

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER MO-4479

Appeal MA20-00421

City of St. Catharines

December 28, 2023

**Summary:** In this order, the adjudicator partially upholds the city's decision to withhold certain information sought by the appellant under the exemptions for solicitor-client privilege and advice and recommendations (in the context of the exemption pertaining to a right to access one's own personal information). The adjudicator orders the remaining information to be disclosed to the appellant.

**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"), 7(1), 12 and 38(a).

### OVERVIEW:

[1] A watermain break occurred near the appellant's property. The appellant made a claim for compensation from the City of St. Catharines (the city), which was denied. There was no litigation in relation to the claim.

[2] The appellant made an access request to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all notes and records relating to the claim.

[3] The city located responsive records and issued a decision, denying access in full, claiming the application of the discretionary exemptions in sections 7(1) (advice and recommendations) and 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). The appeal was assigned to a mediator to explore possible resolution.

[5] The appeal was then moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. An IPC adjudicator sought and received representations from the city and the appellant. Representations were shared with the parties in accordance with the IPC's *Code of Procedure* and practice Direction 7.

[6] The appeal was then transferred to me to continue the inquiry. I reviewed the records and the materials exchanged in the inquiry.

[7] I informed the city of my preliminary view that some of the records at issue contained the appellant's personal information and that therefore the *Act* may require that the exemption claims be considered under sections 38(a) (discretion to refuse requester's own information).

[8] I also invited further representations from the parties about whether certain records identified by the city in the appeal were responsive to the request. This resulted in the city issuing a supplementary decision in which it disclosed an additional 82 pages of records to the appellant (the Additional 82 Pages). All but one of the additional 82 pages (i.e. page 7) was disclosed in full. A portion of page 7 was withheld on the basis of the section 7(1) exemption.

[9] It was later discovered that some of the Additional 82 Pages included duplicates of some of the information that remained at issue in the appeal. As will be described further below, the city no longer objects to disclosure of the duplicate information to the appellant.

[10] In this order, I partially uphold the city's exemption claims under section 38(a), read with sections 7(1) and 12, and I order other information that I find does not qualify for exemption to be disclosed.

## **RECORDS:**

[11] The city initially identified 26 pages of responsive records, which were grouped into 5 "documents." These documents are bundles of related emails, reports and invoices. The city claims that section 12 applies to the entirety of the 26 pages.

[12] As described above, the Additional 82 Pages that were disclosed to the appellant contained duplicates of some of the information at issue in the 26 pages. I inquired with the city about this, and the city decided that it no longer objects to disclosing the following pages of the 26 pages of responsive records to the appellant: 1-8, 16-17 and 26. I will therefore order the city to disclose these pages to the appellant.

[13] This means that only the following pages of the 26 pages of responsive records remain at issue: 9-14, 15, 18-25.

[14] As described by the city, pages 9-11 consist of an investigation report prepared by the city's insurance adjuster for the city's legal counsel. These pages are withheld on the basis of section 12.

[15] Pages 12-14 are withheld by the city on the basis that they are not responsive to the request or, alternatively, that they are exempt under section 12. These are invoices for services provided by the insurance adjuster (the invoices).

[16] Pages 15, 18-20, and 22-25 consist of emails and are withheld on the basis of sections 7(1) and/or 12.

[17] Pages 21 and 25 have been partially disclosed (with the Additional 82 Pages); however, as clarified by the city's supplementary decision, a portion of this information is withheld on the basis of section 7(1).

## **ISSUES:**

- A. Are the invoices responsive to the request?
- B. Do the records contain the appellant's personal information?
- C. Does the discretionary exemption at section 38(a), allowing an institution to refuse access to a requester's own personal information, read with the solicitor-client privilege exemption at section 12, apply to the information at issue?
- D. Does the discretionary exemption at section 38(a), allowing an institution to refuse access to a requester's own personal information, read with the advice and recommendations exemption at section 7(1), apply to the information remaining at issue?
- E. Did the city exercise its discretion?

## **DISCUSSION:**

### **Issue A: Are the invoices responsive to the request?**

[18] The city claims that the invoices are not responsive to the request. To be considered responsive to the request, records must "reasonably relate" to the request.<sup>1</sup> Institutions should interpret requests liberally, in order to best serve the purpose and spirit of the *Act*. Generally, if there is ambiguity in the request, this should be resolved

---

<sup>1</sup> Orders P-880 and PO-2661.

in the requester's favour.<sup>2</sup>

[19] The appellant's request was for "all notes and records related to the review of the claim." On the topic of responsiveness, the appellant's position is that her request should be interpreted broadly and that records that are reasonably related to her request should be disclosed. The city has not specifically addressed its view about why the invoices are not responsive to the request. However, it argues generally that the appellant has not requested "all" records related to the claim, but only those records that specifically relate to the city's "review" of the claim, which I understand to mean the substance of its review. The appellant submits that her request should be so narrowly construed.

[20] In my view, the invoices are reasonably related to the request. They pertain only to the insurance adjuster's review of the appellant's claim against the city. I disagree with the city that the request is to be narrowly construed to include only records that reveal the substance of the city's assessment of the claim. I find the invoices to be responsive and I will therefore consider the city's alternative claim that the invoices are exempt from disclosure under section 12.

### **Issue B: Do the records contain the appellant's "personal information"?**

[21] 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>3</sup>

[22] As noted above, I informed the city that it was my preliminary view that the records at issue contained the appellant's personal information. The city did not make any representations in response to this view.

[23] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." 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>4</sup>

[24] Section 2(1) of the *Act* gives a list of examples of personal information. The list of examples of personal information under section 2(1) is not a complete list. This

---

<sup>2</sup> Orders P-134 and P-880.

<sup>3</sup> 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.

<sup>4</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

means that other kinds of information could also be “personal information.”<sup>5</sup>

[25] Having reviewed the records I find that they contain the appellant’s personal information because they reveal that the appellant made a claim for compensation from the city – this information is “recorded information about an identifiable individual” in that it reveals something of a personal nature about her. Because the records contain the appellant’s personal information, it is necessary to consider the city’s exemption claims under section 38(a).

**Issue C: Does the discretionary exemption at section 38(a), allowing an institution to refuse access to a requester’s own personal information, read with the solicitor-client privilege exemption at section 12, apply to the information at issue?**

[26] 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.

[27] 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.

[28] The discretionary nature of section 38(a) 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>6</sup>

[29] 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.

[30] 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

---

<sup>5</sup> Order 11.

<sup>6</sup> Order M-352.

establish that at least one branch applies.

[31] In this appeal, the city relies only on the first branch, so I will not describe the second branch further.

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

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

[33] To be clear (because there was some confusion on the part of the parties about this), the first branch consists of both solicitor-client communication privilege *and* litigation privilege, both at common law. I will not refer to the “first branch” again in this decision, despite the fact that it is discussed frequently in the parties’ representations.

[34] 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>7</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>8</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>9</sup> The privilege may also apply to the lawyer’s working papers directly related to seeking, formulating or giving legal advice.<sup>10</sup>

[35] 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>11</sup>

[36] 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.<sup>12</sup> The litigation must be ongoing or reasonably contemplated for the common law litigation privilege to apply.<sup>13</sup> This privilege protects records created for the dominant purpose of litigation. It protects a lawyer’s work

---

<sup>7</sup> Orders PO-2441, MO-2166 and MO-1925.

<sup>8</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>9</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>10</sup> *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

<sup>11</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

<sup>12</sup> *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4<sup>th</sup>) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

<sup>13</sup> Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

product and covers material going beyond communications between lawyer and client.<sup>14</sup> Common law litigation privilege generally comes to an end with the termination of litigation.<sup>15</sup>

### ***Representations***

[37] Generally, the city says that all the responsive records consist of communications that were kept confidential between city staff and its insurance adjuster as the city's agent. The city refers expressly to "common law litigation privilege" in reference to each of the documents, but it also refers and relies on the principles relevant to common law solicitor-client communication privilege. For instance, it refers to Order MO-3056, an order in which the adjudicator upheld a claim of solicitor-client communication privilege on the basis of her finding that the communications comprised a "continuum of communications" between a solicitor and client.

[38] The appellant explains that there was no litigation about the watermain break and submits that to the extent that the city relies on common law litigation privilege, this protection has now come to an end because there was no litigation commenced and the relevant limitation period has expired. The appellant says that therefore, there is no "zone of privacy" within which communications are protected. (There was some dispute between the parties about the relevant limitation period; however, no litigation was commenced before the expiry of either of the possible limitation periods.)

[39] The appellant also submitted that the city should not be permitted to raise the statutory privileges in the second branch of section 12. The city has not done so.

[40] In response to the appellant's arguments, the city submitted that in addition to common law litigation privilege, it is relying on the common law solicitor-client communication privilege because the records are direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.

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

[41] As noted, solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.<sup>16</sup>

#### *Pages 9-14*

[42] Pages 9-11 consists of the investigation report of the watermain break provided

---

<sup>14</sup> *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

<sup>15</sup> *Blank v. Canada (Minister of Justice)*, cited above.

<sup>16</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

to the city by its insurance adjuster. Pages 12-14 consist of the invoice for services provided by the adjuster to the city – the invoices discussed above.

[43] In my view, the entire investigation report and portions of the invoices describing communications contain confidential communications between the city's insurer and the city's legal counsel about the merits of the claim and the city's risk. Disclosure of this report and portions of the invoice contain or would reveal confidential communications between the adjuster and the city's legal counsel for the purpose of informing the city's legal counsel to provide legal advice. The solicitor-client communication privilege is not time limited and it therefore is irrelevant that litigation was not commenced by the appellant against the city. Subject to my review of the city's exercise of discretion, I will uphold the city's decision to withhold this information.

[44] The remaining portions of the invoices do not reveal communications of a confidential nature between solicitor and client. These are not legal billings and have no presumption of privilege at common law. Nor am I persuaded that the invoices were provided to the city in the requisite zone of privacy required to establish litigation privilege. Because the city has made no other alternative claim over this information, I will order it to be disclosed to the appellant.

*Pages 15, 18-20, and 22-25*

[45] Pages 15 and 18-20 and 22-25 are emails between the insurance adjuster and the city's non-legal staff. The city's main argument is these pages are "an exchange of information between [c]ity employees and its agent." The city does not argue and the records do not suggest that these communications included legal counsel. These emails do not therefore qualify for the solicitor-client communication exemption.

[46] It is not necessary to consider whether the emails qualify for common law litigation privilege because there was no litigation and any relevant limitation period has expired. As noted above, common law litigation privilege generally comes to an end with the termination of litigation.

[47] I will, however, consider the city's alternative claims that the section 7(1) exemption for advice and recommendations applies to the emails.

**Issue D: Does the discretionary exemption at section 38(a), allowing an institution to refuse access to a requester's own personal information, read with the advice and recommendations exemption at section 7(1), apply to the information remaining at issue?**

[48] In the alternative, the city claims that pages 15, 18-25 and page 7 (from the additional 82 pages) are exempt from disclosure under section 7(1). As noted above, some of these pages contain duplicate information.

[49] Because these pages contain the appellant's personal information it is necessary



to consider the city's section 7(1) claim under section 38(a). Section 7(1) of the *Act* exempts certain records containing advice or recommendations given to an institution. This exemption aims to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.<sup>17</sup>

[50] Section 7(1) states:

A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[51] "Advice" and "recommendations" have distinct meanings. In relation to the information remaining at issue, the city claims only that they consist of advice.

[52] "Advice" has a broader meaning than "recommendations." It includes "policy options," which are the public servant or consultant's identification of alternative possible courses of action. "Advice" includes the views or opinions of a public servant or consultant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.<sup>18</sup>

[53] "Advice" involves an evaluative analysis of information. Neither "advice" nor "recommendations" include "objective information" or factual material.

[54] Section 7(1) applies if disclosure would "reveal" advice or recommendations, either because the information itself consists of advice or recommendations or the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.<sup>19</sup>

[55] Sections 7(2) and (3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7(1). Section 7(3) is not relevant to the present appeal. The relevant portion of section 7(2) states:

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual material;

---

<sup>17</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43 ("John Doe").

<sup>18</sup> See above at paras. 26 and 47.

<sup>19</sup> Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

[56] Factual material refers to a coherent body of facts separate and distinct from the advice and recommendations contained in the record.<sup>20</sup> Where the factual information is inextricably intertwined with the advice or recommendations, section 7(2)(a) may not apply.<sup>21</sup>

[57] As noted, the city submits that the information provided by city staff to the adjuster constitutes "advice." The city argues that the information at issue clearly meets the definition of "advice," and its exemption claim should be upheld as the protection provided is necessary to allow for the deliberative decision-making process.

[58] The appellant agrees with the purpose of the section 7(1) exemption; however, she argues that what the city is trying to protect is factual or background information upon which the insurance adjuster provided an opinion to the city. The appellant also submits that she is aware of any advice that may have been provided to the city by the adjuster because she is aware that the adjuster recommended that the city deny any liability.

[59] In reply the city says that the information at issue has "not necessarily" been disclosed to the appellant and it denies that the information at issue is "factual." The city reiterates that withholding the information is necessary to enable city staff and the insurance adjuster to engage in "full, free and frank," discussions, citing *John Doe*.

### ***Analysis and finding***

[60] Pages 15 consists of a question from the adjuster to city staff. This question does not contain evaluative analysis or options and disclosure of it would not permit the accurate inference of any advice given to staff. It does not qualify for the section 7(1) exemption [as read with section 38(a)].

[61] Pages 18-20 consist of an email exchange between the adjuster and city staff. In my view, one portion of this exchange consists of advice because it includes information that is evaluative in nature. It contains the views or opinions offered by a public servant about a particular topic and the options available the city to respond to same. The remaining portions of these pages consist of factual material about the circumstances of the watermain break and do not qualify for exemption under section 38(a), read with section 7(1).

[62] Pages 21-25 consist of an email chain (including many duplicate emails) initiated by a question from the adjuster to city staff. In my view, several portions of this email chain qualify as advice within the meaning of section 7(1). The portions that qualify as advice are evaluative and include the adjuster's and public servants' assessments, views and opinions about a particular circumstance; or, their disclosure could permit the drawing of inferences about those views and opinions. The remaining information on

---

<sup>20</sup> Order P-24.

<sup>21</sup> Order PO-2097.

these pages consists of factual material about the circumstances of the watermain break and does not qualify for exemption under section 38(a), read with section 7(1).

[63] In summary, I find that some of the information at issue is exempt under section 38(a), read with section 7(1). Subject to my review of the city's exercise of discretion, I will uphold the city's decision to withhold this information.

**Issue E: Did the city exercise its discretion?**

[64] The sections 38(a), 7(1) and 12 exemptions are discretionary meaning that the institution can decide to disclose information even if the information qualifies for exemption. The IPC reviews an institution's exercise of discretion to determine whether it did so properly.

[65] The city says that it exercised its discretion in good faith and with a view to the applicable exemptions in the *Act*, as well as its past practices. The city also submits that it was mindful of the risk of litigation to the city in making its access decision. The appellant submits that the city has not exercised its discretion properly. She says that the city merely regurgitated the wording of the claimed exemptions and applied the section 12 exemption, in particular, in an umbrella fashion.

[66] The appellant does not claim – and there is no basis to find – that the city exercised its discretion in bad faith or for an improper purpose. I find that the city's considerations were relevant and appropriate.

[67] One of the factors that an institution should consider is whether the requester is seeking access to their own personal information. While the city has not specifically addressed this in its representations, I am satisfied that it considered the fact that the information pertained the appellant. That it did so is inherent in its decision-making as explained in its representations; however, the city also considered and placed greater weight on other relevant factors, including the impact of disclosure on the city.

[68] I uphold the city's exercise of discretion.

**ORDER:**

1. On the basis of section 38(a), read with section 12, I uphold the city's decision to withhold pages 9-11 and the portions of page 14 highlighted on the copy of the records provided to the city with this order.
2. On the basis of section 38(a), read with section 7(1), I uphold the city's decision to withhold portions of pages 18-25, as well some of the withheld information on page 7 of the Additional 82 Pages. I have indicated which portions of these pages are exempt from disclosure on the highlighted copy of the records provided to the city with this order.

3. I order the city to disclose the remaining information at issue to appellant by January 29, 2024.
4. In order to verify compliance with order provision 3, I reserve the right to require the city to provide me with a copy of the records disclosed to the appellant.

Original Signed By: \_\_\_\_\_  
Valerie Jepson  
Adjudicator

December 28, 2023 \_\_\_\_\_