

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4524

Appeal MA21-00596

City of Hamilton

May 23, 2024

Summary: The appellant made a request under the *Act* for records relating to a complaint he filed regarding a surveillance camera in his neighbourhood. The city withheld some records, claiming the discretionary exemptions in section 38(a) (records containing the requester's own personal information), read with sections 7(1) (advice or recommendations) and 12 (solicitor-client privilege), and section 38(b) (unjustified invasion of personal privacy). In this order, the adjudicator upholds the city's decision and finds there is no public interest in the disclosure of the records. The adjudicator 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"), 7(1), 12, 14(1), 14(3)(b), 16, 38(a) and (b).

OVERVIEW:

[1] The appellant is an individual with concerns regarding images gathered by a porch surveillance camera in his neighbourhood. The appellant filed a complaint with the city alleging the surveillance camera breached the City of Hamilton's (the city) *Fortification By-Law No. 10-122*¹ which is a by-law to prohibit and regulate fortification and protective elements of land, such as surveillance cameras.

[2] The appellant submitted an access request under the *Municipal Freedom of*

¹ May 26, 2010. Online Available at: [City of Hamilton Fortification By-Law No. 10-122](#)

Information and Protection of Privacy Act (the *Act*) to the city for all records relating to his complaint, "including but not limited to images from the camera and the names of any lawyers or paralegals consulted."

[3] Initially, the appellant did not receive an access decision from the city and he filed a deemed refusal appeal with the Information and Privacy Commissioner of Ontario (the IPC). The appeal was resolved when the city granted the appellant partial access to nineteen pages of records. The city withheld three pages in part and sixteen pages in full under the exemptions in sections 7(1) (advice or recommendations), 8(2)(a) (law enforcement report), 12 (solicitor-client privilege), and 14(1) (personal privacy) of the *Act*.

[4] The appellant appealed the city's decision to the IPC.

[5] During mediation, the mediator raised the possible application of section 38 which applies to records that contain a requester's personal information. As such, sections 38(a), read with sections 7(1), 8(2)(a), and 12, and 38(b) were added to the appeal.

[6] Mediation did not resolve the appeal and it was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry under the *Act*. The adjudicator who had carriage over the appeal decided to conduct an inquiry and sought representations from the city and an affected party.²

[7] The city issued a revised access decision to the appellant, in which it granted him complete access to one record and disclosed another record in part, withholding portions under section 38(b). The city also advised it no longer claims the exemption in section 38(a), read with section 8(2)(a). As a result, the exemption in section 8(2)(a) is no longer at issue.

[8] The adjudicator then sought and received representations from the appellant. In his representations, the appellant raised the application of the public interest override in section 16 to the information withheld from disclosure.

[9] The appeal was then transferred to me to complete the inquiry. Upon review, I decided I did not need to hear further arguments from the parties before issuing my decision.

[10] In the discussion that follows, I uphold the city's decision and dismiss the appeal.

RECORDS:

[11] There are ten records at issue, totalling eighteen pages. The records are described

² During mediation, the affected party provided their consent to the disclosure of the records. However, at the start of the inquiry, the affected party rescinded their consent.

as follows in the city's index of records:

Record	Page(s)	Description	Decision/Exemption(s) claimed
6	6	Email dated January 28, 2021	Withheld in part under section 12 (solicitor-client privilege)
9	9, 9-1, 9-2	Email dated March 10, 2021	Withheld in full under sections 12, and 14(1) (personal privacy)
10	10, 10-1, 10-2	Email dated March 12, 2021	Withheld in full under section 38(a), read with section 7 (advice or recommendations) and 12
11	11, 11-1	Email dated March 12, 2021	Withheld in full under section 38(a), read with section 12
16	16	Action Request Form	Withheld in part under section 38(b)
17	17	Inspection Notes	Withheld in part under section 14(1)
19	19, 19-1	AMANDA database screenshots	Withheld in full under section 14(1)
21	21, 21-1, 21-2	Email dated March 10, 2021	Withheld in full under section 14(1)
22	22	AMANDA database screenshot	Withheld in full under section 14(1)
23	23	AMANDA database screenshot	Withheld in full under section 14(1)

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 mandatory personal privacy exemption at section 14(1) or the discretionary personal privacy exemption at section 38(b) apply to the information at 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 advice and recommendations exemption at section 7(1), apply to the information remaining at issue?
- D. Does the discretionary solicitor-client privilege exemption at section 12 or the exemption at section 38(a), allowing an institution to refuse access to a requester's own personal information, read with solicitor-client privilege exemption in section 12, apply to the information at issue?

- E. Did the city exercise its discretion and if so, should the IPC uphold its exercise of discretion?
- F. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the exemptions claimed by the city?

DISCUSSION:

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

[12] In order to decide which sections of the *Act* may apply, the IPC must first decide whether the records contain personal information and, if so, to whom it relates. It is important to know whose personal information is in the records. If the records contain the requester's personal information, the requester's access rights are greater than if the records do not contain their personal information and access to the records will be considered under Part II of the *Act*.³ Also, if the records contain the personal information of other identifiable individuals, one of the personal privacy exemptions might apply.⁴ The term *personal information* is defined in section 2(1) as "recorded information about an identifiable individual."

[13] To qualify as personal information, the information must be about the individual in a personal capacity. Generally, information associated with an individual in a professional, official or business capacity will not be considered to be *about* an individual.⁵

[14] However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁶ To qualify as personal information, it must be reasonable to expect an individual will be identified if the information is disclosed.

[15] The city submits the records contain the personal information of individuals other than the appellant. Specifically, the city submits record 9 contains the name, address and statements of an individual and statements about an individual in connection with the appellant's complaint of a possible contravention of a city by-law. The city submits the information relating to this identifiable individual qualifies as their personal information as that term is defined in paragraphs (d), (f), (g), and (h) of section 2(1) of the *Act*.

[16] The city also submits record 17 contains the name, telephone number, and

³ Under sections 36 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.

⁴ See section 14(1) of the *Act*.

⁵ See sections 2(3) and (4) of the *Act* and Orders P-257, P-427, P-1621, R-98005, MO-1550-F and PO2225.

⁶ Orders P-1409, R-980015, PO-2225 and MO-2344.

statements of an individual in connection with the appellant's complaint of a possible contravention of a city by-law. The city submits the information relating to this individual qualifies as their personal information under paragraphs (d) and (h) of the definition in section 2(1) of the *Act*.

[17] The city submits records 19, 21, 22 and 23 were sent to the city by one individual and relate to the same subject matter. The city claims these records contain the address of an identifiable individual who is not the appellant, which is personal information under paragraph (d) of the definition at section 2(1). Further, the city submits the email message and attachments (records 19, 21-1, 21-2, 22 and 23) were sent to the city by an individual that is implicitly of a private or confidential nature, which is personal information under paragraph (f) of the definition in section 2(1).

[18] Neither the appellant nor the affected party directly address whether the records contain personal information.

[19] I reviewed the records before me and records 10, 11 and 16 contain the appellant's personal information. Specifically, these records contain recorded information about an identifiable individual, i.e. the appellant, as per the introductory wording of the definition in section 2(1). Records 10, 11 and 16 also contain the appellant's contact information (which is *personal information* under paragraph (d) of the definition of that term in section 2(1)), opinions of other individuals about him (paragraph (g)), and his name where it appears with other personal information relating to him (paragraph (h)). I find the remainder of the records do not contain the appellant's personal information.

[20] I find records 9, 16, 17, 19, 21, 22 and 23 contain the personal information of the affected party and another individual. Specifically, the records contain recorded information about these individuals, their addresses and contact information (paragraph (d)), their personal views or opinions (paragraph (d)), correspondence they sent that is implicitly of a private or confidential nature (paragraph (f)), and their names as they appear with other personal information relating to them (paragraph (h)).

[21] In conclusion, I find records 10, 11, and 16 contain personal information belonging to the appellant. I find records 9, 16, 17, 19, 21, 22 and 23 contain personal information belonging to other identifiable individuals but not that of the appellant. As records 10, 11 and 16 contain personal information belonging to the appellant, I will consider whether he is entitled to access to them under Part II of the *Act*.⁷ I will consider the remainder of the records under Part I of the *Act* because they do not contain personal information relating to the appellant.⁸

⁷ I will consider the application of sections 38(a), read with sections 7(1) and/or 12, and (b) to records 10, 11 and 12.

⁸ I will consider the application of sections 12 and/or 14(1) to records 6, 9, 17, 19, 21, 22 and 23.

Issue B: Does the mandatory personal privacy exemption at section 14(1) or the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

[22] The city applied section 14(1) to withhold portions of record 17 and the entirety of records 9, 19, 21, 22 and 23 from disclosure. The city also applied section 38(b) to withhold a portion of record 16 from disclosure.

[23] 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 a number of exemptions from this right. Under section 38(b), where a record contains personal information of both the appellant and another individual, and disclosure of the information would be an unjustified invasion of the other individual's personal privacy, the institution may refuse to disclose that information to the appellant. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the appellant.

[24] In contrast, under section 14(1), where a record contains personal information of another individual but *not* the appellant, the institution is prohibited from disclosing that information unless one of the exceptions in sections 14(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy (the section 14(1)(f) exception).

[25] Under section 38(b), if any of the exceptions in sections 14(1)(a) to (e) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). None of the exceptions in section 14(1)(a) to (e) are applicable here.

[26] In determining whether the disclosure of the personal information in the records *would not* be an unjustified invasion of personal privacy under section 14(1)(f) or *would* be an unjustified invasion of personal privacy under section 38(b), sections 14(2) to (4) offer guidance. The factors and presumptions in sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Additionally, if any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under either section 14(1) or section 38(b). None of the circumstances listed in section 14(4) are present here.

[27] If, as in this case, section 14(4) does not apply, in deciding whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under sections 14(1) or 38(b), I must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁹

[28] If any of sections 14(3)(a) to (h) apply, disclosure of the personal information is presumed to be an unjustified invasion of personal privacy under sections 14(1) or 38(b).

⁹ Order MO-2954.

Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.¹⁰ The list of factors under section 14(2) is not a complete list. The institution must also consider any other circumstances that are relevant, even if these circumstances are not listed under section 14(2).¹¹

Parties' representations

[29] The city submits the presumption in section 14(3)(b)¹² applies to records 9, 16, 17, 19, 21, 22 and 23. The city claims the personal information of the affected party and another identifiable individual was compiled as part of an investigation into a possible contravention of *Fortification By-Law No. 10-122*. The city submits it is standard procedure for it to compile information from individuals during an investigation and the city did so in response to the appellant's complaint.

[30] The city also submits the factor weighing against disclosure in section 14(2)(f) (highly sensitive) applies to the personal information at issue because there is a reasonable expectation of significant personal distress if the information is disclosed. The city submits the affected party did not consent to the disclosure of any information relating to them.

[31] Finally, the city submits there is no indication the appellant is aware of the withheld personal information at issue. As such, the city submits it would not be absurd to withhold the information in these circumstances.

[32] In their representations, the affected party submits the records contain their personal information. The affected party acknowledges they originally consented to the disclosure of information related to them, but after researching the by-law and relevant Ontario regulations, they rescinded their consent.

[33] The appellant does not directly address whether the information at issue is exempt under the personal privacy exemption. However, the appellant submits the use of a video camera attached to a residence is excessive and raises concerns of voyeurism. The appellant submits the affected party should have no privacy interest in the information compiled as they are using the camera to capture personal information of other individuals inappropriately.

Analysis and findings

[34] I am satisfied the presumption in section 14(3)(b) applies to the personal

¹⁰ Order P-239.

¹¹ Order P-99.

¹² Section 14(3)(b) of the *Act* reads: "A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation."

information at issue. I find the presumption in section 14(3)(b) applies as the personal information was compiled and is identifiable as part of an investigation into a possible violation of a city by-law. Specifically, the city investigated the possible violation of By-Law 10-122 by an individual in the manner in which they used their residential video surveillance camera. I note the presumption has been found to apply to a variety of investigations, including those related to by-law enforcement.¹³ From a review of the records, it appears no charges were laid after this investigation. In any case, even if no charges were filed against an individual in relation to the incident or they were later withdrawn, section 14(3)(b) may still apply. The presumption only requires there be an investigation in a *possible* violation of law.¹⁴

[35] Upon review of the records subject to the city's privacy claim, I find section 14(3)(b) applies to the personal information and its disclosure is presumed to be an unjustified invasion of the affected party and another identifiable individuals' personal privacy.

[36] Under section 14(1), if a presumption in section 14(3) is found to apply, the personal information cannot be disclosed unless there is a reason under section 14(4) that disclosure of the information would *not* be an unjustified invasion of personal privacy, or there is a compelling public interest in the disclosure of the records. As stated above, section 14(4) does not apply in the circumstances of this appeal. Accordingly, the portions of record 17 and the entirety of records 9, 19, 21, 22 and 23 are exempt under section 14(1) of the *Act*. I will consider whether the public interest applies, below.

[37] The city applied section 38(b) to withhold a portion of record 16, specifically the name and address of an identifiable individual. The record is an Action Request Form which contains the details of a complaint regarding a possible infraction of city By-Law 10-122. Under section 38(b), I must consider and weigh the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties in deciding whether the disclosure of the other individual's personal privacy would be an unjustified invasion of personal privacy.¹⁵

[38] In this case, the city claims the application of the factor in section 14(2)(f). The information at issue in record 16 is an individual's name and contact information. Given the circumstances, it appears the appellant may be aware of this individual's name and address. Therefore, I give section 14(2)(f) little weight in my personal privacy analysis. The appellant did not raise any factors favouring disclosure and I find none apply. Further, I find none of the factors favouring non-disclosure apply to the personal information in record 16. Accordingly, after weighing the factors and presumptions in sections 14(2) and (3), I find the personal information in record 16 qualifies for exemption under section 38(b) of the *Act*.

¹³ See Orders MO-2147 and MO-3686.

¹⁴ Orders P-242 and MO-2235.

¹⁵ Order MO-2954.

[39] In its representations, the city considered the application of the absurd result principle to the records subject to its sections 14(1) and 38(b) claims. The absurd result principle applies in cases where the requester originally supplied the information in the record or is otherwise aware of the information contained in the record. In these situations, withholding the information may be absurd and inconsistent with the purpose of the exemption.¹⁶ I reviewed the personal information at issue and find that while some of the information may be within the appellant's knowledge, the appellant did not provide this information nor is it clearly within his knowledge. Given these circumstances, I find the absurd result principle does not apply.

[40] In conclusion, I find the personal information withheld from record 16 is exempt under section 38(b) of the *Act*, subject to my review of the city's exercise of discretion below. I find records 9, 17 (in part), 19, 21, 22 and 23 are exempt under section 14(1) of the *Act*.

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 advice and recommendations exemption at section 7(1), apply to the information remaining at issue?

[41] The city claims record 10 is exempt under section 38(a), read with section 7(1), of the *Act*. 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, 9, 9.1, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[42] 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.¹⁷

[43] 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.¹⁸

[44] Section 7(1) states,

¹⁶ Orders M-444 and MO-1323.

¹⁷ Order M-352.

¹⁸ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43 ("*John Doe*").

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.

[45] *Advice* and *recommendations* have distinct meanings. *Advice* has been found to include "policy options," which are a public servant or consultant's identification of alternative possible courses of action. *Advice* also 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.¹⁹

[46] 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.²⁰

[47] 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).

[48] In its representations, the city claims email 10 contains the advice from city staff members during deliberations regarding a decision. Specifically, the city submits record 10 contains email exchanges between city staff in which a city staff member requested other city staff members (including the solicitor) to provide their comments on a draft email message. The city submits its staff provided their comments regarding the draft email and provided advice regarding city By-Law 10-122. The city submits the email exchanges include the views and opinions of staff members regarding the possible contravention of the city by-law. The city submits these views and opinions reflect the staff members' analysis of the information gathered during the investigation of the possible contravention of the by-law and the approaches to the issue.

[49] The appellant did not address the application of this exemption to the records at issue.

[50] Based on my review of record 10, I agree with the city and find it contains the advice of city staff regarding the possible contravention of a city by-law and correspondence in response to an email. I agree with the city that the information in record 10 is evaluative in nature and contains the views or opinions offered by a public servant about the by-law and a draft response to an email. Accordingly, I find the record

¹⁹ See above at paras. 26 and 47.

²⁰ 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.

qualifies for exemption under section 38(a), read with section 7(1), of the *Act*.

[51] I reviewed the exceptions to the exemption in sections 7(2) and (3) and find none apply.

[52] Therefore, I find record 10 is exempt from disclosure under section 38(a), read with section 7(1), subject to my review of the city's exercise of discretion below.

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

[53] The city claims records 6 and 11 are exempt from disclosure because they contain solicitor-client privileged information. I found record 11 contains the appellant's personal information and will therefore consider whether it is exempt under section 38(a), read with section 12. Record 6 does not contain the appellant's personal information, so I will consider whether it is exempt under section 12 of the *Act*.

[54] 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.

[55] 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. In its representations, the city relies on the first branch, solicitor-client communications privilege at common law.

[56] 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.²¹ 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.²² 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

²¹ Orders PO-2441, MO-2166 and MO-1925.

²² *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

advice can be sought and given.²³

[57] The privilege may also apply to the lawyer's working papers directly related to seeking, formulating or giving legal advice.²⁴

[58] 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.²⁵ The privilege does not cover communications between a lawyer and a party on the other side of a transaction.²⁶

[59] The city submits records 6 and 11 are subject to solicitor-client communication privilege. The city submits the severed portion of record 6 is an email exchange between the city solicitor and a city staff member in relation to a request for legal support from the city's Legal Services Division. In that email exchange, the city submits the city solicitor provided advice to her client (the city staff member) in the course of responding to the appellant's complaint. As such, the city submits the email exchange in record 6 is direct communications of a confidential nature between lawyer and client which was made for the purpose of obtaining or giving legal advice.

[60] The city submits that record 11 is connected to record 10 in that it continues the email chain in which a city staff member requests other city staff, including legal counsel, to provide comments to the initial email message. The city submits record 11 contains the initial request for advice and the response from the city solicitor. The city submits the email chain contains a clear request for advice and the solicitor provides advice to his client (the city staff). As such, the city submits record 11 is protected by common law solicitor-client communication privilege.

[61] For both records 6 and 11, the city submits there has not been any express or implied waiver of solicitor-client privilege over the communications subject to solicitor-client privilege.

[62] The appellant did not address whether the records contain solicitor-client privileged information in his representations.

[63] 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.²⁷

[64] I reviewed the email records and find they contain direct communications between a solicitor and their client for the purpose of obtaining or providing professional legal

²³ *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.

²⁴ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

²⁵ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

²⁶ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

²⁷ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

advice. Disclosure of these emails would reveal confidential communications between city staff and the city's legal counsel for the purpose of requesting legal advice and the legal counsel's legal advice to their client. Subject to my review of the city's exercise of discretion, I uphold the city's decision to withhold the information at issue in record 6 and record 11 in its entirety under section 38(a), read with section 12.

Issue E: Did the city exercise its discretion and if so, should the IPC uphold its exercise of discretion?

[65] The sections 7(1), 12, 38(a) and (b) exemptions are discretionary, meaning 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.

[66] The city submits it exercised its discretion properly to withhold records 6, 16 and 17, in part, and records 9, 10, 11, 19, 21, 22, and 23, in full. The city submits it acted in good faith and for an appropriate purpose and applied the exemptions in a limited and specific manner. The city states it considered the following factors when exercising its discretion:

- The purposes of the *Act*, including the principle that individuals should have a right of access to their own personal information.
- The wording of the exemptions and the interests they seek to protect, such as the importance of protecting solicitor-client privileged communications, preserving an effective and neutral public service, and protecting the personal privacy of individuals.
- The appellant is seeking his own personal information; as such, the city disclosed as much of the responsive information as possible.
- The city considered the appellant's circumstances but found there was no sympathetic or compelling need for the appellant to receive the exempt information.
- Disclosure would not increase public confidence in its operations because the matter is primarily of a private nature between two parties.
- The nature and sensitivity of the information as it relates to the affected individuals whose information is at issue.

[67] The appellant does not claim and I find there is no basis to conclude the city did not exercise its discretion properly. Based on my review, I find the city's considerations were relevant and appropriate. Specifically, the city considered the appellant's right of access to his own personal information, the purposes of the *Act* and the particular exemptions claimed, and the privacy rights of the individuals whose personal information

is also contained in the records.

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

Issue F: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the exemptions claimed by the city?

[69] In his representations, the appellant states, "I respectfully request the release of all documents relevant to my request, which is in the public interest." I decided to consider whether the public interest override in section 16 of the *Act* could apply to the information exempt from disclosure. I note, however, the public interest override cannot apply to information found to be exempt under the solicitor-client privilege exemption. Therefore, I will only consider whether the public interest override applies to the information I found exempt from disclosure in records 9, 10, 16, 17, 19, 21, 22, and 23.

[70] Section 16 of the *Act* provides for the disclosure of records that would otherwise be exempt under another section²⁸ of the *Act* where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. For section 16 to apply, there must be a compelling public interest in disclosure of the records and this interest must clearly outweigh the purpose of the exemption.

[71] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.²⁹ In previous orders, the IPC has stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.³⁰

[72] A "public interest" does not exist where the interests being advanced are essentially private in nature.³¹ However, if a private interest raises issues of more general application, the IPC may find that there is a public interest in disclosure.³²

[73] A public interest is not automatically established because a requester is a member of the media.³³

[74] In his representations, the appellant states he is a professional journalist investigating apparent misconduct at the city regarding staff statements about the application of a by-law that prohibits video cameras attached to buildings that capture

²⁸ Section 16 applies to override information exempt under sections 7, 9, 9.1, 10, 11, 13 and 14.

²⁹ Orders P-984 and PO-2607.

³⁰ Orders P-984 and PO-2556.

³¹ Orders P-12, P-347 and P-1439.

³² Order MO-1564.

³³ Orders M-773 and M-1074.

footage beyond the property limits. The appellant submits the camera that is the subject of his request and a complaint he filed “apparently records” into the houses of neighbours, including his own. The appellant submits the camera raises concerns of voyeurism.

[75] The appellant submits a city employee advised him the camera was not “excessive” and, therefore, did not violate By-Law No. 10-122 based on advice from the city’s legal counsel. The appellant claims this lawyer’s “unprofessional conduct has affected me and I should have the right to identify this lawyer for the purpose of a complaint to the Law Society of Ontario.”

[76] Based on my review of the appellant’s representations, it appears the appellant has raised private, rather than public, interests in the records. First, the appellant takes issue with a specific surveillance camera and the fact that it may be capturing footage of his home. Second, the appellant wishes to file a complaint to the Law Society of Ontario against the city lawyer who advised the city there was no breach of the city’s by-law. I agree the issue of video surveillance may raise general privacy concerns. However, it is clear in this case, the appellant takes personal issue with the use of a particular surveillance camera. Given these circumstances, I find the appellant has not identified a compelling public interest in the disclosure of the information I have found exempt.

[77] Therefore, I find there is no compelling public interest in the records that outweighs the purpose of the exemptions claimed and section 16 has no application.

ORDER:

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

Original Signed By: _____
Justine Wai
Adjudicator

_____ May 23, 2024