Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-4383-I

Appeal MA20-00220

City of Niagara Falls

May 30, 2023

Summary: The City of Niagara Falls received a request under the *Act* for three reports related to a specified townhome complex prepared by a consultant. The city withheld the reports in full claiming the application of the discretionary exemptions at 12 (solicitor-client privilege) and 13 (danger to safety or health) of the *Act*. The appellant appealed the city's decision to the Information and Privacy Commissioner of Ontario. In this order, the adjudicator finds that the reports are not exempt under section 12. She finds that the city's evidence failed to establish that section 13 applies and orders full disclosure of the reports pertaining to the exterior areas of the townhouse complex. The adjudicator orders the partial disclosure of the report pertaining to interior areas of the townhouse complex, withholding the unit numbers as the unit owners were not notified of the appeal. The appellant is to notify the IPC in writing if she wishes to pursue access to the unit numbers in this report within 15 days of her receipt.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 12 and 13.

Orders and Investigation Reports Considered: Orders PO-3651 and MO-4311.

OVERVIEW:

[1] The background of this appeal is that the City of Niagara Falls (the city) received numerous complaints from residents/unit owners about a specified townhouse complex regarding building deficiencies. In response, the city retained Canadian Home Inspection Services (CHIS) to prepare a number of reports.

[2] This order resolves an appeal of the city's access decision under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) denying the

appellant's request for copies of three reports prepared by the consultant.[1] In its initial access decision, the city claimed that the three reports qualify for the solicitor-client privilege exemption in section 12.

[3] The appellant appealed the city's decision to the Information and Privacy Commissioner's Office (IPC) and a mediator was assigned to explore settlement with the parties. Mediation did not resolve the appeal and the matter was transferred to the adjudication stage of the appeal process in which an adjudicator may conduct an inquiry.

[4] During the inquiry I invited and received representations from the parties.[2] In its representations, the city raised the possible application of the discretionary exemption under section 13 (danger to safety or health) for the first time.[3] A considerable portion of the appellant's representations focus on her arguments in support of her position that the compensation the city offered unit owners and the condo corporation was insufficient and that the city failed to uphold its fiduciary duty. Issues regarding the manner the city handled the complaints or the compensation offered is outside the jurisdiction of the IPC and thus will not be addressed in this order.

[5] For the reasons stated below, I find that all three reports are not exempt under section 12. I order full disclosure of the reports (records 2 and 3) pertaining to the exterior areas of the townhouse complex. I order partial disclosure of the report pertaining to the interior areas (record 1), withholding the unit numbers because the unit owners were not notified of the appeal. The appellant is to notify the IPC in writing if she wishes to pursue access to the unit numbers in this report within 15 days of her receipt.

RECORDS:

The records at issue, as described in the Index of Records prepared by the city, are described below:

1. Interior Report prepared by Canadian Home Inspection Services, dated May 29, 2019 (Interior report),

2. Exterior Report prepared by Canadian Home Inspection Services, dated May 23, 2019 (Exterior report), and

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[1] The appellant also sought access to copies of inspection reports prepared by the consultant, which the city disclosed in full.

[2] The parties' representations were shared in accordance with the confidentiality criteria in IPC *Practice Direction 7* and section 7.07 of the IPC's *Code of Procedure* [the *Code*].

[3] The IPC's *Code* provides basic procedural guidelines for parties involved in appeals before the IPC. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Here, the city did not claim the discretionary section 13 exemption in a timely way. Accordingly, the issue of whether the city should be permitted to rely on the discretionary exemption at section 13 was added to this appeal.

3. Grading Report prepared by Canadian Home Inspection Services, dated May 15, 2019 (Grading report).

ISSUES:

A. Does the discretionary exemption at section 12 apply to the records?

B. Does the discretionary exemption at section 13 apply to the records?

DISCUSSION:

Issue A: Does the discretionary exemption at section 12 apply to the records?

[6] The city claims that the records should be withheld under the solicitor-client privilege exemption in section 12. 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:

> 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.

[7] 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. The city relies on both branch 1 and 2.

[8] For reasons stated below, I find that the records do not qualify for exemption under branch 1 or 2.

Branch 1: common law privilege

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

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

Branch 2: statutory privilege

[10] The branch 2 exemption is a statutory privilege that applies where the records were "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."

[11] The statutory and common law privileges, although not identical, exist for similar reasons. I will start my discussion by considering the city's claim that the common-law and statutory litigation privilege apply to the records.

Findings and analysis

The statutory litigation privilege in branch 2 does not apply

The statutory litigation (including settlement) privilege does not apply

[12] This privilege applies to records prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation." In contrast to the common law privilege, termination of litigation does not end the statutory privilege in section 12.

[13] It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[4] However, the statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.[5]

[14] The city takes the position that the reports were "prepared for mediation and the settlement of potential litigation" and argues:

> The three reports, Interior Report, External Report and Grading Report were commissioned by the City of Niagara Falls to assist Legal Counsel in providing advice to the City and in contemplation of litigation by the unit owners of the [condo townhouse complex.] These reports were commissioned for evidence in mediation proceedings and to be used in case of litigious proceedings.
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> Documents that were not released to the appellant were sought out by the City of Niagara Falls for the purpose of documenting and assessing the final work of the homebuilder. Each residence was assessed in regards to the Grading, Interior and Exterior of every single residence within the identified subdivision. The information in the three documents was used by the City of Niagara Falls Legal Department to review and assess every property.

[15] The appellant says that residents were aware when the reports were commissioned. She also says that the residents worked cooperatively with the consultants when on-site completing the inspections. The appellant asserts that she was not aware of a "lawyer involved between the complex and the city at that time" the reports were commissioned. In addition, the appellant provided copies of emails which show that city employees and council members attended the townhouse complex for a site visit(s) and to talk to residents about their concerns.

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[4] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

[5] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

[16] In Order MO-4311 Adjudicator Lan An rejected the city's claim that one of the reports at issue in this appeal (the grading report) was subject to the statutory legal privilege in branch 2. In that order, Adjudicator Lan found that there was insufficient evidence of any ongoing or reasonably contemplated litigation between the city and the residents of the townhome complex and condominium corporation and stated:

> For a record to be covered by common law or statutory litigation privilege, litigation must be ongoing or reasonably contemplated at the time of the record's creation.[6] Determining whether litigation was "reasonably contemplated" is a question of fact that must be decided in the specific circumstances of each case.[7] In Order PO-3651, Adjudicator Cathy Hamilton commented on what constitutes "contemplated" litigation, in part by saying:
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> > [I]n order to conclude that there was "contemplated" litigation, there must be evidence that litigation was reasonably in contemplation, which requires more than a vague or general apprehension of litigation.

[17] I see no reason to allow the application of section 12 to the grading report to be relitigated. Adjudicator Lan's order was a final order. In any event, I agree with and adopt the reasoning in Orders PO-3651 and MO-4311.

[18] The city says the consultant was hired to prepare the three reports to assist legal counsel in providing advice to the city and in contemplation of litigation. However, other than asserting that litigation was reasonably contemplated, the city did not provide corroborating evidence, such as correspondence or minutes of council meetings to demonstrate that litigation was reasonably contemplated. I have reviewed the representations of the parties along with the records themselves and note that each report is accompanied by a covering letter addressed to the city's chief building official. I also note that the offer of compensation letter[8] sent to the appellant by city was authored by the city's risk manager and copied to the city's chief building official. In the letter, the city wrote:

> Following discussions between City Staff and the [condominium corporation board of directors], the City retained Canadian Homes Inspection Services (the "Consultant") as a third party consulting firm to conduct visual exterior and interior building inspections for each authorized townhome unit. The purpose of these inspections was to identify any existing Ontario Building Code deficiencies that might be considered as reasonably enforceable during the active permit stage and determine an associated cost to bring these deficiencies into compliance.

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[6] Footnote 12 in Order MO-4311 reads: Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, [(1999), 45 O.R. (3d) 321 (C.A.)]; see also *Blank v. Canada (Minister of Justice)* [(2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

[7] Footnote 13 in Order MO-4311 reads: Order PO-3651.

[8] Dated, February 4, 2020,

[19] Having regard to the above, I am not persuaded that there was more than a "vague or general apprehension of litigation" by the city at the time the reports were prepared. Accordingly, I find that there is insufficient evidence to support the city's assertion that the reports were prepared for counsel in reasonable contemplation of litigation. In my view, the evidence supports the appellant's evidence that at the time the consultants were hired, the city sought to identify building deficiencies and bring the deficiencies into compliance and in doing so sought to work with the residents. Accordingly, I find that the branch 2 statutory litigation privilege has not been established.

The common law litigation privilege in branch 1 also does not apply

[20] Common law litigation privilege is based on the need to protect the adversarial process by ensuring that legal counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[9] The litigation must be ongoing or reasonably contemplated for the common law litigation privilege to apply.[10]

[21] This privilege protects records created for the dominant purpose of litigation. It protects a lawyer's work product and covers material going beyond communications between lawyer and client.[11] Litigation privilege does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[12]

[22] For the same reasons I found that the statutory litigation privilege does not apply, I find that the common law litigation also does not apply. The city has failed to adduce sufficient evidence to demonstrate that the reports were created for the dominant purpose of reasonably contemplated litigation. Accordingly, the branch 1 common-law litigation privilege has not been established.

The communication privileges in branch 1 and 2 do not apply

Common law solicitor-client communication privilege

[23] The rationale for the common law solicitor-client communication privilege in branch 1 is to ensure that a client may freely confide in their lawyer on a legal matter.[13] 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.[14] The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client

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[9] *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[10] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)*, cited above.
[11] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).
[12] *Ontario (Ministry of Correctional Service) v. Goodis*, 2008, cited above.
[13] Orders PO-2441, MO-2166 and MO-1925.
[14] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

aimed at keeping both informed so that advice can be sought and given.[15] The privilege may also apply to the lawyer's working papers directly related to seeking, formulating or giving legal advice.[16]

[24] 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.[17] The privilege does not cover communications between a lawyer and a party on the other side of a transaction.[18]

[25] For this communication privilege to apply, the city's evidence would have to demonstrate that the reports reveal direct communications of a confidential nature between the city and its counsel. In some cases, an expert opinion sought by a lawyer in order to provide legal advice is also protected by this privilege.[19]

[26] The city asserts that "the records were created for the purpose of obtaining legal advice" and "… were prepared for the purpose of formulating and providing legal advice." However, the records themselves do not support the city's assertion. As noted above, the reports were authored by the consultants and sent to the city's chief building official, not counsel. I also note that the reports the city have identified as responsive to the appellant's request do not contain any markings or notations made by counsel which would suggest that the copies before me are counsel's work product related to her formulation or giving legal advice.

[27] Having regard to the above, there is insufficient evidence before me to support the city's assertion that the reports are solicitor-client communication privileged at common law. Accordingly, I find that the branch 1 common-law solicitor-client communication privilege has not been established.

Statutory solicitor-client communication privilege

[28] This privilege covers records prepared by or for crown counsel for use in giving legal advice. In support of its position that the statutory communication privilege applies, the city asserts that:

> … records were prepared for legal counsel to assess building deficiencies of individual properties to determine shortfalls from the builder. Legal counsel used the records to share information with homeowners regarding their personal properties to provide compensation for the building inadequacies.

[29] There is insufficient evidence before me to find that the reports were prepared for counsel for use in giving legal advice to the city. As noted above, the reports are addressed to the city's chief building official, not counsel. Accordingly, I

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[15] *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.
[16] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[17] *General Accident Assurance Co. v. Chrusz* cited above, Order MO-2936.
[18] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)
[19] *General Accident Assurance Co. v. Chrusz*, cited above.

find that the branch 2 statutory communication privilege has not been established.

Issue B: Does the discretionary exemption at section 13 apply to the records?[20]

[30] Section 13 is meant to protect individuals from serious threats to their health or safety resulting from disclosure of a record. It states:

> A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[31] Parties resisting disclosure of a record cannot simply assert that the harms under section 13 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 13 are self-evident and can be proven simply by repeating the description of harms in the *Act*.[21]

[32] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[22] 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.[23]

[33] In its representations, the city states:

> The information contained within the records should also be considered under section 13 of the *Act* as releasing the contents of the records could result in the endangering of residents. The information contains photos and descriptions of the homes. Releasing these three records would be an invasion of each property the appellant would have information of the interior and exterior for the dwellings that are part of the condominium.

[34] In its supplemental representations, the city states:

> Someone that has access to the information would be able to determine the contents of the properties (interior and exterior), the layout of the residences, and the deficiencies of the homes.

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[20] Given my finding that the discretionary exemption at section 13(1) does not apply, it is not necessary that I also discuss and make a finding as to whether the city should be permitted to make this claim outside the 35-day notice period set out in section 11 of the *Code*.
[21] Orders MO-2363 and PO-2435.
[22] *Merck Frosst Canada Ltd*. v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[23] *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.

> The records reveal physical locations that are linked to an individual. The record includes photos of people's properties and of the inside of their residences. Thus, allowing the requester access to the layout and contents of individual homes and properties.
>
> The threat would only be apparent, this discretionary exemption is to ensure the safety of the individuals listed in the record. This institution's intent is to ensure the safety of the affected persons and prevent any undo harm that may befall them if the records were to be released.

[35] In my letter to the city inviting its reply representations, the city was directed to provide answers to the following questions:

- Could disclosure of the record reasonably be expected to seriously threaten the safety or health of an individual? What is the connection between the record and the threat to safety or health? Please explain.
- **Which portion or portions of the record are of concern? Please explain**.
- Which individual or individuals could be subject to the threat? Please explain. [Emphasis in the original]

[36] In its reply representations, the city repeated its previous submissions and added that disclosure of the records could reasonably be expected to lead to "a home invasion" or compromise the integrity of the homes. The city asserts that the "entirety of all three records" are subject to concern and says that no portion of the records can be severed. The city says that revealing any information in the reports would require it to "inform every homeowner listed that their safety has been compromised."

[37] I have reviewed the representations of the parties along with the reports themselves and find that the city's concern is based on speculation and not supported by the records themselves. Earlier in this order, I discussed the background of this appeal in which the city received numerous complaints from residents about the townhouse complex which is the subject of this appeal. Many residents complained to the city that townhouse complex had many builder deficiencies. Based on the documentation provided by the appellant, city employees and city council members attended the complex at various times to talk to residents. In addition, to discussing their concerns with the city, the residents discussed their concerns with each other at condo corporation meetings. The appellant provided a copy of slide show presented at one of the condo meetings which included interior and exterior photographs of alleged building deficiencies. In addition, the resident's complaints were reported by the news media.

[38] I have considered the city's evidence taking into account the context of the request and the attention the resident's complaints attracted. I have reviewed the reports in question and note that the photographs and descriptions contained in the

reports do not capture information regarding the layout of the condo units. In addition, the contents of the individual condo units are not photographed. The interior photographs are close range and are accompanied with the consultant's description of the deficiency. For example, a photograph of an exhaust vent appears with the description "water staining around Main Bathroom Exhaust Vent" in the Interior Report (record no. 1). The only image in this photograph is the exhaust vent and as result, the contents or layout of the room can not be ascertained by the photograph and/or description. In my view, the consultant consistently used this approach in the report so that the photographs capture the subject-matter of the concern. The photographs and descriptions in Interior Report (record 1) are identified by the block and unit number.

[39] The exterior photographs and descriptions in the Exterior Report (record no. 2) also contain close-range photographs and descriptions of building deficiencies. Some of the exterior photographs contained in the Grading Report (report no. 3) are of a longer range as they capture issues, such as inadequate drainage, elevation and inconsistencies in a retaining wall. In all cases, the photographs in the Exterior and Grading reports capture outdoor images in plain sight. The exterior photographs and descriptions in both reports are identified by the block and unit number.

[40] For section 13 to apply, there must be a reasonable basis for concluding that disclosure of the information could be expected to seriously threaten someone's safety or health. The city says that disclosure of the "interior and exterior descriptions" contained in the reports could reasonably be expected to lead to a home invasion or compromise the integrity of an individual's home.

[41] In my view, there is insufficient evidence to conclude that releasing the photographs and descriptions of the deficiencies in the records could reasonably be expected to seriously threaten an individual's or group of individual's safety or health. I find that the city's evidence fails to establish a connection between the information in the reports and the alleged harm given the context of the request. I find that the city's evidence speculative and not supported by the reports themselves. For example, the city asserts that disclosure would reveal information about the layout of the individual's homes but the reports do not contain floor plans or reveal the layout of interior spaces.

[42] Section 4(2) of the *Act* obliges the city to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. Given that the unit owners have not received notice of this appeal, I will order the city to disclose the Interior report (record 1) to the appellant with the unit numbers redacted from each report. If the appellant seeks access to the unit numbers, she must notify the IPC of her wish to pursue this information within 15 days of her receipt of the reports so that each unit owner may be notified about the appeal and given an opportunity to make representations on whether the unit numbers qualify for exemption under the *Act*.

[43] With respect to the Exterior and Grading reports (records 2 and 3), I will order the city to disclose these reports to the appellant in full. The subject-matter of these reports exclusively address outdoor structural and landscaping issues and I am

not satisfied that the exemption at section 13 applies to these reports.[24]

ORDER:

1. The city is to provide copies of the Exterior Report (record 2) and Grading Report (record 3) in full to the appellant by **June 29, 2023.**

2. The city is to provide a copy of the Interior Report (record 1) with the unit numbers redacted to the appellant by **June 29, 2023.**

3. The appellant is to notify the IPC in writing within 15 days of her receipt of the Interior Report (record 1) if she wishes to pursue access to the redacted unit numbers.

4. If the appellant does not notify the IPC in accordance with order provision 3, this order is a final order and the appeal file will be closed.

5. 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 to the appellant.

Original Signed by: May 30, 2023
Jennifer James
Adjudicator

[24] I note that in Order MO-4311, Adjudicator Lan An upheld the city's access decision to withhold portions of the grading report under the discretionary exemption under section 7(1)(advice and recommendation). In this appeal, the city did not claim that the discretionary exemption under section 7(1) applied to the grading report.