



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-1875**

**Appeal MA-020258-2**

**City of Hamilton**



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## **NATURE OF THE APPEAL:**

The City of Hamilton (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

. . . [a]ll records related to the current review/reform of the food premises inspection system in the City of Hamilton.

The requester included a detailed description of the types of records requested.

In a letter to the requester dated June 7, 2002, the City described the records that had been identified as responsive to the request and advised him of the exemptions under the *Act* that may be applied to deny access to them. The City also provided the requester with a fee estimate consisting of a photocopying charge of \$166 and a preparation charge of \$200. The requester paid the \$200 preparation charge. An appeal relating to the charging of fees was resolved by Order MO-1699.

In accordance with the provisions of Order MO-1699, the City issued a final decision respecting access to the requested records. The City granted partial access to the information and applied the exemptions found in sections 6(1)(a) (draft by-laws), 7(1) (advice or recommendations), 10(1) (third party information), 11 (economic or other interests of the City), 12 (solicitor-client privilege) and 14(1) (invasion of privacy) of the *Act* to deny access to the remainder, in part or in their entirety. The requester, now the appellant, appealed the City's decision to deny access to the undisclosed records.

During mediation, the appellant indicated that he was not seeking access to any of the information to which the City had applied the invasion of privacy exemption in section 14(1) or the third party information exemption in section 10(1). Also during mediation, the City disclosed an additional 125 pages of records. As further mediation was not possible, the appeal was moved into the adjudication stage of the process.

I provided the City with a Notice of Inquiry setting out the facts and issues remaining in dispute. The City provided me with representations in response. It indicated that it was withdrawing its reliance on some of the exemptions claimed for some of the records. The City has withdrawn its reliance on the discretionary exemptions in sections 7(1) and 11(f) and (g) entirely.

I provided the appellant with a Notice of Inquiry attaching the complete representations of the City. In response, the appellant narrowed the scope of his request considerably to include only copies of draft reports (and the appendices to them) maintained by several individual staff persons that were prepared by the General Manager of the City's Social and Public Health Services together with the Acting Medical Officer of Health for the Mayor and Members of City Council dated December 5, 2001 and February 5, 2002. The City maintains that these records are exempt from disclosure under the discretionary exemption in section 12.

## **RECORDS:**

Using the numbering in the City's most recent (third) Index of Records, and removing the identity of their source, the following records remain at issue:

- L. B. file (#1) Records 7 - 10;
- H. T. file Record 1;
- M. T. file Record 2; and
- S. H-C. file (#2) Records 2 and 3;

## **DISCUSSION:**

### **SOLICITOR-CLIENT PRIVILEGE**

The City claims the application of section 12 for the remaining records at issue. This section 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.

Section 12 contains two branches as described below. The City must establish that one or the other (or both) branches apply.

#### **Branch 1: common law privileges**

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

I will address only the solicitor-client communication privilege aspect of Branch 1 as the City has not claimed that litigation privilege applies to the records.

#### ***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 applies to “a continuum of communications” between a 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.)].

## **Branch 2: statutory privileges**

Branch 2 is a statutory solicitor-client privilege that is available in the context of institution counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

### ***Statutory solicitor-client communication privilege***

Branch 2 applies to a record that was “prepared by or for counsel employed or retained by an institution for use in giving legal advice.”

## **Representations of the parties**

With respect to those records identified as L.B. file (#1) Records 7 – 10, the City states:

Records 7 - 10 are draft reports which were prepared in consultation with the City’s Legal counsel and form part of the continuum of communication between the Public Health staff and legal counsel, in that the draft reports were provided to legal counsel for their review, comments and changes. Based on the direction received from legal counsel the reports were amended to reflect legal counsel’s comments and changes. (Further, it is noted that many drafts of the same report are contained in a number of files at issue in this appeal.)

Similarly, with respect to the record described as H.T. Record 1, the City submits that "Record 1, a draft report, contain[s] comments and changes from Public Health staff which were then submitted to the City's legal counsel for their comments and any proposed changes."

For the documents designated as M.T. file Record 2 and S. H-C. file #2 Records 2 and 3, the City states:

Record 2 is a draft report. Preparation of the report involved Public Health staff and the City's legal counsel. The draft reports were transmitted back and forth through e-mail messages between various Public Health staff and legal counsel; with each party submitting and incorporating each other's ideas and opinions. The draft reports formed part of an on-going dialogue between staff and legal counsel and is viewed by the City as a continuum of communication, containing incorporated solicited advice from legal counsel.

The appellant indicates that, in his view, the records represent only draft reports. He takes the position that they are not exempt under section 12 because:

they do not constitute communications seeking or giving advice, or information passed back and forth between solicitor and client to keep the other informed so advice may be sought or given. Instead these draft reports constitute, at best and then only in part, the product of the advice given.

The city speaks in terms of the drafts containing 'incorporated solicited advice from legal counsel.' This would likely be true of a broad range of internal records kept by the City of Hamilton. Clearly, the purpose of the solicitor client privilege exemption isn't to allow the withholding of any record which the city solicitor may have viewed or suggested changes to, but instead applies to the actual communications back and forth directly related to the giving and receiving of the legal advice. These would include e-mail messages containing the actual advice or seeking advice, but not the report altered as a result of the advice given. If the much broader definition of privilege proposed by the city were to apply, almost any city document not made public could be withheld merely by sending it to the legal department for comment and suggested changes. This goes contrary to the very purpose of the act, to provide public access to records subject only to necessary and limited exemptions.

The city also fails to indicate in its submissions which portions of the records constitute the incorporated solicited advice. It just seeks to apply a blanket exemption to reports that were subject to advice from the legal department. At the very least, should you find that the city's argument has merit, those portions of the draft reports that are not the **direct** result of advice from the legal department should be released. So, for example, if a paragraph were inserted as specifically directed by the legal department, using words recommended by the legal department, this might be severed. The rest of the document would be subject to

release, as would the previous wording that was not the direct result of the advice from legal counsel.

Certainly, any background and contextual material would also be subject to release as this would not relate to any advice given.

Perhaps the simplest way to enunciate the difference between the records that are part of the continuum of communication related to the giving and receiving of legal advice is this: If a record was specifically prepared to give or seek advice, it can be exempted. But if a record is one that would be prepared in any case as part of a broader legislative or policy process, and is only the subject of advice, it cannot be exempted. The exemption applies to the process of giving and receiving advice and in my view the draft reports do not qualify for exemption under section 12.

## **Findings**

In my view, the City has not established whether the records contain any information that qualifies as a confidential communication between a solicitor and client relating to the giving or seeking of legal advice. The Draft Report and Attachments dated February 5, 2002 which comprise L.B. file (#1) Records 7 – 10 and S. H-C. file (#2) Records 2 and 3 are not marked in any way to indicate the legal advice provided that has been incorporated into the document; nor have I been provided with any evidence to indicate that any of the language in the documents originated in the legal advice provided by counsel.

The draft document dated December 5, 2001, designated as H. T. file Record 1, contains a number of highlighted comments attached to various portions of its text, as well as a handwritten note on page one indicating that it includes comments received from the Manager of the City's Environmental Health Branch. The highlighting appears to represent comments made by the Manager on the substance of the text, as originally written. There is no indication on the face of the record or in the submissions of the City to indicate that this individual is a lawyer or that she was providing legal advice to the authors of the report.

The draft document dated December 5, 2001 and described as M. T. file Record 2 contains no highlighting and no suggestion on its face that any of the language contained therein originated with legal counsel. Again, the City's representations do not demonstrate the specifics of any legal consultation that may have been provided by counsel to the City staff responsible for preparing the report and do not specify either the legal advice sought or that provided.

I note that other records that were removed from the scope of the appellant's request originated with or were sent to legal counsel with the City's Legal Department. However, those records are no longer at issue in this appeal.

Based on the evidence provided to me by the City, I am unable to determine which portions of the records remaining at issue, if any, contain information that reflects a confidential communication between a solicitor and his or her client.

Neither can I agree with the position taken by the City that the disclosure of the records would reveal the substance of the “continuum of communications” that took place between the City’s policy makers and its legal advisers during the process of drafting the by-law in question. I find that I have not been provided with sufficient evidence to indicate what portions, if any, of the records remaining at issue represent part of that continuum.

As a result, I find that neither branch of the solicitor-client exemption in section 12 has any application to the records and I will, accordingly, order that they be disclosed to the appellant.

**ORDER:**

1. I order the City to provide the appellant with copies of the records remaining at issue by sending him copies by **December 15, 2004**.
2. In order to verify compliance with Provision 1, I reserve the right to require the City to provide me with copies of the records that are disclosed to the appellant.

Original signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_ November 25, 2004