



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1625

Appeal MA-020068-1

City of Kingston



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

This appeal concerns a decision of the City of Kingston (the City) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the Act). The requester (now the appellant) had sought access to information regarding the number of charges withdrawn by the City's Legal Services Division in relation to by-law 2958 (section 19, in particular) (the by-law) in the six weeks prior to January 28, 2002 and the reasons for the withdrawals.

By way of background, the by-law provides for the prohibition and regulation of signs and other advertising devices in the City. Section 19 of the by-law applies to the use of sandwich board signs. The appellant is a small business owner in the City. The appellant and several other business owners were charged under the by-law for displaying improper sandwich board signage. The appellant alleges that the City has treated him differently from other businesses under the by-law.

The City responded as follows:

There have been 2 charges withdrawn by the City . . . in relation to [the by-law] in the past six weeks.

Pursuant to section 12 of the *Act*, for reasons relating to solicitor-client privilege, the City will not disclose the reasons for these two withdrawals. However, it is my understanding that each case is judged on its own merits by the Prosecutor and he uses his own discretion in deciding whether or not to proceed. Before exercising his discretion the Prosecutor will consider many factors including, but not limited to, the following: the type of offence, the offender, the likelihood of obtaining a conviction, and whether or not the accused is now in compliance.

The appellant appealed the City's decision.

During the mediation stage of this appeal, the Mediator determined that the City had identified two one-page records responsive to the request. Record 1 is a string of two internal e-mails relating to one of the withdrawn charges, and record 2 is a single internal e-mail relating to other withdrawn charges.

Also during the mediation stage of the appeal, the appellant agreed not to pursue a portion of record 1 that the City had indicated was not responsive to the request.

Mediation was not successful in resolving all of the issues in the appeal, so the matter was moved to the adjudication stage of the process.

I, initially, sent a Notice of Inquiry setting out the issues in the appeal to the City. Following receipt of the Notice of Inquiry, the City provided the appellant with a revised decision letter, in which it agreed to disclose portions of record 2. The appellant later advised this office that he was not pursuing access to the remaining portions of record 2 and, therefore, this record is no longer at issue in the appeal.

The City then submitted representations. I provided the appellant with the non-confidential portions of the City's representations and a copy of the Notice of Inquiry. The appellant elected to not submit representations.

RECORDS:

There is one record at issue: record 1 (excluding non-responsive paragraphs) which is comprised of one page. Record 1 consists of an e-mail exchange on January 2 and 3, 2002, between the City's Associate Legal Counsel and City staff, with copies sent to other City staff.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Introduction

The City claims that the relevant portions of record 1 are exempt under section 12, which reads:

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 encompasses two heads of common law privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 12 to apply, it must be established that one or the other, or both, of these heads of privilege apply to the record at issue.

Solicitor-client communication privilege

General principles

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].

Representations

The City submits that record 1 is written communication of a confidential nature between agents for the City and in-house legal counsel. Both the agents and the legal counsel are employees of the City. The City indicates that it prosecutes charges laid by provincial offences officers. In-house legal counsel performs the role of municipal prosecutor with respect to these charges and advises enforcement staff in relation to the suitability of charges and the merits of each case prior to trial.

The City states in particular:

The communication outlines the legal opinion of [in-house legal counsel] in relation to continuing a prosecution matter. The record indicates [that in-house legal counsel] has examined the Prosecution file. After [r]eviewing this file [in-house legal counsel] provides a legal opinion [...] advising [...] that it would not be advisable to proceed with a charge under the by-law.

.
The [in-house legal counsel] for the City [...] advised the City what should be done within the context of a by-law prosecution.

Analysis

As stated above, record 1 is an exchange of e-mail correspondence between the City's Associate Legal Counsel and City staff. The first e-mail is from the City's Associate Legal Counsel to City

staff containing counsel's legal opinion regarding a charge against a local business under the by-law. The second e-mail is from a City staff member to other staff and the Associate Legal Counsel confirming acceptance of the legal advice.

Based on the representations before me and the information in the record itself, I am satisfied that record 1 consists of confidential communications between in-house legal counsel and his clients, City staff, made for the purpose of giving and receiving legal advice. Record 1 clearly fits within the *Balabel* "continuum of communications" between a lawyer and a client. Therefore, I find that record 1 is subject to solicitor-client communication privilege under section 12 of the *Act*.

Since I have found the information contained in record 1 exempt under solicitor-client communication privilege it is not necessary for me to consider the application of litigation privilege in the circumstances of this case.

Exercise of Discretion

Section 12 is a discretionary exemption. Therefore, once it is determined that a record qualifies for exemption under section 12, the City must exercise its discretion in deciding whether or not to disclose it.

The City submits that it considered the following factors in deciding to exercise discretion in favour of applying the solicitor-client privilege exemption:

- Maintaining the confidence of enforcement staff that legal opinions will be kept confidential.
- Fostering a good working relationship between City staff and in-house legal counsel which includes the freedom for staff to communicate with legal counsel without reservation

I am satisfied that the City has not erred in exercising its discretion to refuse access to record 1.

ORDER:

I uphold the City's decision to withhold access to record 1.

Original signed by: _____
Bernard Morrow
Adjudicator

_____ March 20, 2003