature about the requester in the withheld records.

[13] Lastly, the city's position is that because the records do not contain the appellant's personal information, the discretionary exemption in section 38(a) does not apply to them.

[14] The appellant submits that the court docket line number, which is a type of identifying number assigned to him, provides a connection between the court file and the prosecutor's legal file, as well as a connection between him and the city. Accordingly, the appellant argues, the court file number qualifies as his personal information under paragraph (c) of the definition of personal information in section 2(1) because it is an identifying number assigned to him.

[15] Further, the appellant submits that the views and opinions made about him by other individuals at the city regarding the prosecution qualify as his personal information under paragraph (g) of the definition of personal information. Refuting the

³ Order 11.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

city's position, the appellant argues that the city has not referred to any statutory authority in support of its position that the views and opinions about him are not personal information because they are not of a personal nature.

[16] In addition, the appellant's position is that because the records contain his name and relate to the fact that he was charged with an offence and/or contain a reference to the fact that he may have "done something," this information qualifies as his personal information under paragraph (h) of the definition because it contains his name with other personal information relating to him.

[17] As a result of the records containing the appellant's personal information, he submits that section 38(a), which provides individuals a general right of access to their own personal information, applies.

Analysis and findings

[18] I find that the records contain the appellant's personal information. The city acknowledges that the records contain the appellant's name and that they relate to the conduct of a prosecution in which the appellant was charged with an offence, as well as the legal issues raised in the prosecution. Past IPC orders have found that records relating to a prosecution contain the personal information of the individual subject to the prosecution. For example, in Order MO-1983, the IPC found records relating directly to a prosecution of the appellant by a municipality for a violation of its zoning bylaw contained the appellant's personal information. Similarly, in Order MO-2937, a municipality conceded that the record at issue included the appellant's name and the fact that he was involved in legal proceedings with the municipality. In both orders, the IPC found that the record(s) at issue contained the personal information of the appellant within the meaning of paragraph (h) of section 2(1) of the *Act*. Applying the approach taken in Orders MO-1983 and MO-2937, I find that the appellant's name in the records in addition to the fact that he was the subject matter of a prosecution qualifies as his personal information, falling within paragraph (h) of the definition of personal information in section 2(1) of the *Act*.

[19] Having found that the records contain the appellant's personal information, I find that the discretionary exemption in section 38(a), read with section 12, applies to them. By way of background, section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[20] 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.

[21] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.⁵

[22] In Interim Order MO-4092-I, I found that the records were exempt under the discretionary exemption in section 12 (solicitor-client privilege). However, as previously stated, I deferred making a finding regarding the city's exercise of discretion, pending a determination whether the exemption in section 38(a) applies to the records. Having found that section 38(a) (read with section 12) applies, I will now determine whether the city properly exercised its discretion under section 38(a).

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

[23] The section 38(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so. 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.

[24] In addition, the IPC 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.

[25] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.⁶ The IPC may not, however, substitute its own discretion for that of the institution.⁷

[26] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁸

- 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;

⁵ Order M-352.

⁶ Order MO-1573.

⁷ Section 43(2).

⁸ Orders P-344 and MO-1573.

- 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

[27] The city submits that it relies on the initial representations it made to the IPC.⁹ The city further submits that it completed an additional review of the records after the issuance of Interim Order MO-4092-I and that, after deciding that the records do not contain the appellant's personal information, it was confirmed that the Head's initial exercise of discretion was appropriate and that no additional consideration in that exercise of discretion was necessary.

[28] The city reiterates that the records were withheld under the solicitor-client privilege in section 12 and that the purpose of this exemption is to protect legally privileged documents and to allow an institution to seek legal advice and conduct litigation with confidence that a zone of privacy will be protected.

[29] The city further submits that notwithstanding the fact that it could have applied section 12 to certain records, it exercised its discretion and disclosed these records to him anyway. The city states:

All correspondence sent by the requester to the prosecution has been disclosed to him, even where it forms part of a record that is legally privileged. For example, the initial email of an email chain at page 271-273 of the records is correspondence from the requester. The Head has exercised his discretion to disclose this correspondence back to the requester despite previous findings of the IPC that section 12 is a class exemption that will apply to a record in full.

⁹ The initial representations on the city's exercise of discretion are set out in Interim Order MO-4092-I.

[30] The appellant relies on his initial representations on the city's exercise of discretion,¹⁰ and adds that the city has failed to exercise its discretion because it did not take into account the fact that the records contain his personal information. The appellant's position is that the *Act* recognizes a higher right of access to records containing a requester's personal information, and that it is not acceptable for an institution to simply establish the requirements of an exemption claim without taking the additional step of deciding whether or not it will disclose the record despite the fact that it qualifies for an exemption.

Analysis and findings

[31] The city has taken the position that the records do not contain the appellant's personal information, that section 38(a) does not apply to them, and that these considerations did not need to be taken into account in its exercise of discretion.

[32] Given my findings that the records *do* contain the appellant's personal information and section 38(a) *does* apply to them, I am not satisfied that the city has properly exercised its discretion in withholding the records from him. I find that the city, in exercising its discretion, failed to take into account that the records contain the appellant's personal information and that section 38(a) applies. I also find that the city failed to take into account relevant considerations such as the purposes of the *Act*, including the principle that individuals should have a right of access to their own personal information and that, in this case, the appellant is seeking his own personal information. Consequently, I do not uphold the city's exercise of discretion and I will order it to re- exercise its discretion, taking into account these relevant considerations.

ORDER:

1. I order the city to re-exercise its discretion, taking section 38(a) into account and the factors listed above, and to provide written representations to the IPC and the appellant within **15** days of the date of this order on this exercise of discretion.
2. I remain seized of this matter pending my final determination on the city's re-exercise of discretion.

Original Signed by: _____
Cathy Hamilton
Adjudicator

_____ April 12, 2022

¹⁰ See Interim Order MO-4092-I.