

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3056

Appeal MA13-219

City of Toronto

June 3, 2014

**Summary:** The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to zoning, construction and permit records regarding a particular address. The city denied access to certain records citing the discretionary solicitor-client privilege exemption in section 12. This order upholds the city's decision.

**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 City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to records regarding a particular address, specifically the following:

1. Complete contents of city files related to construction projects/permits and related permits, zoning issues, plans, zoning issues, inspections or enforcement actions related to [the specified address] taking place since January 1, 1990 (when [the specified address] received an amendment to the By-law) and especially since January 1, 2010 when new zoning and permits were being reviewed and approved.

2. Copies of all building plans, permits and correspondence in the possession of the City of Toronto or accessible by the City of Toronto related to any construction work or zoning or permit issues at the [specified address] since January 1, 1990 and especially since January 1, 2010.
3. Copies of all email correspondence, letters, or other paper/electronic communication between the City of Toronto staff to any other parties involved in [the specified address] (including [a particular] builder and owner/manager [of the specified address]) and between the City of Toronto and other City of Toronto staff, related to construction/building projects/permits, zoning, inspection or enforcement actions at [the specified address] taking place since January 1, 2010.

[2] The city identified a number of records as responsive to the request and provided partial access to certain records, denying some information pursuant to the mandatory personal privacy exemption in section 14(1) of the *Act*.

[3] After receiving submissions from the owner of the property (the affected party), the city issued a decision to the requester granting partial access to the building permit drawings and archived emails. The city granted partial access to responsive emails, denying some information pursuant to the discretionary solicitor-client privilege exemption in section 12 and section 14(1) of the *Act*. The city denied full access to one page indicating that it was not responsive to the request. The city also denied access to four permit drawings pursuant to the discretionary law enforcement exemption in section 8(1)(i) of the *Act*. Access to the remaining ten permit drawings was granted in full. The city also issued a decision to the affected party advising of its decision to grant access to all but four permit drawings.

[4] The requester (the appellant in this appeal) appealed the city's decision to deny full or partial access to records and this appeal MA13-219 was opened.

[5] The affected party also appealed the city's decision to grant access to permit drawings and the related third party appeal MA13-154 was opened.

[6] During mediation, the appellant advised the mediator that she wished to pursue access to records denied pursuant to section 12 of the *Act*, as well as the permit drawings which were denied under section 8(1)(i) of the *Act*. The appellant confirmed that she is not pursuing access to the information severed under section 14(1) nor to the information described as not responsive to the request.

[7] The city then issued a revised decision to the appellant and the affected party to provide full access to all permit drawings, including the four drawings the city original denied access to under section 8(1)(i).

[8] The affected party subsequently advised the mediator that it wished to appeal the city's revised decision to grant access to the building permit drawings. As a result, all permit drawings are now at issue in the third party related appeal MA13-154 and no longer at issue in this appeal.

[9] The appellant subsequently advised the mediator that she continues to pursue access to all of the records denied pursuant to section 12 of the *Act* in this appeal MA13-219.

[10] As mediation did not resolve the issues in appeal MA13-219, this file was transferred to adjudication where an adjudicator conducts an inquiry. Representations were sought and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[11] In this order, I uphold the city's decision and dismiss the appeal.

## **RECORDS:**

[12] The records remaining at issue consist of 109 pages of e-mails and attachments to these emails, identified as pages A32-A36, A39-A43, A48-A50, A52-A88, A93-A97, A105-A107, and A109-A159. Some of the parties to these communications were solicitors in the city's Legal Services Division.

## **ISSUES:**

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

## **DISCUSSION:**

### **A. Does the discretionary solicitor-client privilege exemption at section 12 apply to the records?**

[13] 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.

[14] 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, it appears that the city is relying on branch 1 solicitor-client communication privilege.

[15] The affected party did not provide representations on this issue.

[16] The city provided both confidential and non-confidential representations. In its non-confidential representations, the city states that the records consist of 109 pages and are largely e-mail communications and attachments thereto between staff in the city's Building Department and the city's Legal Services Department. The exceptions being communications between Toronto Building Department staff members.

[17] The city states that records relate to the "construction/building projects/permits, zoning, inspections or enforcement actions at [the affected party's address (the address)]" and that they are largely comprised of documents which reflect the continuum of communications between a client and a solicitor. The city has classified the records into four groups, as follows:

- Group 1 - Emails between Toronto Building Department staff and Legal Services staff;
- Group 2 - Attachments to emails between Toronto Building Department staff and the City's Legal Services staff;
- Group 3 - Emails between Toronto Building Department staff; and,
- Group 4 - Attachments to emails between the Toronto Building Department staff.

[18] The city provided specific representations on the application of section 12 to each page of the record. The city further submits that each one of the Group 1 records and the copies of the documents attached these documents (i.e. Group 2) were documents "prepared by or for counsel employed or retained by an institution for use in giving legal advice." The city also states that these records are subject to statutory solicitor-client communication privilege, as well as the solicitor-client privilege available at common-law. It states that:

All of the Group 1 Staff-Communications comprise of correspondence between solicitors employed by the City of Toronto and other employees or officers of the City of Toronto relating to the [address]. These documents are related to the providing of legal advice in this issue.

This e-mail correspondence contained "attachments" to the correspondence - which are the Group 2 documents. Some of these "attachments" consisted of additional documents (which provided additional information for use by the solicitors), while other attachments were draft documents provided to the solicitors for the purpose of obtaining legal advice in relation to the content thereof. These Group 1 and Group 2 documents represent a continuum of correspondence in which a variety of legal advice, opinions, and suggestions were either requested or provided in relation to a myriad of developments in relation to the [address]...

...Many of [these records] are communications relating to the possibility of a variety of "legal difficulties" ...

[S]ome of the documents in question contain the "working notes" for various documents prepared in relation to the [address]. It is plainly obvious that providing these "working notes" to would provide allow the content of the solicitor-client advice provided to the city in relation to the [address] to be publicly available.

...Other records are documents prepared by Legal Services such as memorandums, setting out legal and factual issues for the purpose of formulating legal opinions, or are documents provided to Legal Services such as the documents prepared by Toronto Building setting out facts, issues and instructions to the Legal Services department.

...[T]he records comprising Groups 3 and 4 ...are not communications directly involving a city Legal Services staff member. However, each one of these documents were created in response to a communication from Legal Services, and are either internal communications on how to implement the advice given, or a draft document incorporating the advice provided by Legal Services as contained in the Group 1 and 2 documents...

The [records] contain documents, which were used to form legal advice with respect to the contemplated litigation, which could arise from the [address] issue...

The litigation for which the privilege is being claimed remains a possibility. As the current appeal notes, it appears that a "live issue" between the [appellant] and the affected party and the city concerning the applicability of zoning regulations remains. Disclosure of records arising from the solicitor-client communication on the issues relating to [the address], could allow the identification of potential strengths and weakness in the city's positions with respect to issues, which may arise in potential litigation...

[19] The city submits that solicitor-client privilege was not waived as the records were at all times treated as confidential communications and not shared with any party that was not part of the solicitor-client relationship. The city also notes that there has been no indication that there has been waiver of solicitor-client privilege by the head of the city (or anyone else at the city) with respect to these documents.

[20] The appellant states that she does not feel that the discretionary exemption at section 12 applies to the records. She states that of the 48 records, 33 of them have a solicitor cc'd. She states that the mere copying of solicitors does not constitute 'privileged' information as they are not consulting their lawyer directly for advice. She believes that the mere fact that all emails were cc'd to so many people waives privilege. She also believes that since she has seen the property that is the subject of the records that any privilege attached to photographs of the property in the records has been waived.

[21] The appellant states that the records were created in the ordinary course of business and not relating to any litigation at all. She points out that the city describes the purpose of pages A63 to A65 of the records was for the client to obtain advice to "steer clear of legal difficulties" and that this language suggests a cover-up of questionable activities which would, therefore, would be a waiver of privilege for fraudulent acts.

### ***Analysis/Findings***

[22] Branch 1 of the section 19 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 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.<sup>1</sup>

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<sup>1</sup> Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4<sup>th</sup>) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

[23] 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.<sup>2</sup>

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

[25] 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.<sup>4</sup>

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

[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.<sup>6</sup>

[28] The appellant has raised the issue of waiver of privilege. Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

[29] 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.<sup>7</sup>

[30] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.<sup>8</sup>

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

<sup>3</sup> Orders PO-2441, MO-2166 and MO-1925.

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

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

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

<sup>7</sup> *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

<sup>8</sup> 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.) and *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S.C.).

[31] Waiver has been found to apply where, for example

- the record is disclosed to another outside party<sup>9</sup>
- the communication is made to an opposing party in litigation<sup>10</sup>
- the document records a communication made in open court<sup>11</sup>

[32] Based on my review of all of the 109 pages at issue in the records, I agree with the city that these records all contain direct solicitor-client communications or form part of a continuum of communication of legal advice.

[33] The legal advice sought by city staff in the records was for a legitimate issue of concern to the city. Therefore, I do not agree with the appellant that the city by seeking legal advice to “steer clear of legal difficulties” participated in a cover-up of questionable activities which would, therefore, constitute a waiver of privilege for fraudulent acts.

[34] I also find that the copying of the emails to a number of city staff or the fact that the appellant has viewed the property in question, did not, in the circumstances of this appeal, constitute waiver of the privilege attached to the records. The emails at issue were copied to the city staff that were directly involved in the subject matter of the records. Furthermore, although the appellant has seen the property, she has not seen the photographs that are attachments to certain emails at issue.

[35] All of the emails at issue contain legal advice or contain information about the seeking of legal advice. There is no evidence in the records that city staff by copying other city staff on the emails had in any way waived privilege. These emails contain the legal advice provided by the city solicitors and were exchanged between city staff in order to allow city staff to take steps to implement the legal advice provided by the city’s solicitors. The attachments to the emails all refer to information that city staff sought legal advice about. I find that I have no evidence in this appeal that privilege has been waived for the records at issue.

[36] The records at issue are all subject to branch 1 solicitor-client communication privilege. As such, section 12 applies to the records at issue and it is not necessary for me to determine whether the records are also subject to litigation privilege.

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<sup>9</sup> Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

<sup>10</sup> Orders MO-1514 and MO-2396-F.

<sup>11</sup> Orders P-1551 and MO-2006-F.



[37] Accordingly, subject to my review of the city's exercise of discretion, I find that the information at issue in the records is exempt under section 12 of the *Act*.

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

[38] 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.

[39] 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.

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

[41] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>14</sup>

- 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

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<sup>12</sup> Order MO-1573.

<sup>13</sup> Section 43(2).

<sup>14</sup> 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.

[42] The affected party did not provide representations on this issue.

[43] The city states that in considering how to respond to the request, the head consulted with staff knowledgeable with the relevant issues and took into account all of the relevant considerations including the following:

- The purposes of *MFIPPA*;
- The wording of the relevant exemptions in sections 12; The fundamental interests that the s.12 exemption seek to protect;
- The fact that the information the requester is seeking does not relate to what the party may consider to be their "own information";
- The fact that the requester has not stated a sympathetic or compelling need to receive the information;
- The potential relationship between the requester and one of the affected party;
- The fact that disclosing the content of these specific solicitor-client communications would not be likely increase public confidence in the operation of the city, and the decision to disclose solicitor-client communications without a

corresponding benefit to the public would if it had any effect on public confidence in the operation of the city, would be to decrease it;

- The fact that other information on this matter has or may be disclosed to the requester;
- The nature of the information, as being significant and/or sensitive to the city, and of limited sensitivity or significance to the requester or the affected party;
- The relatively young age of the information; and,
- The historic practice of the city of not disclosing solicitor-client privileged materials.

[44] The city states that the ultimate purpose of solicitor-client privilege is to enable every individual to exercise his or her rights in an informed manner and to perform the social function of preserving the quality, freedom, and confidentiality of information exchanged between a client and his or her lawyer in the context of a legal consultation. It states that section 12 enables the city to participate in society - on behalf of the public - with the benefit of the information and advice needed in order to exercise the rights provided to the municipality.

[45] The appellant states that the city exercised its discretion for an improper purpose and failed to take into account relevant considerations. The appellant distrusts the motives for the city denying access and has concerns about the description of the individual records in the city's representations.<sup>15</sup> The appellant also believes that as the zoning review has not yet been completed, then more information is likely to be available.<sup>16</sup>

### ***Analysis/Findings***

[46] Based on my review of the records and the city's and the appellant's representations, I find that the city exercised its discretion in a proper manner in denying access to the records at issue under section 12. The city considered proper factors and did not take into account improper factors.

[47] Accordingly, I uphold the city's exercise of discretion under section 12 of the *Act*.

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<sup>15</sup> I have reviewed the records and note that the dates and recipients are listed on the records.

<sup>16</sup> The adequacy of the city's search for records is not an issue in this appeal.

**ORDER:**

I uphold the city's decision and dismiss the appeal.

Original signed by: \_\_\_\_\_

Diane Smith

Adjudicator

\_\_\_\_\_ June 3, 2014