

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4371

Appeal MA21-00164

City of Mississauga

April 26, 2023

**Summary:** The City of Mississauga (the city) received a request under the *Act* for access to records relating to the Mississauga Fire and Emergency Services (MFES), specifically communications for two timeframes in 2020. The city issued a decision granting access, in full, to some records and denied access, in full, to 17 records. The appellant appealed the city's decision to the Information and Privacy Commissioner of Ontario. In this order, the adjudicator upholds the city's decision.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of personal information), 12, and 38(a).

**Orders Considered:** Orders PO-3811, PO-3836 and PO-3856.

### OVERVIEW:

[1] Since 2015 the appellant has made access requests, under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), to the City of Mississauga (the city) for records relating to how the Mississauga Fire and Emergency Services (MFES), a division of the city, calculated its fire emergency response times.

[2] In November 2020, the appellant made another access request, which relates to how the city processed his request in an appeal that was resolved in Order MO-4361. The request states the following:

1. Events occurring on and after September 29, 2020 regarding the appellant's correspondence with [specified individuals] regarding policies and procedures surround MFIPPA requests, and, the appellant's submission of information pertaining to the latest MFES Long Term Directions Plan ("LTP") and the MFES 2020 Budget. As will be explained under "Public Domain" below, the information supplied was already in the public domain as the result of its publication of its conclusions in the aforementioned plans, presentation(s) to Council (and thereby to the public) and through the distribution of the data, in its entirety under FOI#2020-0171, from which the aforementioned documents were prepared.
2. Meeting held on January 16, 2020. [Specified attendees] and the appellant.

[3] In response to the request, the city issued a decision granting access, in full, to 39 records. The city denied the requester access, in full, to 17 records pursuant to section 12 (solicitor-client privilege) of the *Act*.

[4] The appellant appealed the city's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[5] As mediation did not resolve the appeal, it was transferred to the adjudication stage of the appeals process, in which an adjudicator may conduct an inquiry under the *Act*.

[6] The adjudicator initially assigned to this appeal invited the city and the appellant to provide representations on the issues in this appeal. She received representations from both parties.<sup>1</sup> This appeal was subsequently transferred to me to continue the adjudication. I reviewed the parties' representations and decided that I did not require further submissions before making my decision.

[7] In this order, I uphold the city's decision to withhold the records under section 12.

## **RECORDS:**

[8] The records at issue are email chains between various senior managers and the city solicitor pertaining to the appellant's earlier access requests and follow-up clarifications regarding whether the appellant should communicate only with the city solicitor.

[9] During the inquiry, the city provided an affidavit sworn by its Access and Privacy

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<sup>1</sup> I note that in the city's representations, it states that it is no longer relying on section 12 to withhold records 4, 5, 6 and 8. These records relate to a councillor who is not a client of the city's solicitor. I understand that the city has decided to disclose these records to the appellant. As such, these records are no longer at issue in this appeal.

Officer, which included descriptive details of each record at issue, the date, and the names of individuals appearing in the "From" and "To" fields of the email chains. The city also identified the position held by all the people included in the email chains.

[10] The records remaining at issue are:

No	Record
1	From City Manager, October 5, 2020 (Records 110-111)
2	From Commissioner of Corporate Services, October 4, 2020 (Records 112-113)
3	From Fire Chief, September 30, 2020 (Records 114-115)
7	From City Solicitor, November 15, 2020 (Records 120-126)
9	From City Solicitor, October 29, 2020 (Records 129-131)
10	From City Solicitor, October 13, 2020 (Records 132-136)
11	From City Solicitor, October 13, 2020 (Records 137-140)
12	From Commissioner of Corporate Services, October 9, 2020 (Records 141-143)
13	From City Solicitor, October 9, 2020 (Records 144-147)
14	From City Solicitor, October 9, 2020 (Records 148-152)
15	From City Solicitor's assistant, October 8, 2020 (Records 153-154)
16	From City Solicitor, October 7, 2020 (Record 155)
17	From Fire Chief, October 5, 2020 (Record 156-157)

## **ISSUES:**

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- B. Does the discretionary exemption at section 38(a), read with the section 12 exemption, apply to the records?
- C. Did the city exercise its discretion under section 38(a) (read with the section 12 exemption)? If so, should I uphold the exercise of discretion?

## **DISCUSSION:**

### **A: Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?**

[11] In order to decide whether section 38(a) applies, I must first decide whether the records contain "personal information," and if so, to whom this personal information relates.

[12] "Personal information" is defined in section 2(1) as recorded information about an identifiable individual." Recorded information is information recorded in any format,

including paper and electronic records.<sup>2</sup>

[13] 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.<sup>3</sup>

[14] In this case, the city submits that the records contain the personal information of the appellant within the meaning of section 2(1). I accept the city's submissions. Due to the nature of the request, the records contain information that qualifies as the personal information of the appellant. Accordingly, as the records contain the personal information of the appellant, I will consider his access to the records under Part II of the *Act*.

**B: Does the discretionary exemption at section 38(a), read with the section 12 exemption, apply to the records?**

[15] 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.

[16] 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.

[17] 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.<sup>4</sup>

[18] 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.

[19] In this case, the city relies on section 38(a) in conjunction with section 12, specifically common law solicitor-client communication privilege.

[20] 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

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<sup>2</sup> The definition of "records" in section 2(1) includes paper records, electronic records, digital photographs, videos and maps. The record before me is a paper record located by searching a police database.

<sup>3</sup> Order 11.

<sup>4</sup> Order M-352.

for an institution. It states:

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.

[21] 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. Given the city’s position and my finding in this order, I will only address the first branch.

### **Branch 1: common law privilege**

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

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

[23] The city relies on the common law solicitor-client communication privilege.

### ***Common law solicitor-client communication privilege***

[24] 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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

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

<sup>6</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>7</sup> *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.

<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***

[26] The city submits that the records are communications between its senior managers and the city solicitor about the history of the appellant's access requests, and how to address his ongoing communications to city staff. It submits that its senior managers, as employees of the city, are in a position of client in a solicitor-client relationship with the city solicitor. The city also submits that the communications between its senior managers and the city solicitor were made in confidence.

[27] In addition, the city submits that the records have not been disclosed to anyone except the recipients and except as necessary within the city to respond to the current access request and appeal, and privilege has not been waived.

[28] The appellant submits that the city solicitor is in a conflict of interest. He submits that the senior managers in question may face possible sanctions or criminal charges. The appellant submits that the duty of the city solicitor is to protect the city. As such, he submits that the city solicitor cannot represent the interests of both the senior managers and the city.

[29] In addition, the appellant submits that the city solicitor breached her obligations to the city by not informing council of her concerns. He submits that if she fulfilled her obligations then she must have disclosed identities and communications of the named persons from councillors. He submits that in communicating her concerns, she has to disclose her legal advice, thereby waiving privilege.

[30] The appellant also submits that the fire chief at the time retained his own independent counsel until his retirement announcement. The appellant questions whether the privilege between the city solicitor and the fire chief remains valid.

[31] Finally, the appellant submits he has received MFES response files for 2020 and 2021 which show the same anomalies as those witnessed in the files that are the subject of this appeal and an earlier request. He states that the over-statement of emergency responses remains significant. As such, the appellant states that the continuation of the alleged misrepresentation, when the city solicitor should now have all the fact, negates the claim of privilege.

[32] In response, the city denies that there is any conflict of interest with respect to the legal advice provided to its senior managers. The city submits that an alleged conflict of interest on the part of the city solicitor does not change the nature of the solicitor-client privilege which has not been waived by the clients in the circumstances.

[33] The city also denies there is any bad faith, improper purpose or "cover up" with respect to the appellant's underlying concerns about the MFES budget. In any event, the city submits that the appellant has not raised any credible concern regarding the content or purpose of the specific records at issue to conclude that the claim of privilege is negated.

[34] Finally, the city submits that the fact that the fire chief may have retained separate counsel does not change the nature of the solicitor-client communications in the records. It submits that there is nothing to preclude an individual from receiving legal advice from more than one lawyer.

### ***Analysis and findings***

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

[36] Before I discuss my findings any further, I will first address the appellant's arguments. The appellant submits that the city solicitor has a conflict of interest due to her duty to protect the city and her duty to represent the senior managers. I do not accept the appellant's argument. The appellant's argument is based on his assumption that the senior managers are part of a "cover up" and disclosure of the records would reveal their wrong doing, including sanctions or criminal charges against them. The appellant also believes the city based its annual budget on erroneous, misleading false data since at least 2010, when the fire station expansion was first proposed. However, there is no evidence before me of the senior managers being part of a cover up. As such, the city solicitor has no conflict of interest. In any event, I agree with the city that an alleged conflict of interest on the part of the city solicitor does not change the nature of the solicitor-client privilege which has not been waived by the clients in the circumstances.

[37] The appellant also alleges that the city solicitor has not fulfilled her obligations to the city because she failed to inform council of the records at issue. My understanding of the records is that they are communications between the senior managers and the city solicitor about how to apply the city's corporate policy titled "Staff Procedure for Handling Frivolous and Vexatious Complaints" (the policy) towards the appellant. As such, I do not accept that the city solicitor is in a conflict of interest because she failed to bring council's attention to these communications that are the subject matter of the request. Furthermore, if she had brought them to council's attention, that would not be a waiver of privilege, given council's role in relation to the city.

[38] I now turn to my reasons for finding that the records are exempt under section 12 as solicitor-client privileged communications.

[39] The records at issue can be divided into two groups:

- Group A: communication involving senior managers directly to and from the city solicitor; and,
- Group B: communications between senior managers that do not directly include the city solicitor, but that would directly or indirectly reveal the content of solicitor-client communications. Only record 17 falls within this category.

[40] The Group A records consist of email chains relating to the seeking or providing of instructions on how to apply the city's policy with respect to the appellant. The recipients of these emails include senior managers and the city solicitor. Based on my review of the city's affidavit and representations, I am satisfied that these records either contain legal advice from the city solicitor, or they were created to keep both senior managers and the city solicitor informed so that legal advice may be sought and provided as required on the issue of applying the policy. I find that these records contain confidential communications between the city solicitor and her client regarding legal matters, and therefore fall within the ambit of the solicitor-client communication privilege in Branch 1 of section 12 of the *Act*.

[41] With respect to the Group B record which is a communication that did not include the city solicitor, past IPC orders have recognized that email exchanges between non-legal staff can form a part of the "continuum of communication" covered by solicitor-client privilege.<sup>10</sup> This includes where disclosure would "indirectly reveal information exchanged between the [counsel] and [client] for the purpose of keeping both [...] informed so that legal advice may be sought and given as required,"<sup>11</sup> and where emails between non-legal staff refer to the need for the communications to be sent to legal counsel.<sup>12</sup>

[42] Based on my review of the city's evidence and representations about the Group B record, I am satisfied that it contains information that would reveal the content of discussions between senior managers and the city solicitor. I am also satisfied that disclosure of this record would indirectly reveal information exchanged between the city solicitor and senior managers for the purpose of keeping both informed so that legal advice may be sought and given as required. Having regard to the content of this record as a whole, I find that it forms part of the "continuum of communication" which falls within the solicitor-client communication privilege exemption at section 12 of the *Act*.

[43] With respect to waiver, the city submits that no parties outside of the solicitor-client relationship were involved in the discussions contained in the records, and that privilege has not been waived in relation to any of these records. As there is no evidence before me to suggest that waiver has occurred, I find that there has not been a waiver of solicitor-client privilege in relation to the records.

[44] I will now turn to the city's exercise of discretion in withholding the records that are exempt under the common law solicitor-client communication privilege.

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<sup>10</sup> Orders P-1409, P-1663, and PO-2624.

<sup>11</sup> Order MO-2789.

<sup>12</sup> Order PO-2624.



**C: Did the city exercise its discretion under section 38(a)? If so, should I uphold the exercise of discretion?**

[45] 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 Commissioner may determine whether the institution failed to do so.

[46] 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.

[47] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>13</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>14</sup>

[48] The city submits that it had properly exercised its discretion. In particular, the city submits that it considered the fact that the appellant is not specifically seeking access to or correction of his own personal information, but rather records that speak to how his prior access request was addressed by the city. The city notes that the appellant was provided responsive records that speak to the substance of his request, and was only refused access to records that are protected under solicitor-client privilege (which speak more to the process of responding to the appellant than the substance of the request). The city submits that the *Act's* purpose in providing access to an individual's own personal information is not significantly engaged, and the appellant has no legitimate interest in the internal deliberations and legal advice that was provided in connection with the decision to continue to treat him as a vexatious person.

[49] The appellant submitted representations but they did not address this issue.

[50] Based on my review of the parties' representations and the nature and content of the records, I find that the city properly exercised its discretion to withhold the records under section 38(a) in conjunction with section 12 of the *Act*. I note that the city took into account the above noted considerations, such as the purposes and principles of the *Act*, the wording of the exemption and the interests it seeks to protect, and the lack of any compelling need to receive the records withheld. I am satisfied that it did not act in bad faith or for an improper purpose. Accordingly, I uphold the city's exercise of discretion in deciding to withhold the records pursuant to section 38(a) in

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<sup>13</sup> Order MO-1573.

<sup>14</sup> Section 43(2).

conjunction with section 12.

**ORDER:**

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

Original signed by: \_\_\_\_\_

\_\_\_\_\_ April 26, 2023

Lan An  
Adjudicator