



Information and Privacy
Commissioner/Ontario

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

ORDER M-237

Appeal M-9300067

City of Toronto



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ORDER

BACKGROUND:

The City of Toronto (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to records which mentioned the requester, located in certain identified departments of the City.

After clarifying with the requester that he was interested in records which "incorporate the name or address of the requester directly or indirectly in their subject matter", the City responded to the request. Access was granted to a number of records in total. The City denied access to other records, in whole or in part, claiming the exemptions in sections 12 and 38(a) of the Act.

The City also informed the requester that, as disclosure of four of the records might affect the interests of two "third parties", these parties were being notified pursuant to section 21 of the Act. One of these parties did not respond; the other objected to the disclosure of the two records which might affect its interests.

The City subsequently issued two more decision letters granting the requester access to all of the records which had been the subject of the section 21 notification. One of the parties who received notification appealed this decision of the City concerning the disclosure of two of these records. The issues arising in that appeal are addressed in a separate order. The remaining two records which had originally been the subject of the notification were disclosed to the requester.

The requester appealed the decision of the City.

Mediation of this appeal was not successful, and notice that an inquiry was being conducted to review the decision of the City was sent to the appellant and the City. Representations were received from the City only.

In its representations, the City stated that three of the records at issue in this appeal might attract the application of section 10 of the Act. A supplementary Notice of Inquiry was then sent to the City, the appellant and a party whose interests might be affected by the disclosure of these three records (the affected party), requesting representations regarding the application of section 10. Representations on this issue were received from the City only.

THE RECORDS:

After reviewing the original request, as clarified, and the records at issue in this appeal, I am of the view that Records 9A and 9B are not responsive to the request. In my view, these documents do not "incorporate the name or address of the requester directly or indirectly in their subject matter".

A list of the records remaining at issue and the corresponding exemptions claimed for each is contained in Appendix A to this order. Duplicate records are indicated in brackets. My decision will apply to both the original record and its duplicate, if any.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the discretionary exemptions provided by sections 12 and 38(a) of the Act apply.
- C. If the answer to Issue A is yes, whether the exemptions provided by sections 10 and 38(a) of the Act apply to Records 6B and 9C.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.

Section 2(1) of the Act defines "personal information", in part, as follows:

"personal information" means recorded information about an identifiable individual, including,

...

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

...

- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

...

- (h) the 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

I have reviewed all the records at issue in this appeal. In my view, with the exception of Records 6A and 32, they all contain the personal information of the appellant. While Record 6A is responsive to the request in that it "indirectly incorporates the name of the requester in its subject matter", it is the attachment to this covering letter, Record 6B, that contains the actual personal information of the appellant. Record 32 contains information related to a matter in which the appellant was involved, but does not contain any of his personal information.

ISSUE B: If the answer to Issue A is yes, whether the discretionary exemptions provided by sections 12 and 38(a) of the Act apply.

The City has claimed that section 12 of the Act applies to all the records at issue in this appeal. This section 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.

Section 12 consists of two branches, which provide the City with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and
2. a record which 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 (Branch 2).

BRANCH 1

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the City must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication; **and**
- (b) the communication must be of a confidential nature; **and**
- (c) the communication must be between a client (or his agent) and a legal advisor; **and**

- (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Orders 49, M-2 and M-19]

Records 30, 31, 32, 33 and 34

The City claims that Records 30, 31, 32, 33 and 34 qualify for exemption under the first test set out in the first branch of the solicitor-client privilege.

Records 30 and 33 are correspondence from the City Solicitor to the Mayor's office. Record 31, referred to in Record 30, is a draft response to a letter from the appellant prepared for the Mayor's signature by the City Solicitor. The severed portion of Record 32 is a copy of a message from the City Solicitor to the Mayor's office. The severed portion of Record 34 is part of a note prepared by a City employee and subsequently attached to a letter sent by the appellant to the Mayor. These records all concern the correspondence received from the appellant in 1985.

In Order 210, Commissioner Tom Wright provided the following definition of the term "legal advice" as used in section 19 of the Freedom of Information and Protection of Privacy Act, which is similar to section 12 of the Act. He stated:

The term "legal advice" is not defined in the Act. In my view, the term is not so broad as to encompass all information given by counsel to an institution to his or her client. Generally speaking, legal advice will include a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications. It does not include information given about a matter with legal implications, where there is no recommended course of action, based on legal considerations, and where no legal opinion is expressed.

I agree with this approach and adopt it for the purposes of this appeal.

Turning to the records at issue, I agree that Records 30, 31, 33 and the severed portions of Records 32 and 34 are confidential written communications between the City and its legal advisor.

However, in my view, only Records 30, 31 and 33 are communications "directly related to seeking,

formulating or giving legal advice" as defined above.

The portion of Record 32 which is at issue merely notes the status of a matter involving the City and the appellant. The comments withheld from Record 34 note that a response from the legal department may be required. In my view, none of this information is directly related to seeking, formulating or giving legal advice for the purpose of section 12 of the Act. As this was the only exemption claimed by the City to apply to Records 32 and 34 they should be disclosed to the appellant in their entirety.

Records 12A, 18A and 20

The City submits that Records 12A, 18A and 20 qualify for exemption under the second part of the common law solicitor-client privilege. The City merely states that:

... All [Records 12A, 18A and 20] were created especially for the lawyer's brief for existing litigation.

This aspect of the common law solicitor-client privilege requires a consideration of whether the records were created or obtained especially for the lawyer's brief for existing or contemplated litigation.

Record 12A is a memorandum dated July 9, 1992, and contains a request from the Mayor's office to the City Solicitor regarding a matter which is subject to threatened litigation. I am satisfied that this record meets the second part of the first branch of the section 12 exemption.

Record 18A is letter sent by the City Solicitor to the Parks and Recreation department which simply refers to an attachment, which has been disclosed to the appellant. I am not satisfied that this record was created or obtained especially for a lawyer's brief for litigation and, in my view, this record does not qualify for exemption under the second part of the common law solicitor- client privilege.

Record 20 is a letter from the City Solicitor to another solicitor, concerning matters raised in what appears to be the negotiation of an agreement between the City and the other solicitor's client. Although the letter refers to litigation between certain parties (including the appellant), the City does not appear to be involved in the litigation. The City did not even own the property in question at the time of the creation of the record. Moreover, it is not evident from a review of the record that it was created or obtained especially for a lawyer's brief for litigation, either existing or contemplated, nor have I been provided with any evidence regarding what litigation is in issue. It appears that the record was created during the course of negotiations between the City and the other solicitor's client concerning the City's eventual purchase of the property.

Accordingly, I find that Record 20 does not qualify for exemption under the common law solicitor-client privilege.

BRANCH 2

Records 2, 3, 5, 6A, 6B, 9C and 13

The City submits that these remaining records qualify for exemption under the second branch of the section 12 exemption.

A record can be exempt under Branch 2 of section 12 of the Act regardless of whether the common law criteria relating to Branch 1 is satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for counsel employed or retained by an institution; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order M-86]

Commissioner Wright considered this aspect of the section 19 exemption in Order 210:

The second branch of the section 19 exemption requires that the record be prepared for use in giving legal advice, or in contemplation of or for use in litigation. This is a narrower wording than if the requirement were that the record be prepared for the purpose of giving legal advice. In my view, it contemplates that the record itself will be used in giving legal advice.

I adopt this approach for the purposes of interpreting section 12 in this appeal.

Record 2 is a letter to the City Solicitor from the City's Parks and Recreation Department providing the department's comments in response to Record 3, in which the City Solicitor asks for the comments. I am satisfied that both of these records were prepared for use in litigation.

Record 5 is a letter from the City Solicitor to the Parks and Recreation Department, which summarizes the status of a particular court action. The correspondence also identifies a recommended course of action. In my opinion, this record was prepared for use in giving legal advice.

Record 6A is a letter from the City Solicitor to the Parks and Recreation Department summarizing a discussion between the City solicitor and the department concerning the purchase of property by the City. This record contains legal advice from the City Solicitor to the department recommending a certain course of action prior to the closing of the property purchase. I am satisfied that this record qualifies for exemption

under Branch 2 of section 12 of the Act.

Record 6B consists of two lists of unregistered encumbrances provided to the City Solicitor by a third party. The City submits that these lists were then provided to the Parks and Recreation Department by the City Solicitor, as that department was required to carry out the legal advice provided by the City Solicitor. Hand-written notations have also been made on the lists. It is my view that this record was prepared by or for the City Solicitor for use in giving legal advice and that section 12 applies.

Record 9C is a memorandum to file prepared by a solicitor for the City summarizing a meeting concerning negotiations and an agreement between the City and a third party. In my view, this record was prepared by counsel employed by the City for use in giving legal advice.

Record 13 is a letter from the City Solicitor to a lawyer at the Ministry of the Attorney General. The correspondence concerns a proposed meeting between the lawyer and City staff, including the City Solicitor, in which a public nuisance claim is discussed. This record identifies the time, place and issues to be discussed at the proposed meeting. I am satisfied that it was prepared in contemplation of or for use in litigation, and that it qualifies for exemption under section 12 of the Act.

To summarize, I find that Records 2, 3, 5, 6A, 6B, 9C, 12A, 13, 30, 31 and 33 qualify for exemption under section 12 of the Act.

As I have found under Issue A that all of these records, with the exception of Record 6A, contain the personal information of the appellant, I must now consider the application of section 38(a) of the Act which states:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 9, 10, 11, **12**, 13 or 15 would apply to the disclosure of that personal information; [emphasis added]

This is a discretionary exemption which gives the head discretion to deny access to an individual's own personal information in instances in which one of the enumerated exemptions would apply. I have reviewed the City's representations regarding its exercise of discretion to deny access to the records. I find nothing to indicate that the exercise of discretion was improper and I would not alter it on appeal.

I have also reviewed the City's representations on its exercise of discretion pursuant to section 12 as it applies to Record 6A. I would not alter this on appeal.

Because of the manner in which I have disposed of Issue B, it is not necessary for me to address Issue C.

ORDER:

1. I uphold the City's decision not to disclose Records 2, 3, 5, 6A, 6B, 9C, 12A, 13, 30, 31 and 33.
2. I order the City to disclose to the appellant Records 18A, 20 and the severed portions of Records 32 and 34 within 15 days of the date of this order.
3. In order to verify compliance with the provisions of this order, I order the City to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2, **only** upon request.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ December 8, 1993

APPENDIX A

FULLY EXEMPT RECORDS		
Record	Description	Exemption
2 (14A)	Correspondence dated July 8, 1991	12, 38(a)
3 (14B)	Correspondence dated June 28, 1991	12, 38(a)
5 (16)	Correspondence dated November 28, 1990	12, 38(a)
6A (11A)	Correspondence dated June 20, 1990	12, 38(a)
6B (11B)	Attachment to record 6(A)	10, 12, 38(a)
9C	Memorandum dated March 15, 1990	10, 12, 38(a)
12A	Correspondence dated July 9, 1992	12, 38(a)
13	Correspondence dated November 25, 1992	12, 38(a)
18A	Correspondence dated October 4, 1990	12, 38(a)
20	Correspondence dated January 30, 1989	12, 38(a)
30	Correspondence dated April 18, 1985	12, 38(a)
31	Draft correspondence	12, 38(a)
33	Correspondence dated April 12, 1985	12, 38(a)

SEVERED RECORDS		
Record	Description	Exemption
32	Telephone messages dated April, 1985	12
34	Letter from requester to Mayor dated April 8, 1985, with hand-written notations	12