

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-2818-I

Appeal MA11-374

City of Hamilton

December 11, 2012

Summary: The appellant requested copies of two reports relating to its commercial relationship with the city. The city denied access to the responsive records pursuant to sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege). The adjudicator determined that the records qualify for exemption pursuant to solicitor-client communication privilege under both branches of the discretionary section 12 exemption. The adjudicator ordered the city to provide submissions on its exercise of discretion in withholding the records at issue.

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

OVERVIEW:

[1] The appellant is a company that has been involved in a contractual relationship with the City of Hamilton (the city). The appellant submitted two requests to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to two specified reports relating to the commercial relationship between it and the city.

[2] Following receipt of the two requests, the city advised the appellant that it would process the requests as one as they appear to deal with related records. The city denied access to the responsive records pursuant to sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege) of the *Act*.

[3] The appellant appealed the city's decision.

[4] During the course of mediation, the city agreed to disclose one of the withheld records consisting of correspondence addressed to the appellant dated April 26, 2011. However, the appellant indicated that it already has this record and accordingly, it is not at issue in this appeal.

[5] I sought and received representations from the city and the appellant, respectively. The representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[6] I subsequently sought reply representations from the city, and provided it with a copy of the appellant's submissions. The city's attention was drawn to the appellant's submission that it had failed to explain its exercise of discretion in its representations. The city was asked to provide submissions on its exercise of discretion under sections 6(1)(b) and 12.

[7] The city did not submit representations in response. Although numerous attempts were made by this office to contact the city, the calls were not returned and additional representations were not received.

[8] In this order, I find that the records qualify for exemption under the discretionary exemption at section 12 of the *Act*. The city did not provide representations on its exercise of discretion and, accordingly, I have ordered the city to exercise its discretion and to provide submissions on this exercise. Because of the decisions I have made, it is not necessary to determine the other exemption claims made by the city, including the possible application of section 6(1)(b) and the litigation privilege aspect of section 12.

RECORDS:

[9] The following records remain at issue in this appeal:

- Record 1 - Confidential report (FCS11031/LS11004) and Appendix
- Record 2 - Confidential report (FCS11031(a)/LS11004(a) and Appendix

ISSUES:

- A. Does the discretionary exemption at section 12 apply to the records?
- B. Did the city exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the discretionary exemption at section 12 apply to the records?

General principles

[10] 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.

[11] 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

[12] 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.¹

Solicitor-client communication privilege

[13] 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.²

[14] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.³

¹ 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).

² *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

³ Orders PO-2441, MO-2166 and MO-1925.

[15] 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.⁴

[16] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.⁵

[17] 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.⁶

Branch 2: statutory privileges

[18] 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

[19] 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

[20] The city indicates that record 1 was prepared by in-house counsel and the city’s Director of Financial Services (director), and record 2 was prepared by in-house counsel and the city’s Procurement Manager (manager). According to the city, both records were submitted to the Audit, Finance and Administration Committee of City Council in confidence. The city notes that the records are marked as “Confidential.” The city has attached copies of the agendas and minutes for these meetings which indicate that the reports were being submitted and maintained in confidence.

[21] The city indicates further that the director and manager were involved in the preparation of the reports as they are experts in the matter of municipal finance and procurement.

⁴ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

⁵ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

[22] The city submits that both records consist of the written communications between counsel and the "client," who consists of the members of City Council's Audit, Finance and Administration Committee, and that they were prepared for the purpose of providing analysis, legal advice and recommendations to the city's decision-makers.⁷

[23] The appellant disputes that the exemption at section 12 is available to withhold these two records. It takes the position that the city has failed to meet its burden in establishing that the exemption applies, as its representations lack detail to support its application of either branch of solicitor-client communication privilege.

[24] The appellant argues that neither of the reports was prepared for the purpose of giving legal advice. Referring to a decision of the Supreme Court of Canada,⁸ the appellant states:

The Supreme Court of Canada stated that even if a communication is exchanged between a solicitor and his client, the scope of the privilege does not extend to the communication if legal advice is not sought or offered in it.

[25] Moreover, the appellant submits that legal authorities indicate that "to be protected by privilege, the advice communicated by a solicitor to his client 'must be based upon the professional's expertise in law'."

[26] The appellant submits that "there is strong evidence that the dominant purpose of the Reports was merely to provide recommendations regarding [the appellant's] future business relationship with the [city]."

[27] Referring to the April 26, 2011 letter that the city agreed to disclose to the appellant, the appellant states that this letter "confirms that [record 1] 'speaks to [the appellant's] performance on [city] contract' and how this might impact [the appellant's] commercial relationship with the [city]."⁹

[28] The appellant states further that the subject matter of the records was discussed by the Audit, Finance and Administration Committee under the heading "commercial relationship" and notes that in its section 6(1)(b) discussion, the city "makes no reference to the provision of legal advice."

Analysis and findings

[29] The appellant's primary argument regarding the application of section 12 to the records at issue is based on the lack of evidence and supporting documentation

⁷ The city refers to Order MO-1925 in support of its position.

⁸ *Pritchard v. Ontario (Human Rights Commission)* [2004] SCC 31.

⁹ Emphasis in the original submissions.

presented by the city in its representations. In addition, the appellant takes issue with the manner in which the matter for which the records were prepared is described as pertaining only to its "commercial relationship" with the city.

[30] In determining this issue, I have considered the submissions made by both parties. In addition, I have reviewed the records at issue, which form an important part of the evidence regarding the application of section 12. Based on my review of the records, I find that they were clearly prepared by legal counsel, with input from other city staff which was incorporated into the legal advice contained in the records. The records indicate that they were prepared in confidence for a committee of council. I am satisfied that both records contain 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, thus falling within the common-law solicitor-client privilege aspect of branch 1.

[31] Moreover, I find that the records were prepared by or for counsel employed or retained by an institution for use in giving legal advice, and thus satisfy the second branch of solicitor-client communication privilege. Although the records contain information that was provided to counsel by city staff, I am satisfied that this input was given to legal counsel for use in giving legal advice.

[32] The role of the city's lawyer is, in part, to provide legal advice on municipal matters that come before council, as is recognized in section 239(2)(f) of the *Municipal Act, 2001* and the city's By-law No. 10-053, section 8.1(f). The fact that communications between the city and the appellant, and identification of the issue to be discussed by the committee of council refer to the matter as pertaining to the "commercial relationship" between the city and the appellant does not refute the nature of the information contained in the records at issue. The appellant has made certain assumptions about the content of the records at issue which are not borne out by the actual information contained in them.

[33] The minutes of the committee's meetings provided by the city with its representations clearly indicate that the records at issue have been maintained in confidence and the appellant does not argue that solicitor-client privilege has been waived.

[34] Accordingly, I find that the records qualify for exemption under the solicitor-client communication privilege aspect of both branches of the section 12 exemption. Section 12 is a discretionary exemption and I will now turn to that issue.

B. Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

General principles

[35] 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.

[36] 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.

[37] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁰ This office may not, however, substitute its own discretion for that of the institution.¹¹

Relevant considerations

[38] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹²

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected

¹⁰ Order MO-1573.

¹¹ Section 43(2).

¹² Orders P-344 and MO-1573.

- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[39] As I indicated above, the city did not provide submissions on its exercise of discretion. Although it was contacted on several occasions and asked to submit representations on this issue, the city failed to respond. As a result, I am unable to determine whether the city exercised its discretion or whether its exercise of discretion should be upheld. Accordingly, I will order the city to provide submissions to me on this issue in the order provisions set out below.

[40] In addressing this issue in its representations, the appellant states that the city did not consider the principles that "information should generally be available to the public and that exemptions from the right of access should be limited and specific."

[41] The appellant also submits that the city did not consider its unique circumstances present in this situation. In particular, the appellant states:

Simply put, the Reports contain essential information, without which [the appellant] cannot defend itself against the allegations made by the City. The current ban on [the appellant's] bidding on City contracts has had a significant and presumably lasting impact on [the appellant's] business. [The appellant] has suffered economic and reputational damage without ever being shown the Reports that have led to said damage.

[42] In providing its submissions on the exercise of discretion, the city should take into consideration and address the appellant's position in this regard.

[43] Because of the decisions I have made in this order, it is not necessary for me to address the possible application of section 6(1)(b) to the records or the litigation privilege aspect of section 12.

ORDER:

1. I order the city to exercise its discretion under section 12 taking into account relevant considerations, including those identified by the appellant in its submissions and set out above.
2. I order the city to provide me with representations in its exercise of discretion no later than **December 28, 2012**.
3. I will defer my final decision with respect to the application of section 12 pending my review of the city's exercise of discretion as required by Provision 1.
4. I remain seized of this appeal in order to deal with the exercise of discretion, and any other issues that may be outstanding.

Original Signed by: _____

Laurel Cropley
Adjudicator

December 11, 2012 _____