



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-1068

Appeal M-9700281

**City of Toronto
[formerly Municipality of Metropolitan Toronto]**



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NATURE OF THE APPEAL:

The City of Toronto (the City), formerly the Municipality of Metropolitan Toronto, received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for access to records relating to the purchase of a home by the requesters from the City. The City located a large number of responsive records in its Legal Department and Real Estate Division and granted access to some of them. The City denied access to the remaining responsive records, claiming the application of the following exemptions contained in the Act:

- advice and recommendations - section 7(1)
- solicitor-client privilege - section 12
- invasion of privacy - sections 14 and 38(b)
- discretion to refuse requester's own information - section 38(a)

In a further letter to the requesters, the City provided them with access to all of the records in the Real Estate Division's files which related to the tenancy of the requesters in the subject property. By a subsequent letter, the City acknowledged that access to other records contained in the Real Estate Division's files which relate to the sale of the property to the requesters was denied, pursuant to section 12 and sections 11(c) and (d) of the Act as the records contain information which pertains to the economic and other interests of the City.

The requesters, now the appellants, appealed the City's decision. Within the 35-day time period prescribed in the Confirmation of Appeal sent by this office, the City advised the appellants that it also intended to rely on section 14 to deny access to certain records contained in the Real Estate Division's files.

A Notice of Inquiry was provided to the appellants, the City and to another individual whose rights may be affected by the disclosure of the records (the affected person). Representations were received from all three parties. In its submissions, the City indicated that it was no longer relying on the exemptions contained in sections 11(c) and (d). As these are not mandatory exemptions, I will not consider their possible application to the records.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE/DISCRETION TO REFUSE REQUESTERS' OWN INFORMATION

The City submits that all of the responsive records are exempt from disclosure under both parts of Branch 1 and Branch 2 of the solicitor-client exemption. At the time of the purchase of the subject property by the appellants, a dispute arose over title to a portion of the driveway of the home which infringes on an adjoining property. The City indicates that the appellants have brought an application before the Ontario Court (General Division) for a declaration that they are entitled to an easement over the neighbouring lands or for an abatement in the purchase price under Rules 3.02(1) and 14.05(3)(d) and (h) of the Rules of Civil Procedure against its predecessor, the Municipality of Metropolitan

Toronto. The appellants have also commenced a similar action against the Municipality in the Ontario Court (General Division), for similar relief. Each of these proceedings remain unresolved.

Under section 2(1) of the Act, “personal information” is defined, in part, to mean recorded information about an identifiable individual. I find that the majority of the records relate to a matter involving the appellants and, therefore, they contain their personal information as well as that of other individuals, including the affected person. Records 41-42 and 79 from the Real Estate Division’s files refer to the subject property and are, accordingly, responsive to the appellants’ request. The information which these documents contain, however, does not relate to the appellants or their dispute with the City. I find that these records contain only the personal information of individuals other than the appellants or the affected person.

Under section 38(a) of the Act, the City has the discretion to deny access to an individual’s own personal information in instances where certain exemptions would otherwise apply to that information. Section 38(a) 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]

The City has exercised its discretion to refuse access to the records at issue under sections 7 and 12. In order to determine whether the exemption provided by section 38(a) applies to the information in these records, I will first consider whether the exemption in section 12 applies.

The Tests for Section 12

Section 12 of the Act 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.

This section consists of two branches, which provide a head 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 the City for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for the records to be subject to the common law solicitor-client privilege (Branch 1), the City must provide evidence that the records satisfy 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]

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 the City; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

The Submissions of the Parties with respect to Section 12

As I indicated above, the City is relying on both parts of Branch 1 and Branch 2 with respect to the subject records. It submits that Records 73, 74, 82, 86, 90-94, 95, 96-99, 118-121, 122-124, 125-126, 146, 150, 151, 152, 154, 173 and 206-207 from the Legal Department files and Records 111, 136, 137-139, 176, 188-229, 242-244 and 248-251 from the Real Estate Division's files constitute written, confidential communications between counsel for the City and the client department of the City. It argues that these records are related to the seeking, formulating or giving of legal advice or legal assistance with respect to the sale of the subject property to the appellants and the subsequent dispute over the adjoining driveway property. As such, the City argues that these records are exempt from disclosure under the first part of Branch 1.

The City has also claimed the application of the second part of Branch 1 to all of the remaining records in the Legal Department and Real Estate Division's files. It submits that these records include notes and

correspondence which were created or obtained especially for the lawyer's brief at a time when litigation was either existing or contemplated, since these records were created or obtained directly in relation to the dispute over the driveway.

By way of summary, the City argues that these records were created in response to contemplated litigation and were obtained for and eventually formed part of counsel's brief. Included with the City's submissions are affidavits from both inside counsel responsible for performing the legal work involved in the property sale and outside counsel retained to defend the City's interests in the legal proceedings initiated by the appellants. Both counsel depose that they intend to rely on the contents of the records to prepare and defend the application and the action on behalf of the City.

The City also submits that all of the remaining records are also exempt from disclosure under Branch 2 of section 12 as they represent papers and materials created or specially obtained for the lawyer's brief with respect to litigation which remains on-going.

The appellants argue that the records at issue were not prepared for use in giving legal advice, nor were they prepared in contemplation of or for use in litigation. Rather, the appellants submit that the records were prepared in the course of a real estate transaction.

The affected person submits that the records include correspondence between the City and his solicitors and that any such communications are subject to the solicitor-client privilege outlined in section 12.

The Application of Section 12 to the Records

Part 1 of Branch 1

I have reviewed each of the subject records which the City has claimed are exempt under the first part of Branch 1 of section 12. I find that Records 73, 82, 86, 93-94, 118-121, 122-124, 150, 152 and 206-207 of the Legal Department records and Records 111, 136, 176, 183, 184, 185, 242, 248-249 and 250-251 from the Real Estate Division's files are written confidential communications to or from legal counsel which are directly related to seeking or formulating legal advice with respect to the sale of the appellant's property or the dispute involving the location of the driveway. As such, each of these records qualifies for exemption under the first part of Branch 1 of the section 12 exemption. Accordingly, these records are exempt from disclosure under section 38(a).

Part 2 of Branch 1

Following my review of the records, I conclude that the majority of the remaining documents fall within the ambit of the second part of Branch 1 of the section 12 exemption. Each of these records were created or obtained especially for the lawyer's brief at a time when litigation was either underway or was being contemplated. In my view, these documents represent the assembly by counsel of the

relevant materials which she will require in order to conduct the City's defence to the appellant's pending application and action in the Ontario Court (General Division).

The following records fall within the scope of the second part of Branch 1 of section 12 and are, therefore, exempt from disclosure under section 38(a):

Records 38, 49, 62, 63, 83, 84-85 (which is identical to Records 208-209), 89, 90-92, 95, 111-112, 113, 125-126, 146, 151, 153, 154, 157, 173, 174, 179, 204-205 and 210 from the Legal Department's files, and;

Records 27, 28, 37-38, 39, 43-45, 46-66, 67, 68-78, 86, 91, 137-139, 143, 171, the notations made to Records 174-175, 178-179 and 234-236, 190, 191-192, 193-195, 196-197, 198-199, 200-221, 224, 244, 255-258 and 259-262 from the Real Estate Division's files.

The City has also claimed the application of either Branch 1 or Branch 2 of section 12 for Records 40, 74, 96-99 and 172 of the Legal Department's files and Records 40, 188, 222-223 and 243 of the Real Estate Division's files.

Record 40 of the Legal Department's files is a covering memorandum from a City Law Clerk to an official with the City's Finance Department to which was attached the Statements of Adjustments for several properties sold by the City, including that purchased by the appellants. In my view, the information contained in Record 40 about properties other than that purchased by the appellants is not responsive to the request and may be severed from the document. The remaining information relates only to the appellants and is not, in my view, subject to either branch of the section 12 exemption. Accordingly, I find that this information should be disclosed.

Record 74 of the Legal Department's files is an excerpt from the Act. I find that it is not exempt from disclosure under either branch of section 12 and should be disclosed to the appellants.

Records 96-99 of the Legal Department's files and Records 188, 222, 223 and 243 of the Real Estate Division's files are facsimile cover pages and transmission confirmation sheets. They do not contain any information which is exempt from disclosure under section 12 and should, accordingly, be disclosed to the appellants.

Record 172 of the Legal Department's files contains information about the municipal tax status of the appellants' property and another which is unrelated to the request. I find that the information about the unrelated property is not responsive to the request. The remaining information, which pertains only to the appellants' property, is not subject to exemption under either branch of section 12 and should be disclosed to the appellants.

Record 40 of the Real Estate Division's files is a public advertisement which appeared in local newspapers announcing the sale of a number of properties, including that purchased by the appellants. I find that this document is not subject to either branch of section 12 and that it should be disclosed to the appellants.

Record 85 from the Real Estate Division's files is a statement showing the current status of rents payable to the City by tenants of various properties, including that now owned by the appellants. I find that the information in the record which relates to properties other than that owned by the appellants is not responsive to the request. Further, in my view, the information about the appellants is not subject to either branch of section 12 and ought to be disclosed to them.

Records 174-175, 178-179 and 234-236 from the Real Estate Division's files are correspondence to and from the appellants' counsel. Notes have been made on these records by the City's counsel which I have found to be exempt from disclosure under part 2 of Branch 1 of the section 12 exemption. The remaining portions of these records are not subject to either branch of section 12 and are not, therefore, exempt under section 38(a). These records may, therefore, be disclosed to the appellants.

INVASION OF PRIVACY

I have found above that Records 41-42 and 79 of the Real Estate Division's files contain only the personal information of individuals other than the appellants.

Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits disclosure of this information to any person other than the individual to whom the information relates except in certain circumstances listed under the section.

Neither the City nor the appellants have provided any representations on the application of section 14(1) to these particular records. In my view, the only exception to the section 14(1) mandatory exemption which have potential application in this appeal is section 14(1)(f) of the Act which states that a head shall refuse to disclose personal information to any person other than the individual to whom the information relates except if the disclosure does not constitute an unjustified invasion of personal privacy.

Because this is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 14(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

Sections 14(2) and (3) of the Act provide guidance in determining whether disclosure would result in an unjustified invasion of personal privacy. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

The only way in which a section 14(3) presumption can be overcome is if the personal information falls under section 14(4) of the Act or where a finding is made under section 16 of the Act that there is a compelling public interest in disclosure of the information which clearly outweighs the purpose of the mandatory personal information exemption.

In this case, the appellants, who are the parties seeking disclosure, have not provided any representations with respect to Records 41-42 and 79 from the Real Estate Division's files. In the absence of any evidence to establish the exception in section 14(1)(f), I find that the mandatory exemption from disclosure in section 14(1) of the Act applies to these documents. Records 41-42 and 79 should not, accordingly, be disclosed.

Because I have found that all of the records for which the City had claimed section 7(1) are exempt under section 12, it is not necessary for me to address the possible application of section 7(1) to them.

ORDER:

1. I order the City to disclose the responsive portions of Records 40 and 172 and Records 74 and 96-99 of the Legal Department's files, as well as Records 40, 188, 222, 223 and 243, the responsive portion of Record 85 and Records 174-175, 178-179 and 234-236 (except for the handwritten notes) from the Real Estate Division's files to the appellants by sending them a copy by **March 4, 1998** but not before **February 27, 1998**.
2. I uphold the City's decision to deny access to the remaining records or parts of records.
3. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of the records which are disclosed to the appellants in accordance with Provision 1.

Original signed by: _____

Donald Hale
Inquiry Officer

January 29, 1998