

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-4438

Appeal MA20-00254

Toronto and Region Conservation Authority

September 7, 2023

**Summary:** The Toronto and Region Conservation Authority (the TRCA) received an access to information request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a requester seeking access to all records relating to his address during a certain timeframe. The TRCA located responsive records, and granted partial access to them. In this order, the adjudicator finds that most of the information requested is exempt from disclosure under the discretionary exemption at section 38(a) (discretion to refuse requester's own personal information), read with the discretionary exemption at sections 8(1)(a) (law enforcement matter), and that the rest of it is exempt under section 38(a), read with section 12 (solicitor-client privilege) of the *Act*. As a result, she upholds the TRCA's decision to withhold this information, and dismisses the appeal.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 38(a), 8(1)(a), 8(1)(b), and 12.

**Orders Considered:** Orders PO-2329 and PO-3197.

### OVERVIEW:

[1] The appellant submitted an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Toronto and Region Conservation Authority (the TRCA) for access to all records relating to his address for a specified period of time.<sup>1</sup>

[2] The TRCA located a number of records and notified a third party whose

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<sup>1</sup> The appellant later clarified with the TRCA that he does not seek access to records that were disclosed to him pursuant to a previous request.

interests may be affected by the disclosure of the records (the affected party).<sup>2</sup> The TRCA then issued an access decision to the parties, granting the appellant partial access to the records. The TRCA advised the appellant that it withheld some of the responsive information under the discretionary exemptions in sections 8(1)(a) (law enforcement matter) and (b) (law enforcement investigation) and 12 (solicitor-client privilege) of the Act. The TRCA also applied the mandatory exemption in section 14(1) (personal privacy) to withhold portions of the records.

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

[4] The IPC appointed a mediator to explore resolution. During mediation, the dispute was narrowed: the appellant confirmed he does not pursue access to the information subject to the TRCA's section 14(1) claim or information that the TRCA determined was non-responsive to the request. The TRCA also issued a revised access decision to the appellant, granting him access to additional records. The TRCA continued to rely on the sections 8(1)(a) and (b) and 12 exemptions to withhold the records from disclosure, but agreed with the mediator that these exemptions should be read with the discretionary exemption at section 38(a) (discretion to refuse requester's own personal information).

[5] No further mediation was possible and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[6] The adjudicator previously assigned to this appeal began a written inquiry under the *Act* by inviting the TRCA to provide written representations in response to a Notice of Inquiry, setting out the facts and issues on appeal. The TRCA issued a further revised access decision granting the appellant additional access to portions of record 11.<sup>3</sup> Since the TRCA deferred to the City of Toronto (the city) in its representations about the exemptions at sections 8 and 12, the previously assigned adjudicator asked the city for representations too. The city provided representations in response. The adjudicator then sent the appellant a Notice of Inquiry and a full copy of the representations of the TRCA and the city, for a response. The appellant provided written representations.

[7] The appeal was later reassigned to me. On my review of the file, given the passage of time, I asked the TRCA and the city for an update on the status of the law enforcement exemptions at sections 8(1)(a) and 8(1)(b) because they are both time-sensitive. I received an update from the TRCA.

[8] For the reasons that follow, I uphold the TRCA's decision to withhold the information at issue in the records, and dismiss the appeal.

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<sup>2</sup> See section 21 of the *Act* regarding notification to affected persons.

<sup>3</sup> TRCA also advised that portions of Records 11, 12 and 14 are withheld under section 14(1), but that exemption is no longer at issue, after mediation.

## RECORDS:

[9] Based on the TRCA's revised index of records, four records (emails between the TRCA and Toronto Building) were released in part, and seven were withheld in full.

[10] Given my finding that all of the records contain information that qualifies as "personal information" of the appellant, I am considering section 38(a) read with section(s) 8(1)(a), 8(1)(b), and/or 12, as the case may be, as follows:

<b>Record number(s)</b>	<b>Exemptions claimed</b>	<b>Withheld in full or in part</b>
records 1, 6, 13, and 14	section 38(a), read with sections 8(1)(a), 8(1)(b), and 12	Withheld in part
records 3, 5, and 9	section 38(a), read with sections 8(1)(a), 8(1)(b), and 12	Withheld in full
records 7 and 8	section 38(a), read with section 12	Withheld in full
record 11	section 38(a), read with section 8(1)(b)	Withheld in full

## ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(a), allowing an institution to refuse access to a requester's own personal information, read with the section 8(1)(a), 8(1)(b), and/or 12 exemption(s), apply to the information at issue?

## DISCUSSION:

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

[11] In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the record contains "personal information," and if so, to whom the personal information relates. For the following reasons, I find that each of the records at issue contains personal information that relates to the appellant.<sup>4</sup>

[12] Section 2(1) of the *Act* defines "personal information" as "recorded

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<sup>4</sup> Although some records contain "personal information" of other identifiable individuals, such information is no longer at issue in this appeal as a result of IPC mediation.

information about an identifiable individual.”<sup>5</sup> 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. Information is about an “identifiable individual” if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.<sup>6</sup>

[13] Section 2(1) of the *Act* gives a list of examples of personal information, including information relating to address and telephone number [paragraph (d)], and an 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 [paragraph (h)]. The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be “personal information.”<sup>7</sup>

[14] It is important to know whose personal information is in the record. If the record contains the requester’s own personal information, their access rights are greater than if it does not.<sup>8</sup>

[15] Although the TRCA claimed (at mediation) the discretionary exemption at section 38(a), which can only be raised if a record contains a requester’s own personal information, its representations also state that some records contain personal information and some do not.<sup>9</sup>

[16] Based on my review of the records, I disagree with the position the TRCA takes in its representations, and I find that all of the records contain information that qualifies as the appellant’s own “personal information” as that term is defined in section 2(1) of the *Act*. I find that some records contain the appellant’s name with other personal information listed in section 2(1), such as his address. I also find that all of the records reflect the fact that the appellant was the subject of a complaint, and took actions that were subject to the scrutiny of the government, which is the

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5 “Recorded information” is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps (see the definition of “record” in section 2(1) of the *Act*).

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

7 Order 11.

8 Under sections 36(1) and 38 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies. Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply [see sections 14(1) and 38(b)].

9 The TRCA also states that the mandatory exemption at section 14(1) over portions of some records. However, section 14(1) may apply only if a record contains the personal information of an individual *other than* the requester. It appears that the TRCA’s claim of section 14(1) relates to the portions of some records that contain the “personal information” of another individual. As noted, at mediation, the appellant removed that information from the scope of the appeal. To be clear, had the appellant not done so, access to information relating to the complainant would have been considered under the discretionary exemption at section 38(b) (personal privacy), not the mandatory exemption at section 14(1) (personal privacy), due to my finding that all of the records at issue contain the appellant’s own personal information. Since the complainant’s personal information is no longer at issue, the TRCA must continue to withhold that information.

appellant's "personal information" under the introductory wording of the definition of that term ("recorded information about an identifiable individual"). Therefore, I do not agree with the TRCA's representations which indicate that some of the records contain personal information, and others do not.

[17] Since all of the records contain the appellant's personal information, I will consider the TRCA's claims of sections 8(1)(a), 8(1)(b), and 12, read with section 38(a).

**Issue B: Does the discretionary exemption at section 38(a), allowing an institution to refuse access to a requester's own personal information, read with the sections 8(1)(a), 8(1)(b), and/or 12 exemptions, apply to the information at issue?**

[18] For the following reasons, I uphold the TRCA's decision to withhold the records at issue, in full or in part.

[19] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides some exemptions from this general right of access to one's own personal information.

[20] Section 38(a) of the *Act* 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, 9.1, 10, 11, **12**, 13 or 15 would apply to the disclosure of that personal information.

[21] The discretionary nature of section 38(a) ("may" refuse to disclose) 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 own personal information.<sup>10</sup>

[22] If the institution refuses to give an individual access to their own personal information under section 38(a), the institution must show that it considered whether a record should be released to the requester because the record contains their personal information.

[23] In this case, the TRCA relies on section 38(a) read with sections 8(1)(a), 8(1)(b), and/or 12, as set out in the Records section above. I will discuss each of these claims in turn, below.

***Section 38(a), read with sections 8(1)(a) and 8(1)(b)***

[24] Sections 8(1)(a) and 8(1)(b) say:

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<sup>10</sup> Order M-352.

(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[.]

[25] The institution holding the records need not be the institution conducting the law enforcement matter.<sup>11</sup>

[26] The term "law enforcement"<sup>12</sup> can include a municipality's investigation into a possible violation of a municipal by-law.<sup>13</sup>

[27] On my review of the records and the representations of the TRCA and the city, I find that the records were created in relation to alleged violations of the *Building Code Act, Ontario Regulation 166/06* which requires any proposed development, interference or alteration within an area regulated by the TRCA to have a permit from the TRCA, and/or city by-law(s), so the records relate to "law enforcement."

[28] The two section 8 exemptions that the TRCA claimed over records 1, 3, 5, 6, 9, 11, 13, and 14 are time-sensitive:

- For section 8(1)(a) to apply, the law enforcement matter must still exist or be ongoing.<sup>14</sup> This exemption does not apply once the matter is completed, nor where the alleged interference is with "potential" law enforcement matters.<sup>15</sup>
- 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

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11 Order PO-2085.

12 The term "law enforcement" is defined in section 2(1), in part, as follows:  
"law enforcement" means,

...  
(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).

13 Orders M-16 and MO-1245.

14 Order PO-2657.

15 Orders PO-2085 and MO-1578. Note that "matter" has a broader meaning than "investigation" and does not always have to mean a specific investigation or proceeding [see *Ontario (Community Safety and Correctional Services)*, 2007 CanLII 46174 (ON SCDC)]. Also note that the institution holding the record does not need to be the institution conducting the law enforcement matter for the exemption to apply (see Order PO-2085).

with “potential” law enforcement investigations.<sup>16</sup> The investigation in question must actually exist or be ongoing.<sup>17</sup>

[29] Given this time-sensitivity, when the appeal was reassigned to me, I determined that it was appropriate to seek an update on the status of any law enforcement matter and/or law enforcement investigation from the TRCA and the city.

*The TRCA law enforcement matter or investigation*

[30] The TRCA consulted with its staff and with the city to respond with updates. The TRCA advised the IPC that it “verified with its staff and the position from enforcement is that, as the violations are currently beyond statute, all the remaining materials may be released.” On this basis, I find that there is no ongoing or existing law enforcement matter or investigation on the TRCA’s part.<sup>18</sup> This means that the information at issue is not exempt under section 38(a), read with sections 8(1)(a) or 8(1)(b) as far as any TRCA law enforcement matter or investigation.

*City law enforcement matter or investigation*

[31] The city would not provide an update on the status of any law enforcement matter or law enforcement investigation relating to it.

[32] However, on my further review of the city’s representations, I noted that, in the details offered about the circumstances of this appeal, the city stated that its investigation concluded, and then “enforcement of relevant of the relevant provincial legislation was commenced,” which resulted in prosecution of the appellant. Based on this description of events by the city, I find that there is no ongoing or existing investigation. Therefore, section 38(a), read with 8(1)(b) does not apply to the information withheld in the record over which it was claimed by the TRCA.

[33] The remaining question, then, is whether there is an ongoing or existing law enforcement matter involving the city, such that the information can be withheld under section 38(a), read with section 8(1)(a). As noted, the city’s representations noted that the prosecution was ongoing. The TRCA’s update after consulting the city was that the city’s “litigation is still ongoing.” This is important to note because the definition of “law enforcement” includes proceedings related to investigations or inspections that could lead to court or tribunal proceedings.<sup>19</sup> Therefore, in the circumstances, I find that there is an ongoing law enforcement matter in relation to the information withheld under section 38(a), read with section 8(1)(a).

[34] As a result, I uphold the TRCA’s decision to withhold the information over

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16 Order PO-2085.

17 Order PO-2657. Also note that the institution holding the record does not need to be the institution that is conducting the law enforcement investigation for the exemption to apply (see Order PO-2085).

18 The TRCA subsequently advised that it confirmed with the city that its litigation is still ongoing (I will discuss this later on, when considering section 38(a), read with section 12).

19 See Note 12, above, for the definition of “law enforcement,” and, for example, Order PO-2329.

which it claimed sections 8(1)(a) in records 1, 3, 5, 6, 9, 11, 13, and 14, but under section 38(a), read with section 8(1)(a). Given this finding, it is not necessary to consider the TRCA's alternate finding that the information is also exempt under section 38(a), read with section 12.

***Section 38(a), read with section 12***

[35] 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.

[36] 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*.

[37] The institution must establish that at least one branch applies.

***Records 7 and 8***

[38] The TRCA submits that records 7 and 8 are direct communications between it and its counsel for the purpose of seeking legal advice, and are therefore subject to solicitor-client privilege.

[39] The city submits that one or both branches apply. Since record 8 is an email chain that includes some city staff, I have considered the city's submission that it has a "common interest" with the TRCA here, due to the factual and jurisdictional issues involved in the by-law investigations. The city explains that at the time of the communications that make up records 7 and 8, both the city and the TRCA had reasons to believe that either or both of them would be involved in litigation of some sort with the appellant regarding the subject of the records. In addition, the city relies on Order PO-3167 and submits that the parties claiming a "common interest" do not need to be formal co-parties to existing litigation and, in addition, may bring somewhat differing interests to the larger issue. What is required, is that the parties share a common interest with respect to reliance on the legal advice provided and in maintaining its confidentiality. The city submits that this is sufficient basis to withhold the records under section 12.

[40] The appellant opposes the claim of privilege, asserting no privilege exists. I understand his representations to mean that since the TRCA did not prosecute him within a certain amount of time, the claim of privilege must fail. He also expresses his views about the city's authority to prosecute the matters in question, and its code of conduct but such matters are not relevant to whether records 7 and 8 are exempt from disclosure under section 38(a), read with section 12.



[41] At common law, solicitor-client privilege (branch 1) encompasses two types of privilege: solicitor-client communication privilege, and litigation privilege. For the following reasons, I find that the common law solicitor-client communication privilege applies to records 7 and 8.

[42] 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>20</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>21</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>22</sup> The privilege may also apply to the lawyer's working papers directly related to seeking, formulating or giving legal advice.<sup>23</sup>

[43] Confidentiality is an essential component of solicitor-client communication privilege. For the privilege to apply, the communication must have been made in confidence, either expressly or by implication.<sup>24</sup>

[44] Based on my review of records 7 and 8, I find that it is clear from their contents that they are direct communications of a confidential nature between the TRCA's lawyer and the TRCA (the client). The fact that the TRCA did not later prosecute the appellant does not change the nature of these records. As a result, I uphold the TRCA's determination that section 12 applies to records 7 and 8.

[45] I also find that there is no evidence that the TRCA waived solicitor-client privilege over either of these records. While record 8, as an email chain, does contain some emails that include city employees along with the TRCA employees, I find that this not a waiver on the TRCA's part, in the circumstances. I agree with the city that it had a "common interest" with the TRCA in the subject matter of the email chain because at the time, both the TRCA and the city had reasons to believe that either or both of them would be involved in litigation of some sort with the appellant regarding the subject matter of the emails. As a result, I find that they had a mutual interest in maintaining the confidentiality of the record.

### ***Exercise of discretion under section 38(a)***

[46] As discussed, the discretionary nature of section 38(a) ("may" refuse to disclose) 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

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20 Orders PO-2441, MO-2166 and MO-1925. The privilege does not cover communications between a lawyer and a party on the other side of a transaction [see *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)].

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

22 *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.

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

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

requesters access to their own personal information.<sup>25</sup> If the institution refuses to give an individual access to their own personal information under section 38(a), the institution must demonstrate that it considered whether a record should be released to the requester because the record contains their personal information.

[47] The TRCA's position is that it disclosed as much of the records as possible; the city's position is that the TRCA's exercise of discretion should be upheld, as it was made taking into consider relevant factors such as the purposes of the exemptions claimed and the lack of sympathetic or compelling need for the appellant to receive the specific information at issue. The appellant did not address the exercise of discretion.

[48] Having reviewed the records withheld in full and in part, I accept that the TRCA disclosed as much of the records as possible to the appellant, taking into consideration that he was seeking records containing his personal information. I also accept that the TRCA considered the purpose of the law enforcement exemption and of the exemption covering solicitor-client privilege, in the circumstances. Based on the evidence before me, I accept these were relevant factors to consider, and that no irrelevant factors were considered. Furthermore, in the circumstances, I accept that this exercise of discretion was made in good faith, and that there is insufficient basis to conclude otherwise. As a result, I uphold the TRCA's exercise of discretion.

[49] For there reasons, I uphold the TRCA's decision, and dismiss the appeal.

**ORDER:**

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

Original signed by: \_\_\_\_\_  
Marian Sami  
Adjudicator

September 7, 2023 \_\_\_\_\_

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<sup>25</sup> Order M-352.