Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1766

Appeal MA-030124-1

City of Toronto

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NATURE OF THE APPEAL:

The requester made a request to the City of Toronto (the City) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act)* for the following information:

> a complete copy of the Forestry Department's file documenting the maintenance and assessment of the tree located on the front lawn at [a specified address in Toronto]. … We wish to review all reports prepared by the staff at the Toronto Forestry Department, as well as any private contractors used to carry out maintenance and/or assessments of this tree.

The City issued a decision to the requester, granting access to a number of records. The City denied access to one record, relying on the exemption at section 12 (solicitor-client privilege).

The requester (now the appellant) appealed the City's decision to deny access.

Mediation did not resolve this appeal, and the file was transferred to adjudication. I sent a Notice of Inquiry to the City, initially, outlining the facts and issues and inviting the City to make written representations. The City submitted representations in response. After reviewing the City's representations, I decided that it was not necessary to seek representations from the appellant.

In this appeal I must decide whether the exemption claimed by the City applies to the record.

RECORD:

The record is a one-page document entitled "Service Request Investigation."

BRIEF CONCLUSION:

The record is not exempt from disclosure under section 12, and it must be disclosed.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The City relies on 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.

More specifically, the City claims that the record at issue "qualifies for litigation privilege … under both branches of section 12."

General principles

Section 12 contains two "branches." Branch 1 applies to records that are subject to solicitor-client privilege at common law, thus encompassing both solicitor-client communication privilege and litigation privilege. Branch 2 is a statutory solicitor-client privilege that is available in the context of institution counsel giving legal advice or conducting litigation. Like Branch 1, Branch 2 encompasses both solicitor-client communication privilege and litigation privilege as derived from the common law.

Litigation privilege

At common law, litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation. Its purpose is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. Litigation privilege prevents counsel from being compelled to prematurely produce documents to an opposing party or its counsel (Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)).

Courts have described the "dominant purpose" test as follows:

> A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection (*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co.*; see also Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.)).

To meet the "dominant purpose" test, something more than a vague or general apprehension of litigation must exist (Order MO-1337-I).

Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief (Order MO-1337-I; *General Accident Assurance Co., supra*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)).

Under Branch 2 of section 12, litigation privilege applies to records "prepared by or for counsel employed or retained by an institution … in contemplation of or for use in litigation."

Representations

The City asserts that it created the record for the dominant purpose of reasonably contemplated litigation. Among other things, the City submits:

> When an incident is reported involving a tree, the City sends members of Urban Forestry Services staff [to] attend at the scene in order to assess the situation, clean up the area and render it safe. The information regarding the incident obtained at the scene is then recorded electronically on the Service Request Investigation Form. These forms are kept on the Urban Forestry Services computer system. …

The City explains that its practice is for Forestry Services staff to leave a "Claims Card" with anyone who may have suffered damage as a result of an incident. The Claims Card outlines the procedure for making a claim against the City. If a claim is made, it is assigned to the City's adjuster:

> After the claim is assigned to an adjuster, the City adjuster first obtains information about the tree and the incident by requesting maintenance records and the record at issue, the Service Request Investigation Form, from Forestry Services. The adjuster obtains these records in order to determine whether, in his or her opinion, there is any liability on the part of the City.
>
> When the adjuster contacts the claimant, a number of outcomes are possible. The adjuster may inform the claimant that in his/her opinion there is no liability on the part of the City and deny the claim or, the adjuster may, if he/she believes that there is liability, make an offer in settlement of the claim. It is then up to the claimant to decide whether or not they accept the adjuster's assessment of the situation. If the claimant accepts the assessment of the adjuster, the matter will not proceed any further. If the claimant does not agree with the adjuster as to liability or the proposed amount of settlement, the claimant may then decide to launch a formal lawsuit.
>
> If the claimant proceeds to litigation, the adjuster, in consultation with the Insurance and Risk Management Unit of the Treasury and Financial Services Department, retains counsel, either internal or external, to defend the action on the part of the City. It is the adjuster's responsibility to amass all the necessary information to defend the claim. The type of record that remains at issue in this appeal is an integral part of the information used to defend a claim or lawsuit.
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> …
>
> … when the record at issue was created there was a reasonable contemplation of litigation and, therefore, the record is protected by litigation privilege found in both branches of section 12.

> The City so consistently anticipates litigation that, when there are instances of tree damage, it has developed the practice of providing potential claimants with detailed instructions at the time of the incident on how to file a claim. …
>
> …
>
> Although the City's legal department may not become involved immediately after an incident has occurred, … litigation becomes more than reasonably contemplated once a claim has been filed with the city. As is the practice with all insurance claims, the City, in the interests of efficiency and cost effectiveness, uses adjusters, not lawyers, to address and potentially resolve claims in their early stages. In this capacity, the adjuster is acting as agent for counsel to the City. Should the matter proceed to litigation, the adjuster is responsible for assembling all the information necessary to defend the claim. The record remaining at issue in this appeal is an integral part of the City's case in defending its interests and would become part of counsel's brief for trial.
>
> …
>
> … although the records were not created exclusively to be used in litigation, their dominant purpose is for use in the assessment and defence of a claim and any resulting litigation.

The City also makes certain confidential representations that I am not at liberty to disclose in this order.

Findings

Based on the materials before me, I am satisfied that when the City created the record, it was reasonably conceivable that litigation over the tree-related incident might arise at some future time. The prospect of such litigation amounts to more than a vague or general apprehension of litigation in this case (see Order MO-1337-I, *supra*).

I am not persuaded, however, that the City prepared the record for the dominant purpose of litigation. While I accept that preparing for potential litigation may have been one of the City's purposes in creating the record, the evidence before me does not establish that it was the City's main purpose in doing so.

The circumstances in this appeal are similar to those in *Waugh*, cited above. In that case, the English House of Lords considered whether a railway inspector's routine accident report was protected by litigation privilege. The Court found that the accident report was not prepared for the dominant purpose of litigation, and one judge characterized the report in this way:

> … the report was prepared for a dual purpose: for what may be called railway operation and safety purposes and for the purpose of obtaining legal advice in

> anticipation of litigation, the first being more immediate than the second, but both being described as of equal rank or weight.

Similarly, the record at issue here (entitled "Service Request Investigation") is a routine accident report. The City's representations indicate that the City's practice is to create such reports in all or virtually all cases in which an incident involving a tree is reported. Prior to completing such reports, Urban Forestry Services staff visit the scene "in order to assess the situation, clean up the area and render it safe." Thus, such reports also serve the purpose of recording these activities, describing the condition of the tree and surrounding area, and – where applicable – identifying any work that may be required. The fact that such reports are routinely made tends to prove that they serve multiple purposes, such as ensuring safety and preventing future incidents, and avoiding any related economic losses. On its face, the record at issue in this appeal appears to serve one or more of these purposes, each of which, at the time of the record's creation, would have been as important as (or more so than) preparing for possible litigation. Whether or not any claims were subsequently made against the City is not relevant to the assessment of the record's dominant purpose at the time of its creation.

I therefore find that the record was not created for the dominant purpose of litigation.

In addition, the record does not qualify for litigation privilege by virtue of forming part of a lawyer's brief. The City's submission that the record "would become part of counsel's brief for trial" at some future time is not enough to make it subject to litigation privilege. While litigation privilege would attach to the record should it find its way into a lawyer's brief in the future, the privilege cannot attach unless and until that time arrives.

Accordingly, the record does not qualify for exemption under section 12.

ORDER:

1. I order the City to disclose the record to the appellant by **April 13, 2004**.

2. In order to verify compliance with Provision 1, I reserve the right to require the City to provide me with a copy of the record that is disclosed to the appellant.

Original Signed By: March 19, 2004
Shirley Senoff
Adjudicator