

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4212-F

Appeal MA19-00470

City of Ottawa

June 16, 2022

Summary: This final order deals with the sole 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 *Act*). The request was for records of certain communications relating to the appellant. 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 Interim Order MO-4186-I, the adjudicator found that the records contain the personal information of the appellant and ordered the city to re-exercise its discretion, taking into account the application of the discretionary exemption in sections 38(a) and 12. In this final order, the adjudicator upholds the city's re-exercise of discretion under sections 38(a) and 12 and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 12 and 38(a).

Orders and Investigation Reports Considered: Interim Orders MO-4092-I and MO-4186-I.

OVERVIEW:

[1] This is the final order, disposing of the sole remaining issue in this appeal, which is whether the City of Ottawa (the city) properly re-exercised its discretion under sections 38(a) and 12 of the *Municipal Freedom of Information and Protection of*

Privacy Act (the Act).

[2] The appeal was of an access decision made by the city under 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.

[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 of Ontario (the IPC).

[5] 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).

[6] After receiving representations from the city and the appellant, I issued Interim Order MO-4092-I on August 3, 2021, 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

¹ See Order provision 2.

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

[7] On April 12, 2022, I issued Interim Order MO-4186-I, in which I found that the records at issue contained the appellant's personal information and that the discretionary exemption in section 38(a) applied to them. I did not uphold the city's exercise of discretion and I ordered it to re-exercise its discretion, taking section 38(a) into account in doing so. I also ordered the city to provide both the IPC and the appellant with written representations on its re-exercise of discretion. The city provided representations on its re-exercise of discretion, which were shared with the appellant. The appellant was provided with the opportunity to provide representations on the city's re-exercise of discretion, but did not do so.

[8] In this final order, I uphold the city's re-exercise of discretion under sections 38(a) and 12 and, dismiss the appeal.

DISCUSSION:

[9] As previously stated, the sole remaining issue in this appeal is whether the city properly re-exercised its discretion under sections 38(a) and 12. Section 38(a) of the *Act* states:

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.

[emphasis added]

[10] In Interim Order MO-4186-I, I found that the city, in exercising its discretion, failed to take into account that the records contained the appellant's personal information and that section 38(a) applied to them. I also found 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 was seeking his own personal information. As a result, I ordered the city to re-exercise its discretion, taking into account these relevant considerations.

[11] On appeal, the IPC may determine whether an institution properly exercised its discretion. In addition, the IPC may find that the institution erred in exercising its discretion where, for example,

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

- 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.

[12] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.³ The IPC may not, however, substitute its own discretion for that of the institution.⁴

[13] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁵

- the purposes of the *Act*, including the principles that individuals should have a right of access to their own personal information;
- 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 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.

[14] The city concedes that the records contain personal information related to the prosecution of the appellant for red-light camera infractions, including the appellant's name and the court file number, but that section 38(a) permits a head to refuse to disclose a requester's own personal information if, as is the case in this appeal, section 12 of the *Act* applies to that information.

[15] The city submits that following the issuance of Interim Order MO-4186-I, the head re-exercised his discretion, and took into account the above-referenced relevant and proper considerations, sections 38(a) and 12, and whether disclosure would increase public confidence in its operation. In particular, the head considered any

³ Order MO-1573.

⁴ Section 43(2).

⁵ Orders P-344 and MO-1573.

possible public interest, or other sympathetic or compelling interest in the disclosure of the records. In addition, the head considered the importance of solicitor-client privilege, which is to ensure that legal advice may be freely sought and given, and litigation conducted effectively within a zone of privacy, stating:

. . . Disclosure of legally privileged documents may undermine or diminish public confidence in the City's conduct of prosecutions and provincial offences appeals. The public expects that the City's legal files remain confidential, and the protection afforded to those files by legal privilege is upheld in accordance with the prevailing law.

[16] Lastly, the city's position is that there is no evidence that it erred in re-exercising its discretion by doing so in bad faith or for an improper purpose, or by taking into account irrelevant considerations.

[17] I have considered the city's representations on the factors it took into consideration in re-exercising its discretion to not disclose the records for which it claimed section 12. I am satisfied that the city took into account relevant considerations, including the fact that the records contain the appellant's personal information. In particular, I find that the city balanced the appellant's request for disclosure of his own personal information against the purpose and importance of the solicitor-client privilege in section 12. In sum, I am satisfied that the city re-exercised its discretion within the appropriate parameters, and that it considered relevant factors in doing so. Accordingly, I find that the city properly re-exercised its discretion in this appeal, and I will uphold it.

ORDER:

I uphold the city's re-exercise of discretion under sections 38(a) and 12 and, dismiss the appeal.

Original Signed by: _____
Cathy Hamilton
Adjudicator

_____ June 16, 2022