Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2865

Appeal MA12-119

City of Toronto

April 5, 2013

Summary: The appellant submitted a request to the city for a copy of a legal opinion prepared by a city solicitor regarding the lease of a named restaurant. The city located one record, and withheld access to it pursuant to sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege). The appellant appealed the city's decision and claimed that a legal opinion prepared at a later date should also exist, thus raising reasonableness of search as an issue. In addition, the appellant claimed that the public interest override at section 16 of the *Act* applies in the circumstances. The adjudicator upholds the application of the discretionary exemption at section 12. She finds further the section 16 does not apply. She also finds the city's search to be reasonable. In addition, the adjudicator addresses a preliminary issue raised by the city.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 12 and 16.

OVERVIEW:

[1] The appellant submitted a request to the City of Toronto (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of a legal opinion prepared by a city solicitor regarding the lease of a named restaurant. The appellant clarified that the opinion relates to the costs of breaking the lease and it would have been dated after the last municipal election in October, 2010.

[2] The city issued a decision stating that it was unable to locate a responsive record which post-dated the last municipal election, but did find an opinion which was prepared in June, 2010 relating to the matter. The city denied access to this record, citing sections 6 (closed meeting) and 12 (solicitor-client privilege) of the *Act*.

[3] The appellant appealed this decision.

[4] During mediation the appellant provided information from the media which implied that an opinion would be provided to Council after October 30, 2010. The city undertook another search but advised that only the one responsive record could be located. The appellant requested, and the city provided, an affidavit signed by the lawyer who prepared the one responsive record, which outlined the searches she undertook in response to the request. The appellant was not satisfied with the affidavit. Accordingly, search is an issue in the appeal.

[5] The appellant suggested that there are "enormous public policy reasons" for the disclosure of this record and implicitly raised section 16 as an issue.

[6] Further mediation could not be effected and the file was forwarded to the adjudication stage of the appeal process. I sought and received representations from the city and the appellant. These representations were shared in accordance with section 7 of the *Code of Procedure* and *Practice Direction 7*.

[7] In its representations, the city raises "abuse of process" with respect to my decision to require submissions on the exemptions claimed by it in the circumstances of this appeal, because the appellant took the position that the record the city has identified is not the record he requested. I will address this as a preliminary issue.

RECORD:

[8] The record at issue comprises a confidential briefing note consisting of a covering memorandum and a three-page memorandum prepared by a city solicitor.

ISSUES:

A: Does the discretionary exemption at section 12 apply to the record?

B: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 12 exemption?

C: Did the institution conduct a reasonable search for records?

PRELIMINARY MATTER:

Abuse of process

[9] The city notes that, initially, the appellant simply sought the legal opinion relating to the named restaurant. However, the city indicates that the appellant clarified his request and indicated that he was seeking a legal opinion that was drafted after the last municipal election in October 2010. In response to his clarified request, the city located only the record at issue, which pre-dates the municipal election by several months.

[10] The city takes the position that the appellant has made it clear, both in his request and following receipt of the city's decision letter[1] that the record at issue is not the document he requested. Accordingly, the city submits that the record being considered in this appeal is not at issue and should, therefore, be removed from the appeal. Similarly, it argues that any exemptions claimed by the city for this record should also be removed from the scope of the appeal.

[11] The city submits that "to continue an appeal on issues where the only record affected **is not being requested**,[2] imposes a burden on the [city] which is not in keeping with the purposes of [the *Act*]." Accordingly, the city claims that requiring it to make submissions on the application of the exemptions claimed by it for the record identified above is an abuse of process. Referring to Orders M-618 and PO-2490, the city argues that "an institution may raise the issue of an abuse of process during an appeal before the IPC."

[12] The city's representations on this issue were provided to the appellant, and he was invited to comment on them. The appellant rejects the city's position and denies that he stated that the record at issue was not the record he requested. He refers to his letter of appeal, in which he states that he is seeking access to "a copy of the briefing note dated in June 2010 that has been located."

[13] On reply, the city reiterates its previous position and provides additional representations in which it argues that:

- The appellant clarified his request to a record dated after the last municipal election;
- In its decision, the city noted that the record that it located was responsive to the original request, but not the clarified request;

[1] The appellant responded to the city's access decision in a letter dated February 16, 2012, in which he explained why he believed that a record post-dating the municipal election should exist.
[2] Emphasis in the original.

- The appellant's contention that he did not abandon his original request is not consistent with the content of subsequent correspondence between him and the city (the February 16, 2012 letter);
- In his February 16, 2012 letter, the appellant clearly indicated that the record at issue was "a previous unrequested document…"
- The appellant is seeking to broaden the scope of the request through the appeal process; an approach that has been rejected by this office.

[14] The city notes that if the appellant now wishes to obtain the record at issue, he may submit a new access request.

[15] Orders M-618 and PO-2490 deal with the issue of "abuse of process" in relation to access requests and the actions of a requester. In the current appeal, the city submits that my decision to proceed on the issues relating to the record that the city has identified as being responsive, at least initially, to the request, is an abuse of the appeal process. To my knowledge, this issue has not been previously addressed by this office. In the circumstances of this appeal, I find that it is not necessary to consider whether or not the city can raise "abuse of process" because it is clear that the appellant continues to seek the record at issue.

[16] In response to the city's contention that he does not seek the record at issue, the appellant clearly expressed his desire to pursue access to this record. I have reviewed his February 16, 2012 letter that he sent to the city following receipt of the city's access decision, as well as his letter of appeal, and agree that he did not, at any time, indicate that he did not wish to pursue access to the record at issue. To the contrary, his letter of appeal clearly indicates that he is appealing both the exemptions claimed for the record at issue and the reasonableness of the city's search for an opinion prepared at a later date.

[17] I accept that, at times it may not have been clear whether or not the appellant wished to pursue access to the record at issue as his communications focussed on a legal opinion that post-dated the municipal election. Nevertheless, it was clear that the appellant continued to seek access to the record at issue at the end of the mediation stage of the appeal, as evidenced by the inclusion of this record and the exemptions claimed by the city in the Mediator's Report.

[18] The Mediator's Report is sent to all the parties to an appeal. Its purpose is to confirm any agreements or disagreements, issues raised and/or removed during the mediation stage, and to identify the issues remaining in dispute. The Mediator's Report clearly identified the record at issue and the exemptions as remaining at issue, as well as the reasonableness of search for a legal opinion that post-dated the election. The parties are provided with an opportunity to challenge the Mediator's Report if they disagree with any aspect of it. I note that the city did not object to the issues as identified in the report.

[19] I am satisfied that the appellant has expressed an intention throughout his appeal to obtain access to the record at issue, even though he contends that there should also be a record that post-dates the municipal election. Accordingly, I will not consider this issue further, other than to note that I am at a loss to understand why the city has pursued this issue to the extent that it has. Whatever its reasons are, I find the city's position and approach to the issue to be narrow and not in keeping with the spirit of the *Act*.

[20] I note that, despite the city's arguments above, it has submitted representations on the substantive issues. I will begin with the possible application of the discretionary exemption at section 12 of the *Act*.

DISCUSSION:

A: Does the discretionary exemption at section 12 apply to the record?

[21] Section 12 states as follows:

> 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.

[22] Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply. In this appeal, the city relies on both branches of section 12. I will begin with a discussion of solicitor-client communication privilege.

Branch 1: common law privilege

[23] Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of 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.[3]

[3] Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

Solicitor-client communication privilege

[24] 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.[4]

[25] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[5]

[26] 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.[6]

[27] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[7]

[28] 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.[8]

Branch 2: statutory privileges

[29] Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory solicitor-client communication privilege

[30] 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

[31] The city describes the record at issue as a confidential legal opinion prepared by a city solicitor, which is attached to a briefing note. The city states that this record was

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[4] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[5] Orders PO-2441, MO-2166 and MO-1925.
[6] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[7] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[8] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

submitted to a City Council meeting on June 8 and 9, 2010 relating to an item before Council. The city submits that it contains a confidential communication between a city solicitor and City Council in which the solicitor provides a legal opinion and advice relating to the lease of the named restaurant "and any further actions which may be taken in relation to this issue."

[32] The appellant disagrees with the city's characterization of the record, noting that at all times prior to submitting its representations in this appeal the record has consistently been referred to as a "briefing note." The appellant submits that '[t]here is a big difference between a briefing note and a solicitor's opinion." He submits further that "[b]y arbitrarily elevating it from a briefing note … to a 'Confidential Solicitor Legal Opinion' after the fact is arbitrary and procedurally unfair."

[33] The appellant also states that the city "has revealed the substance of the briefing note in its correspondence, that council member [named] has talked about it at council in an open meeting, that the media has explored the issue at length…" In essence, the appellant suggests that the city has waived any privilege that might have been attached to this record.

[34] In support of this claim, the appellant has attached a copy of a Member Motion of City Council made by the named councillor regarding the named restaurant. In his February 16, 2012 letter and during mediation, the appellant referred to excerpts from two media reports regarding the matter. In the excerpts provided, there are references to statements made by a city solicitor. In the first excerpt, the solicitor indicates that the "contract can be reopened on a 50% vote by the new council." When asked about legal ramifications, she simply stated that the information would be provided to Council in a "confidential briefing note." In the second excerpt, the city solicitor stated "while any contract can be reopened at the will of council, 'there is a cost' to doing so."

Analysis and findings

[35] I have reviewed the record at issue and the submissions made by the parties on this issue. The record contains two parts: a briefing note and an attachment. Both documents were prepared by the city solicitor. It is clear, on the face of the attachment that it contains a confidential communication between a solicitor and client (City Council), made for the purpose of giving professional legal advice. It is also clear from a review of the briefing note and the content of the legal opinion that the briefing note reveals the issues discussed in the legal opinion. I find that disclosure of the briefing note would reveal the confidential communications between the solicitor and her client. Accordingly, I find that the record qualifies for exemption under both branches of the solicitor-client communication privilege aspect of section 12.

[36] The appellant claims that the city has waived its privilege as the content of the legal opinion has been discussed by City Council and has been referred to by the city's solicitor.

Loss of privilege - Waiver

[37] Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

[38] Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege.[9]

[39] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[10]

[40] The application of branch 2 has been limited to waiver of privilege by the *head of an institution.*[11]

[41] I have reviewed the documents provided by the appellant and find that they do not establish that the city has waived privilege in the record. While the documents provided by the appellant show that the issue was raised in a council meeting, I am not persuaded that the contents of the legal opinion were disclosed. Further, the brief responses provided by the city solicitor to the media are vague and do not reveal the content of the legal opinion. Accordingly, I find that the city has not waived privilege in the record.

Exercise of Discretion

[42] The section 12 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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[9] S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd. (1983), 45 B.C.L.R. 218 (S.C.)
[10] J. Sopinka et al., The Law of Evidence in Canada at p. 669; see also Wellman v. General Crane Industries Ltd. (1986), 20 O.A.C. 384 (C.A.); R. v. Kotapski (1981), 66 C.C.C. (2d) 78 (Que. S. C.).
[11] see Ontario (Attorney General) v. Big Canoe, [2006] O.J. No. 1812 (Div. Ct.).

[43] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[44] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[12] This office may not, however, substitute its own discretion for that of the institution.[13]

[45] The city indicates that it took a number of factors into account in exercising its discretion to withhold the requested record pursuant to section 12, including the following:

- the purposes of the act;
- the nature of the information at issue, its sensitivity and the importance of the interests being protected;
- the appellant is not seeking his own personal information and there is no compelling need for him to obtain the information;
- the age of the information and the city's historic practice.

[46] Referring to the city's representations on this issue, the appellant takes the position that the city's refusal to disclose the record at issue is contrary to the purposes of the *Act* as set out in section 1. He disagrees with the city's position regarding the nature of the information, the sensitivity of the information or the potential harm in its disclosure. He states:

> The appellant is a resident, voter, and taxpayer and has a statutory right for the purposes [of the *Act*] set out above … The appellant is civically engaged and is a member of many community organizations … which works with hundreds of residents … who are equally civically engaged and equally interested in the matter….

[47] After considering the submissions made by both parties, I am satisfied that the city took into account all relevant considerations and did not take into account irrelevant ones. I find further that the city has not erred in exercising its discretion not to disclose the records. Although the appellant may wish to access the record at issue in order to facilitate his ability to engage in public discussion about the issue it addresses, I accept the city's arguments that the matter is of some sensitivity to the city. As well, I accept

[12] Order MO-1573.
[13] section 43(2).

the city's position regarding the importance of preserving the privilege that attaches to confidential communications between a solicitor and her client. Accordingly, I uphold the city's decision to withhold the record at issue on the basis of section 12 of the *Act*.

[48] Because of these findings, it is not necessary for me to consider the section 6(1)(b) exemption. The appellant has claimed that there is a public interest in disclosure of the records at issue, and I will now turn briefly to that issue.

B: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 12 exemption?

[49] Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[50] Section 12 of the *Act* is not included as an exemption subject to the public interest override in section 16. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,*[14] the Supreme Court of Canada confirmed the constitutionality of section 23 of the provincial *Act* (the equivalent of section 16 of the *Act*), and rejected the argument that the provincial counterpart to the section 12 solicitor-client privilege exemption should be "read in" to the public interest override provision on the basis of section 2(b)[15] of the *Charter* (the guarantee of freedom of expression). The Court stated that access to government information may be considered a "derivative right" under section 2(b) of the *Charter*, and that this derivative right may arise where it is a "necessary precondition of meaningful expression on the functioning of government.[16] However, the Court concluded that no such right arose on the facts of that case.

[51] The appellant has made a number of arguments, some of which are noted above, for applying the public interest override in the circumstances of this appeal. Essentially, his arguments centre on his view that "[m]unicipal institutions function to serve the public [and] are required to be open to public scrutiny…"

[52] I have considered the appellant's arguments. However, I find that there is nothing in the circumstances of this appeal to support the application of section 2(b) of the *Charter*. The appellant has not provided sufficient evidence and argument to establish that access to the record at issue in this case is a necessary precondition of

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[14] *Ontario (Public Safety and Security) v. Criminal Lawyers' Assn.*, [2010] S.C.J. No. 23.

[15] Section 2(b) of the *Charter* states:

> Everyone has the following fundamental freedoms:
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[16] Para. 30.

meaningful expression on the functioning of government. Accordingly, I find that the application of section 16 is not available to override the exemption in section 12 of the *Act*.

C: Did the institution conduct a reasonable search for records?

[53] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[17] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[54] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[18] To be responsive, a record must be "reasonably related" to the request.[19]

[55] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[20]

[56] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[21]

[57] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[22]

[58] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.[23]

[59] The city states that it conducted a search for responsive records "based on a broad and liberal interpretation of the request as originally worded." It indicates further that it communicated with the appellant during the time that searches were being conducted.

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[17] Orders P-85, P-221 and PO-1954-I.
[18] Orders P-624 and PO-2559.
[19] Order PO-2554.
[20] Orders M-909, PO-2469, PO-2592.
[21] Order MO-2185.
[22] Order MO-2246.
[23] Order MO-2213.

[60] The city provided two affidavits sworn by the solicitor who had primary responsibility for the preparation of the "legal opinion" that was located by the city. She states that she was asked to "undertake searches to locate any records in the city's legal department that would be responsive to the request." In doing so, she states:

> On February 3, 2012, I conducted a search for records responsive to the request as stated. Prior to conducting the search for records responsive to the request, I considered the locations in the electronic and paper records of the City's Legal Division known to me that could contain records concerning matters relating to the [named restaurant and matters before Council relating to it]. I conducted my search based upon my opinion as to likely locations where the responsive record might be found and my knowledge of the matter derived from my experience as the solicitor with primary responsibility for the preparation of the Confidential Briefing Note referred to [in this order] and the underlying matters to which the Legal Opinion related.

[61] The solicitor noted that the locations that would likely contain a responsive record were either under her immediate control or would otherwise be known to her. In particular, the solicitor indicates that she searched her own working files concerning the subject property.

[62] The solicitor indicates that she located the record at issue in this appeal during her search of the electronic records.

[63] The appellant refers to the media items referred to above and states:

> [T]here is the document that was reported in the press on October 30 2010 by the city solicitor that 'would be prepared' and given to council. It was assumed to be in the form of a legal opinion 'or any other form' as that would have been the standard form. It appears that it was not prepared and the city now submits that the previous briefing note of June 2010 was simply reused for the new council. This is not what was reported in the press which quoted the city solicitor. It was not reported that a briefing note previously prepared in June 2010 would be provided to the new council. That is not what the quote says. Further, residents were advised that the matter was to be revisited and a full opinion provided (orally by the councilor) so taxpayers and voters could understand why the matter could not be revisited…

[64] In concluding his representations, the appellant indicated that he would only be satisfied with the city's search if it provided greater detail of the searches conducted and provided a definitive statement that the record at issue was the only record prepared.

[65] In response, the city points out that this office has held that a reasonable search is "a search where an employee with sufficient experience for the task, conducts a search to identify any records that are reasonably related to the request, and expends a reasonable effort in completing this task."

[66] The city indicates it is not clear what "oral" comments the appellant is referring to, but submits that, taken alone, they are insufficient to establish that another record should exist. Further, referring to the media reports, the city points out that the phrase the appellant appears to quote does not state that a confidential briefing note "would be prepared." The city states that it "does not dispute that [the appellant] may have *an impression* of the course of action *he would like* to have been taken ... [but] cannot agree that the document relied upon by [the appellant] states that such a process did occur, nor that such a document provides a reasonable basis to assume that a document consistent with [the appellant's] impression exists."[24]

[67] With respect to the city solicitor's comments to the media, the city states:

> The City Solicitor's response does not explicitly state that a <u>new</u> briefing note would be prepared for the new council, but rather that the information would be provided to the 'new council' in a confidential briefing note. While providing that information could take the form of a new communication issued to the 'new council,' it could also be accomplished by simply providing the information to the members of the 'new council" in the form of the already existing City Solicitor's Legal Opinion. The City believes that the City Solicitor's Legal Opinion is the document responsive to [the appellant's] request…[25]

[68] Having reviewed and considered all of the submissions and other evidence provided by the parties, I am satisfied that the city's search for responsive records was reasonable. I am satisfied that the search was conducted by an experienced individual who also was the person most likely to know about the existence of records responsive to the appellant's request as she was responsible for the preparation of the record that was identified, and had responsibility for matters involving the named restaurant.

[69] I also accept the city's explanation for any misunderstandings about what record was actually put before council. I note that the media report of the reporter's conversation with a city solicitor, as provided by the appellant, does not state that a briefing note "would be prepared;" rather, it states that a briefing note "would be provided" to council.

[70] As the city notes, the *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide

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[24] Emphasis in the original.
[25] Emphasis in the original.

sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. I am satisfied that the city has provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate responsive records.

[71] Accordingly, I find that the city's search was reasonable and this part of the appeal is dismissed.

ORDER:

1. I uphold the city's decision to withhold the record at issue pursuant to section 12.

2. The city's search for responsive records was reasonable and this part of the appeal is dismissed.

Original Signed By: April 5, 2013
Laurel Cropley
Adjudicator