



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

# **ORDER MO-1800**

**Appeal MA-030245-1**

**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 Privacy Act* (the *Act*) from a City Councillor for information concerning the cutting down of city trees at an identified location. In its decision letter, the City described the request as having the following three parts:

1. e-mail correspondence and meeting notes related to the unauthorized cutting down of trees at the identified site and involving any of: [three named City employees].
2. e-mail correspondence and meeting notes by any of the following individuals pertaining to the negotiation by the requester of a donation from [a named developer] for the cutting down of trees at the [identified] site: [seven named City employees].
3. a listing of all instances in which City trees were cut down without authorization for the years 2001 and 2002, and information on whether charges were laid by the City and whether the City legal staff made any efforts to collect money over and above the value of trees as determined by City forestry staff, and if so, the extent to which such efforts were successful.

The City identified 244 pages of records responsive to parts 1 and 2 of the request. It provided access to a number of pages, in whole or in part, and denied access to the rest on the basis of section 12 of the *Act* (solicitor-client privilege). The City also advised that one of the employees identified in part 2 of the request does not have any responsive records.

The requester (now the appellant) appealed the City's decision. He accepts that the one employee has no responsive records, but challenges the City's position that the undisclosed records qualify for exemption under section 12.

Mediation was not successful and the file was transferred to the adjudication stage. I initiated my inquiry by sending a Notice of Inquiry to the City setting out the facts and issues and seeking representations. The City responded, and I then provided the appellant with a copy of the Notice and the non-confidential portions of the City's representations. The appellant also submitted representations, which were in turn then shared with the City. The City provided additional representations in reply.

By the time this appeal reached the inquiry stage, the City had still not responded to part 3 of the request, maintaining that it was awaiting records from the Forestry Division. I ordered the City to issue a response to part 3, which it did. After consulting with the appellant, I decided to proceed with this inquiry on parts 1 and 2 only. The appellant has appealed the City's decision on part 3, and that appeal is being handled separately.

## **RECORDS:**

The records that remain at issue for parts 1 and 2 of the request are described in an index prepared by the City and provided to the appellant. They consist of e-mail messages, memoranda, letters, legal opinions, a draft report and handwritten notes of a meeting.

## **DISCUSSION:**

### **SOLICITOR-CLIENT PRIVILEGE**

#### **General**

Section 12 of the *Act* 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 privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege.

#### **Solicitor-Client Communication Privilege**

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 or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

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].

The privilege applied to “a continuum of communications” between a so 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 [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also 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].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

## **Representations**

In its initial representations, the City submits:

... that all of the records at issue are contained in the files of its solicitors. They are either communications, made expressly or implicitly in confidence, between the Legal Department and other City staff related to the provision of legal advice or they are the working papers of the solicitors directly related to the seeking, formulating or giving of legal advice. The legal advice relates to the issues surrounding the inappropriate tree removal, including for example, litigation/compensation, the appellant's separate negotiations, and/or the appellant's right of access by virtue of his position to confidential and privileged information relating to the tree removal.

The City goes on to describe the specific records subject to the section 12 exemption claim, where they were located (primarily in various files in the City's Legal Department), and how their content and the context in which they were created bring them within the scope of solicitor-client communication privilege.

The appellant "[does] not believe that the records in question were kept either for the purpose of providing legal advice or in contemplation of their use in litigation. No legal advice was sought by the client on issues related to this material, nor was any legal advice given". Specifically with respect to the solicitor-client communication privilege component of section 12, the appellant submits:

With regard to the solicitor-client privilege issue, the situation here is somewhat unusual in that I am a member of the group (City Council) which is the client. While I agree that the rights of the Council to information do not necessarily extend to individual councillors in all instances, this is the first time in 22 years as an elected official that I have been denied access to information. This began as a very simple request for access to a file related to the cutting down of four city-owned trees. In any case, regardless of my status as a city councillor, a private citizen should be entitled to access to these records which could not at this point be withheld for any legitimate reason related to solicitor-client privilege.

In reply, the City states that it considered all relevant factors in reaching its decision to apply the section 12 exemption to the various records, including whether the appellant was entitled to the information contained in the records by virtue of his position as City Councillor. In the City's view, the "client" in the context of these records is the City administration and not City Council.

## **Analysis and findings**

Having reviewed the records, I find that they satisfy the requirements of solicitor-client communication privilege. The records consist of email chains, memoranda, and handwritten notes involving members of the City's Legal Department and their internal clients, as well as draft legal documents and correspondence exchanged between lawyers. The content of these

records relates primarily to negotiations undertaken by the City with a developer to obtain compensation for cutting down City-owned trees, and consists of legal advice given and received by City lawyers and clients in this context. I accept that documents of this nature are intended to be treated confidentially.

Accordingly, subject to my discussion of the appellant's status as a City Councillor, I find that all of the records satisfy the requirements of solicitor-client communication privilege and qualify for exemption under section 12 of the *Act* for that reason.

The only remaining issue is whether the status of the appellant as a City Councillor has an impact on the treatment of the various records under section 12.

In Order M-813, Adjudicator Laurel Cropley dealt with a situation where a requester sought access to records held by a municipal Councillor. In determining whether these records were under the control of the institution for the purposes of the *Act*, Adjudicator Cropley looked to the definition of "institution" in section 2(1). Because the definition makes no specific reference to elected officials, she determined that the Councillor would only be considered as part of the institution if he was an "officer" of the municipality. Adjudicator Cropley went through the following analysis before concluding that the Councillor in that case was not an "officer":

The word "officer" appears in several provisions of the *Act* (sections 2(3), 7(1), 7(2)(k), 14(4)(a), 29(2)(c), 32(d) and 49(1)), however, this term is not defined. In my view, in order to determine the issues in this appeal, it is useful to examine the meaning of the term "officer" as it is used in municipal law.

The word "officer" is not defined in the *Municipal Act* or any other related legislation, such as the *Ontario Municipal Board Act* and the *Ontario Municipal Employees Retirement System Act*. It is interesting to note, however, that in some situations these statutes clearly distinguish between "members" of a council or board, and its "officers" or "employees". For example, section 187(12) of the *Municipal Act* provides:

Any member of the council or officer of the corporation who applies for any revenues so charged ... is personally liable for the amount so applied ...

On the other hand, some provisions of the *Municipal Act* imply that in certain situations, a member of council can be both a member and an "officer" of the municipal corporation. For example, section 247(1) of the *Municipal Act* provides:

The Treasurer of every municipality shall ... each year submit to the council of the municipality an itemized statement of the remuneration and expenses paid to each member of council in respect of his or her services as a member of council **or as an**

**officer of the municipal corporation** in the preceding year ...  
(emphasis added).

Part IV of the *Municipal Act*, which is entitled “Officers of Municipal Corporations”, sets out the statutory duties and powers of the following “officers”:

- **the head of council**, which includes a mayor, chair, reeve and warden (section 69);
- **the chief administrative officer**, which in some municipalities is also known as the City Manager (section 72);
- **the clerk, deputy clerk and acting clerk** (section 73);
- **the treasurer, deputy treasurer and acting treasurer** (section 77);
- **collectors** (section 85);
- **auditors** (section 86).

Other “officers” of Municipal Corporations derive their authority from statutes other than the *Municipal Act*, for example:

- **medical officer of health** (*Health Protection and Promotion Act*);
- **chief building official** (*Building Code Act*).

The meaning of the term “officer” in municipal law has also been considered in the courts and has been the subject of academic writing (for example, see: Kenneth Grant Crawford, *Canadian Municipal Government* (University of Toronto Press, 1954), at p. 177 and Ian MacF. Rogers, *Municipal Councillors’ Handbook*, 5th Ed. (Carswell: Agincourt, 1988), at pp. 147 - 148).

In general, the above sources interpret the term “officer” to refer to a high ranking individual within the municipal civic service, who exercises management and administrative functions, and who derives his or her authority either from statute or from council. The Alberta Court of Appeal referred to “officers” in *Speakman v. Calgary (City)* (1908), 9 W.W.R. 264, 1 Alta. L.R. 454 (C.A.), as summarized in Stephen Auerback and Andrew James, *The Annotated Municipal Act* (Thomson: Scarborough, 1989), Volume 1, pp. 17 - 33, as those who exercise powers “of an executive and coercive and quasi-coercive character, and are

binding upon and affect the rights of the inhabitants and ratepayers of the municipality”.

In my view, the authorities referred to above all indicate that, except in unusual circumstances, a member of municipal council is generally not considered to be an “officer” of a municipal corporation. An example of an unusual circumstance would be where a municipal councillor of a small municipality has been appointed a commissioner, superintendent or overseer of any work pursuant to section 256 of the *Municipal Act*. In this regard, the authorities indicate that this would be an extremely unusual situation, and where it occurs, the councillor would be considered an “officer” only for the purposes of the specific duties he or she undertakes in this capacity. In these cases, a determination that a municipal councillor is functioning as an “officer” must be based on the specific factual circumstances.

[Adjudicator’s Cropley’s emphasis]

The *Municipal Act* has been amended since Order M-813 was issued, but the general thrust of Adjudicator Cropley’s analysis was not impacted.

Investigator Warren Morris also concluded in Privacy Investigation Report MC-0200030-1 that City Councillors were not “officers” of the municipality in dealing with a privacy complaint concerning the improper disclosure of personal information from a Mayor to a Councillor under section 32(d) of the *Act*.

Although the context is different in the present appeal, in my view, the reasoning from Order M-813 is applicable. If the appellant, as a City Councillor, is not an “officer” of the municipality (and he is clearly not an “employee”), then he is not part of the “institution” for the purposes of the *Act*, and it would necessarily follow that he is not the “client” for the purposes of the section 12 solicitor-client communication privilege exemption.

In entering into discussions with the City about the tree removal situation in his electoral district, the appellant was acting in his capacity as a representative of his constituents. He was not exercising any “management and administrative functions”, nor was he performing any functions authorized by statute or designated by City Council. In find that the appellant’s role in this context was not one of the “unusual circumstances” identified by Adjudicator Cropley in Order M-813, and that his request under the *Act* should be treated as if it were a request from any other member of the general public.

I should add that I do not accept the City’s position that the “client” in the circumstances of this case is the City administration rather than City Council. Although communications relating to the tree removal issue were made at the staff level, the City Council was involved, as evidenced by the inclusion of an in-camera report to a Council Committee among the records at issue in the appeal. In my view, there is really only one “client” for the purposes of section 12, and that is City Council itself. While, for practical and administrative reasons, individual department heads within the City organizational structure may give instructions to legal counsel or act on behalf of

Council in the context of requesting and receiving legal advice, City Council is the head of the institution under the *Act* and ultimately the “client” for the purposes of section 12, in a manner analogous to the role of a Minister under the provincial *Freedom of Information and Protection of Privacy Act*. That being said, my finding in this regard has no impact on the application of section 12 to the records at issue in this appeal.

In closing I want to make comment on one of the records at issue in this appeal. Pages 133-146 comprise a package of documents with an undated cover sheet (Page 133) containing the name and address of a City employee in the “Corporate Services, Legal Division”. Pages 134-137 are two 2-page legal opinions dated in 1993 from the City Solicitor to the City Clerk, providing advice on how to interpret the *Act* in the context of access requests under consideration at that time; and Pages 138-146 consist of a memorandum and attachments from the City Clerk to members of City Council and Department heads in 1991 on the topic of “Requests by Members of Council for information from City Departments”. While I have found that Pages 133-146 qualify for exemption under section 12, I note that Pages 138-146 were actually provided to all City Councillors in 1991. Although it is not clear to me whether the appellant was an elected official at that time, it is clear that people holding his current position received this package of documents from the City Clerk.

**ORDER:**

I uphold the City’s decision.

Original Signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

\_\_\_\_\_ June 15, 2004