



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1526

Appeal MA-000325-3

City of Toronto



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NATURE OF THE APPEAL:

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 relating to “third party rentals of parking spaces” in two named parking garages. The City located a number of responsive records and granted access to some of them, in accordance with an Index of Records which it provided to the requester. The City denied access to other records, claiming the application of the exemptions found in sections 7(1) (advice or recommendations), 12 (solicitor-client privilege) and 14(1) (invasion of privacy) of the *Act*.

The requester, now the appellant, appealed the City’s decision to deny access to those records which were withheld and also submitted that additional records responsive to the request ought to exist.

During the mediation stage of the appeal, the appellant advised that he was no longer seeking access to the information to which the City had applied section 14(1). The appellant continues to seek access to those records remaining at issue which are, according to the City, exempt under sections 7(1) and 12. In addition, the appellant continues to maintain that additional records exist.

As further mediation was not possible, the appeal was moved into the adjudication stage of the process. I decided to seek the representations of the City, initially. The City made submissions in response to the Notice provided to it. The City indicates that it is no longer relying on the discretionary exemption in section 7(1) for Records 481-482; instead, it is now claiming that these documents are exempt under section 12. I then provided a Notice of Inquiry to the appellant, along with the non-confidential portions of the City’s submissions. The appellant also made representations, which were in turn shared with the City, who then made further submissions by way of reply.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The City submits that the records qualify for exemption under section 12 of the *Act*. This exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. The City has not made any representations in support of the possible application of the litigation privilege aspect of solicitor-client privilege. I will, accordingly, only address the possible application of the solicitor-client communication portion of the section 12 exemption.

Solicitor-client communication privilege

The City maintains that solicitor-client communication privilege applies to all of the records at issue in this appeal. 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 professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

This privilege has been described by the Supreme Court of Canada as follows:

... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to “a continuum of communications” between a solicitor and client:

. . . the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as “please advise me what I should do.” But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

Solicitor-client communication privilege has been found to apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729].

Positions of the Parties with respect to the Application of Section 12

Without making reference to any specific records, the City takes the position that all are subject to solicitor-client communication privilege on the basis that they were made “for the purpose of obtaining legal advice with respect to [an issue]”. It also argues that some of the records “constitute information passed on by City solicitors or various departmental staff to the other party aimed at keeping all parties informed so that advice could be sought and given as required

relating to this issue”. Finally, the City suggests that some of the records “constitute the solicitor’s working papers directly relating to the seeking, formulating or giving of the legal advice”.

The appellant’s representations address more completely the issues raised in the Notice of Inquiry relating to the application of the section 12 exemption to the records. With regard to the solicitor-client communication privilege component of section 12, the appellant submits that:

Given the descriptions by which the city has labelled the documents that have not been produced [in the Index provided to him], it is impossible for a proper discussion as to the applicability of the communication privilege.

...

A review of these documents [referring to a number of records listed above] will determine that they are not prepared by the legal department but appear to be generated in the normal course of daily events. In our opinion, it would be improper to apply communication privilege to a document generated in the normal course of events merely because it has come to the attention of the legal department.

We agree that any documents that directly relate to the working papers seeking, formulating or giving advice would be properly subject to communication privilege, however, it appears as if any communication that is forwarded to the legal department has been made subject to this privilege. In our opinion, our clients will not be able to learn of the prior status of the property or of any investigations that have been undertaken by the City without having access to the reports generated by the Inspectors who visited the property. An inspection report of a visit cannot be the proper subject of communication privilege as is being claimed.

The City claims that communication privilege applies to documents that “constitute information passed on by City solicitors or various departmental staff to the other party aimed at keeping all parties informed”. The “other party” is not identified and as noted above, in our opinion, it is improper to withhold information relaying facts discovered or changes in status at the property. If no opinion is being sought in the correspondence this communication should not be subject to privilege.

Findings

Are the Records Exempt under the Solicitor-Client Communication Privilege Component of Section 12?

In my view, communications between the City solicitor or City officials and counsel representing the owner of the property or other interested parties to the dispute are not privileged under the

solicitor-client communication component of section 12. Only communications between a solicitor and his or her client are protected by the privilege. Accordingly, I find that any privilege attached to the advice contained in these communications between solicitor and client is waived in situations where it has been shared with an opposite or outside party. Accordingly, I find that Records 15-17, 42-43, 57-62, 119, 242-243, 335-336, 337, 347, 348-349 and 354 are not exempt under the solicitor-client privilege exemption in section 12 as they represent communications between solicitor and client which were shared with either opposing counsel or his/her client. As no other exemptions have been claimed for these records and no mandatory exemptions apply, I will order that they be disclosed to the appellant.

I have reviewed the contents of all of the records remaining outstanding and find that the following qualify as confidential communications between a solicitor and client relating directly to the seeking, formulating and giving of legal advice:

Records 50-53, 78-79, 104-111, 112-113, 114, 115-116, 121, 123-124, 125, 131, 134, 152, 162-163, 164-165, 192-193, 194-195, 199-201, 202-203, 206-210, 211-215, 223-226, 228-230, 231, 233-234, 235-240, 250, 253-254, 255, 256, 259-261, 282, 319-321 (which is identical to Record 324-326), 322-323, 333, 334, 338, 339, 340, 341-342, 343, 344, 345-346, 350-352, 356 and 481-482.

Each of these records are correspondence or records of communications between the City Solicitor's Office and various clients within the administration of the City including representatives of the Building Commissioner, Parks and Recreation Department, Planning Department, Council and individual City Councillors. I find that they represent confidential communications between a solicitor and client and are directly related to the provision or the seeking of legal advice relating to a legal matter. All of these records are, accordingly, exempt under the solicitor-client communication component of section 12.

In addition, other records fall within the "continuum of communications" passing between the City Solicitor's office and various clients within the City administration. These records include notes which contain the legal advice received from the solicitor and other communications between solicitor and client which do not relate directly to the giving, seeking or formulating of legal advice such as draft pleadings, arrangements for various meetings and the compilation of documents and memoranda passing within City Departments relating to the legal issue under discussion where the solicitor is copied. As such, I find that Records 118, 120, 153, 219, 221-222, 281 and 353 are also exempt from disclosure under the solicitor-client communication aspect of the section 12 exemption following the reasoning expressed in *Balabel*.

The City appears to be claiming that other records, consisting of notes taken by Building Department inspectors, also form part of the "continuum of communications" between solicitor and client and are exempt from disclosure under the solicitor-client communication component of section 12. I cannot agree with this view. The notes were not prepared for the solicitor by the inspector. These records were later copied for counsel but do not represent communications relating to the giving, seeking or formulating of legal advice. For this reason, I find that they are not exempt under the solicitor-client communication privilege aspect of the section 12 exemption.

In addition, I find that Record 177-183, a copy of a reported decision of the Divisional Court, is exempt from disclosure within the ambit of a "legal advisor's working papers directly related to seeking, formulating or giving legal advice" as described in *Susan Hosiery*. The decision which is copied at Record 177-183 formed part of the solicitor's research and study of the issue under consideration and may properly be considered to be part of his "working papers". This record is, therefore, also exempt under the solicitor-client communication privilege part of section 12.

REASONABLENESS OF SEARCH

In cases where a requester provides sufficient details about the records which he or she is seeking and the institution indicates that records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the City must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records (Orders PO-1744 and PO-1995).

A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

In his representations the appellant states that he believes there are other records which he has not received. In support of this contention, the appellant provided me with a list of seven specific records or types of records which were referred to in the documents provided to him but not actually produced by the City. The appellant's representations in this regard were very specific. I then asked the City to respond to each of the seven points raised by the appellant in as much detail as possible to assist me in determining whether it had undertaken a reasonable search for these documents.

In response, the City describes in detail the manner in which it has addressed this request and two earlier requests by the same appellant for similar records. With regard to the seven items referred to in the appellant's submissions, the City responded as follows:

[upon receipt of the notice of appeal in January 2001, a named Building Inspector] ordered all building files relating to the subject location from records archives, even though it appeared from their descriptions, the contents of the files were not necessarily responsive to the request.

However, upon a review of the additional records located, it was determined that they included records that had been identified in point 1 of the request letter. It was also determined that the memo referred to in point 2 was Record 502, (File Z2), a copy of which has since been disclosed to the appellant (in response to his third request); the microfiche referred to in point 6 was destroyed after the permit had been approved; and the information from [a named individual] referred to in point 7 was contained in Record 27 and has been provided to the appellant in response to his first request.

...

. . . following the receipt of the appellant's representations, [the Building Inspector] was asked again to search for responsive records including those referred to in the remaining points 3, 4 and 5 of the appellant's representations that had not been accounted for. [the Building inspector] confirmed again that all records in his possession and in the 14 building files had been forwarded to the Corporate Access and Privacy Office. [a Plans examiner] was also contacted and he too confirmed that he had no additional responsive records.

Building records are normally retained as follows: when the file is closed, the records are put on microfiche and maintained for the life of the building. The paper copies are maintained for a period of five years, following which time, they are destroyed.

In the circumstances of this appeal, it is possible that some of the records that have not been accounted for have inadvertently been destroyed. However, all reasonable searches have been conducted by knowledgeable staff for these records and no additional documents have been found.

Based upon my review of the records at issue and the representations of the parties, I am unable to determine whether the search for records identified in Parts 1, 3, 4 and 5 was reasonable in the circumstances. It is unclear to me whether the records identified as being responsive to Part 1 were, in fact, ever disclosed to the appellant after being identified as such. The representations of the City with regard to Parts 3, 4 and 5 do not specifically address the nature and quality of the search for the very particular records identified by the appellant. Rather, the City's submissions simply reiterate its contention that the searches undertaken were reasonable without any explanation of the efforts made to identify the records referred to in Parts 3, 4 and 5.

In my view, the City has not provided me with the kind of evidence required to demonstrate that its searches for records responsive to Parts 1, 3, 4 and 5 of the appellant's submission was reasonable in the circumstances. The City failed to provide any details as to the searches undertaken for these records in particular, as opposed to its searches for responsive records in general. I will, accordingly, order the City to conduct additional searches for those records relating to Parts 1, 3, 4 and 5 of the appellant's submissions

ORDER:

1. I uphold the City's decision to deny access to Records 50-53, 78-79, 104-111, 112-113, 114, 115-116, 118, 120, 121, 123-124, 125, 131, 134, 152, 153, 162-163, 164-165, 177-183, 192-193, 194-195, 199-201, 202-203, 206-210, 211-215, 219, 221-222, 223-226, 228-230, 231, 233-234, 235-240, 250, 253-254, 255, 256, 259-261, 281, 282, 319-321 (which is identical to Record 324-326), 322-323, 333, 334, 338, 339, 340, 341-342, 343, 344, 345-346, 350-352, 353, 356 and 481-482.

2. I order the City to disclose Records 15-17, 42-43, 57-62, 119, 130, 196-198, 220, 227, 242-243, 244-248, 252, 285-292, 297-298, 335-336, 337, 347, 348-349 and 354 to the appellant by providing him with copies by **April 18, 2002**.
3. I order the City to conduct further searches for records responsive to Parts 1, 3, 4 and 5 of the appellant's submissions. I order the City to provide the appellant with information as to the results of these further searches in accordance with the requirements of sections 19, 21 and 22 of the *Act* and without recourse to a time extension under section 20 of the *Act* using the date of this order as the date of the request.

Original signed by: _____
Donald Hale
Adjudicator

_____ April 4, 2002