

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4291

Appeal MA19-00343

City of Toronto

November 30, 2022

Summary: The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to a specified property. The city issued a decision granting partial access to the responsive records withholding information under sections 8(1) (law enforcement), 12 (solicitor-client privilege), and 14(1) (personal privacy) of the *Act*. The appellant appealed the city's decision to the Information and Privacy Commissioner of Ontario. In this order, the adjudicator partially upholds the city's decision, and orders the city to disclose additional information to the appellant.

Statutes Considered: The *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 8(1), 12, and 14(1).

Orders and Investigation Reports Considered: Order MO-3326.

OVERVIEW:

[1] The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information, as summarized by the city:

1. All notes, correspondence and e-mails pertaining to December 15, 2017 RentSafeTO Evaluation for [a specified property] specifically those (along with photos) which pertain to graffiti on the exterior grounds.

2. A list/record, along with all related communications with all legal counsel retained by [Executive Director of Municipal Licensing & Standards] with respect to her decision dated October 10, 2018, pertaining to Municipal, Residential Tenancy and Transportation Law concerning [the specified property].

2(b). Reports or documents from the Ministry of Transportation showing motor vehicles registered to [the specified property].

3. Copies of all correspondence, e-mails, notes, pictures, and documents concerning [the specified property], during the period of June 18, 2018 to January 18, 2019, involving: [10 specified city employees]. Of particular interest is any and all communication between Municipal Licensing & Standards and Toronto Fire Services.

[2] The city issued an initial decision granting partial access to 499 pages of responsive records located by the Toronto Fire Services Division (TFS). Information was withheld under section 14(1) (personal privacy) of the *Act*, and some information was withheld as non-responsive to the request.

[3] The city then issued a second decision denying access in full to the responsive records located by the Municipal Licensing & Standards Division (MLS). All responsive records were withheld under section 8(1) (law enforcement) of the *Act*. The city also claimed sections 12 (solicitor-client privilege) and 14(1) (personal privacy) apply to some of the withheld information.¹

[4] The appellant appealed the city's second decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution.

[5] During mediation, the appellant confirmed he is pursuing access to the records from MLS. The city confirmed its decision to deny access to the responsive records.

[6] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage. I decided to commence an inquiry by inviting representations from the city, initially. I received representations from the city and shared the non-confidential representations with the appellant,² and invited representations from the appellant. The appellant submitted representations, which I shared with the city. I then invited and received reply representations from the city.

[7] In this order, I partially uphold the city's access decision. I order the city to

¹ Some information – pages 6 and 7 of the records - was also withheld as non-responsive. However, after the appeal proceeded to the adjudication stage, the city agreed to disclose pages 6 and 7 of the records to the appellant, so those pages are no longer at issue.

² Some portions were withheld in accordance with the confidentiality criteria in IPC Practice Direction 7 and section 7 of the IPC's *Code of Procedure*.

disclose additional information to the appellant because I find that the section 8(1)(a) and 8(1)(b) exemptions do not apply to it. I otherwise uphold the city's decision to withhold certain information on the basis of sections 14(1) and 12.

RECORDS:

[8] The records at issue in this appeal include 620 pages of correspondence, issue summaries, photographs, and inspector's notes as described in the city's index of records. The section 8(1)(a) and 8(1)(b) exemptions were claimed over all the records. The city also claimed additional exemptions apply to information in a sub-set of the records as follows:

Record #	Description	Pages	Additional Exemptions claimed
1	Correspondence of February 5, 2019	1-6	Section 14(1)
2	Correspondence December 18, 2018	12-17	Section 12
3	Correspondence December 10, 2018	18-19	Section 12
4	Correspondence October 22, 2018 (5:19 p.m.)	49-50	Section 12
5	Correspondence October 22, 2018 (9:45 a.m.)	51	Section 12
6	Correspondence October 18, 2018	52-53	Section 12
7	Correspondence October 17, 2018	57-67	Section 12
8	Correspondence October 10, 2018	94	Section 12
9	Correspondence October 4, 2018	99	Section 12
10	Correspondence October 3, 2018	106-131	Section 12
11	Correspondence September 26, 2018 (10:41 a.m.)	135-136	Section 12
12	Correspondence September 26, 2018 (9:49 a.m.)	137	Section 12
13	Correspondence September 24, 2018 (1:42 p.m.)	138	Section 12
14	Correspondence September 25, 2018 (3:35 p.m.)	139	Section 12
15	Correspondence September 24, 2018 (1:42 p.m.)	140	Section 12
16	Correspondence September 25, 2018 (9:16 a.m.)	143	Section 12
17	Correspondence September 20, 2018 (4:38 p.m.)	144-149	Section 12
18	Correspondence September 21, 2018	150	Section 12
19	Correspondence September 20, 2018 (4:38 p.m.)	151-155	Section 12

20	Correspondence July 30, 2018	160	Section 12
21	Correspondence July 25, 2018	161	Section 12
22	Correspondence September 19, 2018	215-216	Section 12
23	Correspondence September 13, 2018	225-226	Section 14(1)
24	Photos and Correspondence September 13, 2018	228-232	Section 14(1)
25	Photos and Correspondence September 13, 2018	234-236	Section 14(1)
26	Correspondence September 10, 2018 (9:46 a.m.)	246-247	Section 14(1)
27	Correspondence September 10, 2018 (9:46 a.m.)	249-250	Section 14(1)
28	Issue Summary September 16, 2018	275	Section 14(1)
29	Issue Summary September 16, 2018	300	Section 14(1)
30	Issue Summary September 16, 2018	302-306	Section 12
31	Correspondence August 23, 2018	343	Section 12
32	Attachment to correspondence – “Synopsis” April 6, 2018	346	Section 14(1)
33	Correspondence August 20, 2018 (3:03 p.m.)	349	Section 12
34	Correspondence August 20, 2018 (3:03 p.m.)	350	Section 12
35	Correspondence August 20, 2018 (3:03 p.m.)	352-354	Section 12
36	Correspondence August 20, 2018 (3:03 p.m.)	362	Section 12
37	Correspondence August 20, 2018 (2:31 p.m.)	363-368	Section 12
38	Issue Summary September 16, 2018	374	Section 12
39	Issue Summary September 16, 2018	375	Section 14(1)
40	Issue Summary September 16, 2018	377-381	Section 12
41	Attachment to correspondence – “issue summary” August 17, 2018	396	Section 12
42	Inspector’s notes August 1, 2018	405	Section 14(1)
43	Inspector’s notes August 1, 2018	409	Section 14(1)
44	Correspondence August 16, 2018 (2:41 p.m.)	419	Section 12
45	Correspondence August 16, 2018 (2:41 p.m.)	420	Section 12
46	Correspondence August 16, 2018 (2:41 p.m.)	421	Section 12
47	Correspondence August 16, 2018 (2:41 p.m.)	423	Section 12
48	Correspondence August 16, 2018 (2:41 p.m.)	428-429	Section 12
49	Attachment to correspondence – “issue summary” August 14, 2018	442	Section 12

50	Inspector's notes August 1, 2018	451	Section 14(1)
51	Inspector's notes August 1, 2018	455	Section 14(1)
52	Correspondence August 8, 2018	484-505	Section 12
53	Attachment to correspondence – "Synopsis" April 6, 2018	560	Section 14(1)

ISSUES:

- A. Do the discretionary law enforcement exemptions at sections 8(1)(a) or 8(1)(b) related to law enforcement activities apply to the records?
- B. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the mandatory personal privacy exemption at section 14(1) apply to the information at issue?
- D. Does the discretionary solicitor-client privilege exemption at section 12 apply to the information at issue?
- E. Did the city exercise its discretion under section 12? If so, should I uphold the exercise of discretion?

DISCUSSION:

Issue A: Do the discretionary law enforcement exemptions at sections 8(1)(a) or 8(1)(b) related to law enforcement activities apply to the records?

[9] The city claims that the section 8(1)(a) and 8(1)(b) exemptions apply to all of the responsive records. Section 8 contains several exemptions from a requester's right of access, mostly related to the context of law enforcement.

[10] Sections 8(1)(a) and 8(1)(b) state:

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

(a) interfere with a law enforcement matter;

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

[11] The term "law enforcement"³ is defined in section 2(1):

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b)

[12] The IPC has found that "law enforcement" can include these situations:

- a municipality's investigation into a possible violation of a municipal by-law,⁴
- a police investigation into a possible violation of the *Criminal Code*,⁵
- a children's aid society investigation under the *Child and Family Services Act*,⁶ and
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997*.⁷

[13] In contrast, the IPC has found that the following situations are not "law enforcement":

- an internal investigation by the institution under the *Training Schools Act*, where the institution lacked the authority to enforce or regulate compliance with any law.⁸
- a Coroner's investigation or inquest under the *Coroner's Act*, which lacked the power to impose "sanctions" or penalties.⁹

[14] Many of the exemptions listed in section 8 apply where a certain event or harm "could reasonably be expected to" result from disclosure of the record.

[15] The law enforcement exemption must be approached in a sensitive manner,

³ The term "law enforcement" appears in many, but not all, parts of section 8.

⁴ Orders M-16 and MO-1245.

⁵ Orders M-202 and PO-2085.

⁶ Order MO-1416.

⁷ Order MO-1337-I.

⁸ Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.).

⁹ Order P-1117.

because it is hard to predict future events in the law enforcement context, and so care must be taken not to harm ongoing law enforcement investigations.¹⁰

[16] However, the exemption does not apply just because a continuing law enforcement matter exists,¹¹ and parties resisting disclosure of a record cannot simply assert that the harms under section 8 are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 8 are self-evident and can be proven simply by repeating the description of harms in the *Act*.¹²

[17] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.¹³ However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.¹⁴

[18] For section 8(1)(a) to apply, the law enforcement matter must still exist or be ongoing.¹⁵ This exemption does not apply once the matter is completed, nor where the alleged interference is with “potential” law enforcement matters.¹⁶

[19] “Matter” has a broader meaning than “investigation” and does not always have to mean a specific investigation or proceeding.¹⁷

[20] The institution holding the record does not need to be the institution conducting the law enforcement matter for the exemption to apply.¹⁸

[21] For section 8(1)(b) to apply, the law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with “potential” law enforcement investigations.¹⁹ The investigation in question must actually exist or be ongoing.²⁰

[22] The institution holding the record does not need to be the institution that is

¹⁰ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

¹¹ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

¹² Orders MO-2363 and PO-2435.

¹³ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

¹⁴ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

¹⁵ Order PO-2657.

¹⁶ Orders PO-2085 and MO-1578.

¹⁷ *Ontario (Community Safety and Correctional Services)*, 2007 CanLII 46174 (ON SCDC)

¹⁸ Order PO-2085.

¹⁹ Order PO-2085.

²⁰ Order PO-2657.

conducting the law enforcement investigation for the exemption to apply.²¹

Representations of the city

The city submits that it denied access to the records in full on the basis of sections 8(1)(a) and 8(1)(b), because the records, at the time, related to an active investigation and then subsequently, related proceedings. The city submits that the appellant made the access request while it was in the process of investigating, and subsequently prosecuting the owner of the specified property, a numbered company, with respect to municipal by-law violations. The appellant is an individual who is able to legally bind the owner of the specified property.

The city submits that the dispute is about the nature of the specified property, and the relationship between the appellant and the residents at the specified property. The city explains that the enforcement activities continued past the time-period covered by the appellant's access request with further proceedings continuing in 2019 and resolving by conviction as of November 2019. The city further submits that although certain proceedings have concluded, there remains potential for further law enforcement matters.

Representations of the appellant

[23] The appellant's representations do not address the law enforcement exemptions. His representations raise arguments about whether additional records should exist. However, the reasonableness of the city's search for records is not at issue in this appeal, and I will not consider these arguments raised by the appellant.

[24] The appellant's representations outline the history of his interactions with MLS staff and their investigations into the operation of the specified property. The appellant also provided documents, such as letters, an inspection report, and emails, etc. containing his handwritten notes commenting on the conduct of the MLS staff and their investigation. The appellant's representations also contain various accusations against the city and specified city staff. These documents and accusations are not relevant to my determination of whether the exemptions claimed by the city apply to the records at issue in this appeal, and I will not comment on them further.

Analysis and findings

[25] Based on the evidence before me, I find that neither of the section 8(1)(a) or 8(1)(b) exemptions apply to the records at issue.

[26] As noted above, for either the section 8(1)(a) or section 8(1)(b) exemptions to apply, the law enforcement matter or investigation must be ongoing, and the exemptions do not apply once the matter or investigation is completed, nor where the

²¹ Order PO-2085.

alleged interference is with "potential" law enforcement matters or investigations.²² The city has conceded that while the law enforcement activities and proceedings against the owner of the specified property were ongoing at the date of the request, they have since concluded. While the city submits that there remains a potential for further law enforcement matters or investigations, this is not sufficient to establish the application of the section 8(1)(a) or 8(1)(b) exemptions. Therefore, I find that these law enforcement exemptions do not apply to the records at issue in this appeal.

[27] The city has claimed additional exemptions apply to some of the withheld records, and I will deal with those records below. However, since I have found that neither law enforcement exemption applies to any of the records at issue, and the city has not made any alternative exemption claims for some of the records, I order the city to disclose these records to the appellant.

Issue B: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[28] The city claims that the personal privacy exemption at section 14(1) applies to some of the information at issue. It is therefore necessary for me to decide whether the records contain "personal information" and, if so, whose.

[29] "Personal information" 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,

²² Orders PO-2085 and MO-1578.

(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.

[30] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.²³

[31] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.²⁴ See also sections 2(2.1) and (2.2), which state:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[32] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.²⁵

Representations of the city

[33] The city submits that 15 records contain personal information of identifiable individuals, specifically personal opinions, financial details, addresses, and names in combination with other personal information. The city submits that:

- Pages 1-6 are registration documents, and pages 246-247 and 249- 250 are emails reproducing this information. These records contain names, ages, gender of named individuals, ownership of specific items, and identifying numbers relating to the item for which they have been determined to be the registered owner.
- Pages 225-226 are summaries of investigation notes which contain descriptions of individuals' gender, appearance, residency, and financial relationships (particularly the payment of rent).

²³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

²⁴ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

²⁵ Orders P-1409, R-980015, PO-2225 and MO-2344.

- Pages 275, 300, and 375 are duplicative records containing information collected during the investigation, and includes names, residency, and individuals' opinions.
- Pages 346 and 560 are duplicative records, which consists of a synopsis of investigative efforts containing the same information in pages 275, etc.
- Pages 405 and 451, and pages 409 and 455, are two sets of duplicative records of handwritten notes containing individuals' names, details of residencies, and financial transactions.
- Pages 228-232, and 234-236 are photographs of identifiable individuals.

Representations of the appellant

[34] The appellant's representations do not address personal information.

Analysis and findings

[35] Based on my review of the records and the representations of the parties, I find that the records contain the personal information of identifiable individuals other than the appellant. I will refer to these identifiable individuals as the affected parties.

[36] I find that the records contain the personal information of the affected parties such as their age, sex, address, driver's licence, financial transactions, their views or opinions, and their name along with other information, which fits within paragraphs (a), (b) (c), (d), (e), and (h) of the definition of "personal information" in section 2(1) of the *Act*.

[37] Neither party argued that the records contain the appellant's personal information, and I find that they do not.²⁶ Any information pertaining the appellant in the records relates to him in a professional, not personal capacity.

[38] Having found that the records contain the personal information of the affected parties, I will now determine whether their withheld personal information is exempt from disclosure under the mandatory personal privacy exemption at section 14(1) of the *Act*.

²⁶ If the records did contain his personal information, the appropriate personal privacy exemption to consider would be the discretionary exemption in section 38(b), which permits an institution to disclose records containing personal information of both a requester and of third parties, even if it would be an unjustified invasion of the third parties' personal privacy. In contrast, where records do not contain a requester's personal information, the appropriate personal privacy exemption to consider is the mandatory section 14 exemption. If the section 14 exemption applies to the records, the institution has no discretion to disclose the information.

Issue C: Does the mandatory personal privacy exemption at section 14(1) apply to the information at issue?

[39] Section 14(1) of the *Act* creates a general rule that an institution cannot disclose personal information about another individual to a requester. This general rule is subject to a number of exceptions.

[40] The section 14(1)(a) to (e) exceptions are relatively straightforward. If any of the five exceptions covered in sections 14(1)(a) to (e) exist, the institution must disclose the information.

[41] The section 14(1)(f) exception is more complicated. It requires the institution to disclose another individual's personal information to a requester only if this would not be an "unjustified invasion of personal privacy." Other parts of section 14 must be looked at to decide whether disclosure of the other individual's personal information would be an unjustified invasion of personal privacy.

[42] Under section 14(1)(f), if disclosure of the personal information would not be an unjustified invasion of personal privacy, the personal information is not exempt from disclosure.

[43] Sections 14(2), (3) and (4) help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy.

[44] Sections 14(3)(a) to (h) should generally be considered first.²⁷ These sections outline several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy. A presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if a section 14(4) exception or the "public interest override" at section 16 applies.²⁸

Representations, analysis and findings

[45] The city submits that disclosure of the withheld personal information would constitute an unjustified invasion of the personal privacy of the affected parties identified in the records at issue.

[46] The appellant's representations do not address the section 14(1) personal privacy exemption.

Section 14(3)(b) presumption: investigation into a possible violation of law

[47] The city argues that the section 14(3)(b) presumption applies to the withheld personal information because it was compiled and is identifiable as part of an

²⁷ If any of the section 14(3) presumptions are found to apply, they cannot be rebutted by the factors in section 14(2) for the purposes of deciding whether the section 14(1) exemption has been established.

²⁸ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

investigation into a possible violation of law, specifically by-law investigations. The city states that these investigations resulted in conviction.

[48] Section 14(3)(b) states:

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

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

[49] Based on my review of the withheld personal information, I am satisfied that it was compiled and is identifiable as part of an investigation into a possible violation of law. The personal information at issue appears in investigation records into municipal by-law violations. As noted above, these investigations resulted in conviction. However, even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.²⁹ The presumption can apply to a variety of investigations, including those relating to by-law enforcement.³⁰ Therefore, I find that section 14(3)(b) applies to the personal information at issue in this appeal, and that its disclosure is presumed to be an unjustified invasion of the personal privacy of the affected parties.

[50] As noted above, in reviewing the mandatory personal privacy exemption in section 14(1), once a section 14(3) presumption has been established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies. I have found that the section 14(3)(b) presumption applies to the withheld personal information. The parties did not argue that any of the exceptions in section 14(4) apply, and I find that none of them apply in the circumstances of this appeal. The parties also did not argue that the "public interest override" at section 16 applies to the information at issue, and I am satisfied that it does not. Therefore, I find that the mandatory personal privacy exemption at section 14(1) applies to the withheld personal information and it is exempt from disclosure.

Issue D: Does the discretionary solicitor-client privilege exemption at section 12 apply to the information at issue?

[51] Section 12 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It states:

²⁹ Orders P-242 and MO-2235.

³⁰ Order MO-2147.

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.

[52] Section 12 contains two different exemptions, referred to in previous IPC decisions as “branches.” The first branch (“subject to solicitor-client privilege”) is based on common law. The second branch (“prepared by or for counsel employed or retained by an institution...”) is a statutory privilege created by the *Act*. The institution must establish that at least one branch applies. Because I find below that the common law (i.e., first branch) solicitor-client communication privilege applies, I will not set out or address the city’s arguments that the second branch also applies.

Branch 1: common law privilege

At common law, solicitor-client privilege encompasses two types of privilege:

- solicitor-client communication privilege, and
- litigation privilege.

Common law solicitor-client communication privilege

[53] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.³¹ This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.³² The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.³³

[54] The privilege may also apply to the lawyer’s working papers directly related to seeking, formulating or giving legal advice.³⁴

[55] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.³⁵ The privilege does not cover communications between a lawyer and a party on the other side of a transaction.³⁶

³¹ Orders PO-2441, MO-2166 and MO-1925.

³² *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

³³ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

³⁴ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

³⁵ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

³⁶ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

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.³⁷ 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.³⁸ Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.³⁹ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.⁴⁰

Representations of the city

[56] The city submits that section 12 applies to approximately 35 records (collectively, referred to as the “legal advice records”), which consist of:

- A. emails to and from lawyers of the city's Legal Services Division (LSD) and attachments thereto. These attachments consist of various documents presented for the purposes of providing legal advice in relation to the city's investigation and enforcement of municipal by-laws, or documents prepared or commented upon by lawyers for use in relation to the investigation and enforcement of municipal by-laws; and,
- B. emails or other correspondence which do not involve lawyers of the city's LSD, but are documents between city staff that reproduce or summarize the contents of solicitor-client communications.

[57] The city submits that one or more of the exemptions set out in the first branch (solicitor-client communication privilege or litigation privilege) or second branch (statutory communication or litigation privilege) applies to each of the legal advice records at issue. Since I find below that the legal advice records are exempt under the first branch (common law) solicitor-client communication privilege, I will not refer to the city's arguments with respect to common law litigation privilege or the second branch (statutory privilege) of section 12.

[58] The city submits that the request is an attempt by the appellant to obtain access to records created in relation to the investigation into the specified property, including legal advice provided to the Executive Director of MLS in part 2 of the request.

[59] The city submits that the legal advice records consist largely of communications and associated attachments between MLS staff and lawyers of the city's LSD related to

³⁷ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

³⁸ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

³⁹ 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.).

⁴⁰ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

the seeking and provision of legal advice. The city submits that these types of records are at the "core" of the interests sought to be protected by section 12. The city submits that the legal advice records reflect solicitor-client communications within the continuum of communications or documents in which a variety of legal advice, opinions, and suggestions were either requested or provided.

[60] The city submits that while some of the legal advice records do not explicitly include lawyers of the city's LSD as parties to the communication, these records contain communications between other city staff, which either reproduce, reference, or summarize the content of solicitor-client communications. The city submits that communicating the contents of solicitor-client communications from the city's LSD to other city staff does not constitute a basis to set the privilege aside.

[61] The city submits that no parties outside of the solicitor-client relationship were involved in the discussions contained in the legal advice records, and that privilege has not been waived in relation to any of these records.

Representations of the appellant

[62] The appellant submits that not all communications between the lawyer and MLS are solicitor-client privileged, and he seeks access to all communications that are not covered by solicitor-client privilege. The appellant submits that communication between MLS and the city's TFS revealed the specified lawyer's involvement in the "creation" of the decision letter, and that this caused the communication to lose its solicitor-client privilege.

[63] As noted above, the appellant's representations contain accusations against the city and specified city staff. These accusations are not relevant to my determination of whether the exemptions claimed by the city apply to the records at issue, and I will not comment on them further.

Analysis and findings

[64] After reviewing the records and the representations of the parties, including the confidential representations of the city, I find that the legal advice records are exempt under the section 12 common law solicitor-client communication privilege.

[65] The legal advice records can be divided into two groups:

- Group A: communication involving MLS staff directly to and from lawyers of the city's LSD; and,
- Group B: communications between MLS staff that does not directly include lawyers of the city's LSD, but would directly or indirectly reveal the content of solicitor-client communications.

Group A Records

[66] With respect to the Group A records, I find that they contain communications between MLS staff and lawyers of the city's LSD seeking and providing advice with respect to the investigation into the specified property.

[67] From my review of the records, including the city's Appendix 1, which outlines the name and position of each person that appears in the records, I find that in all of the Group A records, one of the correspondents is a lawyer hired by the city's LSD. The other correspondents are city staff; none are parties external to the city. Given the subject matter and context of the records, I accept that these communications took place in confidence, and I note that some of these communications are marked as privileged and confidential.

[68] I find, therefore, that these records are confidential communications between a city lawyer and their institutional clients, which is precisely what the section 12 exemption aims to protect. As a result, I am satisfied that disclosure of the information at issue in the Group A records would directly reveal the content of solicitor-client communications. Additionally, while the appellant argues that the revelation of a specified lawyer's involvement in the creation of certain records causes them to "lose", or essentially waive, their solicitor-client privilege, I find that it does not. There is no evidence that the city has waived its solicitor-client privilege. Accordingly, I find that the information at issue in the Group A records is exempt from disclosure under section 12 of the *Act*.

Group B Records

[69] With respect to the Group B records, I find that they contain internal communications between MLS staff which would directly or indirectly reveal the content of solicitor-client communications, if they were disclosed. Previous IPC orders have found that the section 12 exemption can apply to internal communications of an institution, even if they do not contain direct communication to or from a lawyer. For example, in Order MO-3326, Senior Adjudicator DeVries summarized several past orders of this office dealing with this issue:

While I acknowledge that the Group 2 records do not contain direct communications between city staff and city lawyers, I note that this office has previously applied section 12 to internal communications not involving a lawyer where disclosure would reveal the content of communications between a solicitor and client. For example, in Order PO-2087-I, Adjudicator Cropley considered whether briefing papers prepared by non-legal staff at the Ministry of Finance would qualify for solicitor-client privilege under section 19 of the *Freedom of Information and Protection of Privacy Act*, which is equivalent to section 12 under the *Act*. In doing so, she stated the following:

These records were prepared by non-legal staff in the Ministry. However, large portions of them refer to or reflect the legal advice that is contained in the other records at issue in these discussions. In my view, disclosure of this information would reveal the legal advice that was provided and should, therefore, be protected under section 19.

Moreover, in Order M-1112 Adjudicator Hale found that documents passing between employees of a client can be subject to solicitor-client privilege if they transmit or comment on communications with lawyers that are connected with legal advice or contemplated litigation. Similarly, in Order PO-1631, the adjudicator concluded that internal communications containing instructions to seek legal advice on a particular issue should qualify for exemption. Based on the analysis found in these orders, the solicitor-client privilege may apply to the Group 2 records, even though they are not direct communications with legal counsel. Rather, each record must be examined to determine whether its disclosure would reveal the content of solicitor-client communications.

[70] I agree with this reasoning and adopt it in this appeal. As noted above, I am satisfied that disclosure of the information at issue in the Group B records would directly or indirectly reveal the content of solicitor-client communications. On that basis, I find it is exempt under section 12. Additionally, while the appellant argues that the communication of legal advice from a lawyer by city staff to other city staff constitutes a waiver of privilege, I find that it does not. All of the city's employees are part of the institutional client, and communication of legal advice among them does not waive the privilege. Accordingly, I find that the information at issue in the Group B records is also exempt under section 12 of the *Act*.

Issue E: Did the city exercise its discretion under section 12? If so, should I uphold the exercise of discretion?

[71] The section 12 exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, I may determine whether the institution failed to do so.

[72] In addition, I 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; or
- it fails to take into account relevant considerations.

[73] In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations.⁴¹ I cannot, however, substitute my own discretion for that of the institution.⁴²

[74] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:⁴³

- 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 their 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, and
- 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.

Representations of the city

[75] The city submits that it exercised its discretion in good faith and took into account all of the relevant considerations with respect to the application of section 12. The city submits that these considerations include the following:

- the purposes and principles of the *Act* including that the information should be available to the public, and exemptions to access should reflect the specific and

⁴¹ Order MO-1573.

⁴² Section 43(2).

⁴³ Orders P-344 and MO-1573.

limited circumstances where non-disclosure is necessary for the proper operation of municipal institutions;

- the wording of the exemption;
- the fundamental importance to Canadian society of the interests sought to be protected by the section 12 exemption;
- the lack of any sympathetic or compelling need by the appellant to receive the withheld information;
- disclosure will not have any impact on increasing public confidence in the operation of the city;
- the fact that the information at issue cannot be considered to be the appellant's "own" information;
- the requested information is of a highly sensitive nature (active investigation and enforcement activities); and,
- the recent nature of the requested information as it relates to, at the time of the request, active investigations and enforcement activities.

Representations of the appellant

[76] The appellant's representations do not address the city's exercise of discretion.

Analysis and findings

[77] After considering the representations of the parties, and the circumstances of this appeal, I find that the city did not err in its exercise of discretion with respect to its decision to deny access to the withheld information under section 12 of the *Act*.

[78] I am satisfied that it did not exercise its discretion in bad faith or for an improper purpose. I am also satisfied that the city considered relevant factors, and did not consider irrelevant factors in the exercise of its discretion. In particular, I am satisfied that the city provided the appellant access to as much information as possible by applying the exemptions in a limited and specific manner.

[79] Accordingly, I find that the city exercised its discretion in an appropriate manner in this appeal, and I uphold it.

ORDER:

1. I uphold the city's access decision to withhold information as identified in the records section of this order under sections 12 and 14(1) of the *Act*.

2. I order the city to disclose the rest of the responsive information to the appellant by **January 3, 2023** but not before **December 30, 2022**.
3. In order to verify compliance with this order, I reserve the right to require the city to provide me with a copy of the records disclosed upon request.

Original Signed by: _____
Anna Truong
Adjudicator

_____ November 30, 2022