

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-4338-F

Appeal MA19-00081

City of Stratford

February 24, 2023

Summary: The City of Stratford (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to firefighter training and oversight. The city granted partial access to the responsive records. It withheld some information pursuant to the discretionary exemptions at sections 7(1) (advice or recommendations) and 12 (solicitor-client privilege) of the *Act*, and the mandatory exemptions at sections 10(1) (third party information) and 14(1) (personal privacy). In Interim Order MO-4312- I, the adjudicator upheld the city's decision that sections 7(1), 12 and 14(1) applied to some of the information at issue. However, she ordered the city to re-exercise its discretion in relation to its application of the of the sections 7(1) and 12 exemptions. In this final order, the adjudicator reviews the city's re-exercise of discretion under sections 7(1) and 12 and finds that it has now exercised its discretion in a proper manner. She upholds the city's exercise of discretion to withhold one record pursuant section 12 of the *Act*.

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

OVERVIEW:

[1] This final order considers the City of Stratford's (the city) exercise of discretion under the discretionary exemptions in section 7(1) (advice and recommendations) and 12 (solicitor-client privilege) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The appellant submitted a request to the city under the *Act* for information related to the standards, training and degree of oversight provided in relation to firefighters employed by the city that are tasked with responding to emergency medical calls within the city. The appellant asserted that medical response has become a key role for the Stratford Fire Department and argued that there is a "clear and pressing public interest" in having information related to the training, standards and medical oversight of city firefighters available to the public as these calls presently outnumber calls for fire responses.

[3] The city granted partial access to the records it identified as responsive to the request. It denied access to the remainder of the information pursuant to the discretionary exemptions in the *Act* at sections 7(1) (advice or recommendations) and 12 (solicitor-client privilege), and the mandatory exemptions at sections 10(1) (third party information) and 14(1) (personal privacy). The requester appealed the city's decision to the IPC.

[4] During mediation, the city conducted a further search for responsive records and located additional records. It denied access to a portion of the new records pursuant to sections 7(1) and 10(1) of the *Act*. No further mediation was possible and the file was transferred to the adjudication stage of the appeals process. An inquiry was completed and transferred to me to consider the evidence and issue a decision. I issued Interim Order MO-4312-I, which contains a detailed summary of the circumstances of the request and the appeal.

[5] In the interim order, I concluded that section 10(1) did not apply to any of the information the city withheld. I upheld the city's decision that sections 14(1), 7(1) and 12 of the *Act* applied to some of the information at issue. However, I was not satisfied that the city considered whether disclosure of the information I found may be exempt pursuant to sections 7(1) and 12 could be disclosed. I did not uphold the city's exercise of discretion to withhold the information under sections 7(1) and 12 and I ordered it to re-exercise its discretion. I remained seized of the appeal to address this matter.

[6] In accordance with the interim order, the city re-exercised its discretion, issued a new decision to the appellant, and provided me with representations to explain its decision. While the city continued to withhold one record in full pursuant to section 12, it re-exercised its discretion to disclose to the appellant the portions of four other records that it previously withheld pursuant to section 7(1). I invited the appellant to respond to the city's representations, but did not receive a response.

[7] In this final order, I conclude that the city has now properly exercised its discretion under sections 7(1) and 12 of the *Act*. While the city maintains its decision to withhold the information at issue pursuant to section 12, it is entitled to do so, because I already found (in the interim order) that solicitor-client privilege applies to this record, and I now find (in this final order) that the city has properly exercised its discretion under section 12. On this basis, I dismiss the appeal.

DISCUSSION:

[8] The city has re-exercised its discretion and decided to disclose the information it previously withheld pursuant to section 7(1) of the *Act* in records 34, 44, 47 and 225 to the appellant. As a result, the sole issue to be addressed in this final order is whether the city properly exercised its discretion to withhold record 87 pursuant to the solicitor-client privilege exemption at section 12 of the *Act*.

[9] Section 12 is a discretionary exemption (the institution “may” refuse to disclose), meaning the city can decide to disclose information even if the information qualifies for exemption. As such, an institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so. 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, it takes into account irrelevant considerations, or it fails to take into account relevant considerations. In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.¹ The IPC cannot, however, substitute its own discretion for that of the institution.

[10] For the reasons that follow, I conclude that the city has now properly exercised its discretion by considering the public interest, and the need for public access to information, and balancing those interests with the city’s interest in protecting information subject to solicitor-client privilege.

[11] Interim Order MO-4312-I contains a detailed summary of the circumstances of the request and the appeal. In that interim order, I explained my reasons for finding that record 87 was subject to Branch 1 solicitor-client communication privilege pursuant to section 12 of the *Act*. I noted that record 87 was an email from a city employee to a lawyer requesting legal advice on an attached document and that there were no other parties to the email aside from the city employee and the lawyer. I accepted the city’s submission that the communication was made in confidence and was not shared with other parties.

[12] However, the city did not provide any representations about what factors it considered when exercising its discretion to apply section 12 of the *Act* to record 87. The city provided no indication that it had considered the fact that it could choose to disclose the information at issue. As a result, I ordered the city to re-exercise its discretion, taking into account the guidance provided in my interim order.

[13] In accordance with the interim order, the city re-exercised its discretion under section 12, and provided me with representations to explain how it had done so. In its representations, the city explains that it reviewed record 87 again and maintains its decision to withhold the record in full in accordance with section 12 of the *Act*. The city submits that the record is subject to solicitor-client privilege and should not be

¹ Order MO-1573.

disclosed.

[14] The city submits that Courts have consistently and repeatedly emphasized the breadth and primacy of solicitor-client privilege. It says that when considering records subject to section 12, it is only required to balance competing interests, as they relate to solicitor-client privilege, in defined and limited circumstances that are not applicable to this case.

[15] The city submits that releasing record 87 would have a negative effect on the city's ability to carry out its role and function and engage in open and frank discussions with its legal counsel as it could not know in advance whether or not the privileged material would be subject to disclosure.

[16] Finally, the city says that it "done its utmost to balance the public interest and public access while also protecting the core of the solicitor-client privilege contemplated in section 12 of the *Act* and facilitate full, free and frank communication between the City Solicitor and the City."

[17] Having considered the city's representations, and in the absence of a response from the appellant, I find that the city has properly exercised its discretion to withhold record 87 pursuant to section 12 of the *Act*. To begin, I am satisfied from the city's decision and representations on its re-exercise of discretion that it did not consider any irrelevant factors in choosing to withhold record 87. I also accept its representations regarding the breadth of solicitor-client privilege. I note that the Supreme Court has recognized the particular importance of solicitor-client privilege, stating that it must be as close to absolute as possible to ensure public confidence and retain relevance.²

[18] While not determinative, I have also taken into account the fact that the city re-exercised its discretion under section 7(1) and decided to disclose the remaining portions of records 34, 44, 47 and 225 that it previously withheld to the appellant. In my view, this decision supports the city's assertion that it has endeavoured to disclose as much information as possible to the appellant, while maintaining its exercise of discretion to withhold record 87 pursuant to section 12 of the *Act*.

[19] In the circumstances, and for all the reasons given above, I conclude that the city properly re-exercised its discretion pursuant to sections 7(1) and 12 and I uphold the city's decision to withhold record 87 pursuant to section 12 of the *Act*. As this is the only issue left to be decided in the appeal, the appeal is now dismissed.

ORDER:

I uphold the city's exercise of discretion to withhold record 87 pursuant to section 12 of the *Act* and I dismiss the appeal.

² See *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

Original signed by: _____
Meganne Cameron
Adjudicator

February 24, 2023 _____