

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER MO-3425-I

Appeal MA15-375

City of St. Catharines

March 31, 2017

**Summary:** The appellant sought access to records regarding severance and minor variance applications for a specific property. The city granted the appellant partial access to the responsive records and relied on the discretionary solicitor-client privilege exemption in section 12 of the *Municipal Freedom of Information and Protection of Privacy Act* to withhold some information in three records. In this interim order, the adjudicator upholds the city's decision on two of the three records, the city's exercise of discretion, and the reasonableness of the city's search for records. The adjudicator finds one record, an email from the city to the lawyer for the property owner, is not solicitor-client privileged and the property owner should be notified before a decision on its disclosure is made.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 12 and 16.

**Orders and Investigation Reports Considered:** M-1165, MO-1172, P-1511 and PO-2087-I.

### BACKGROUND:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of St. Catharines (the city) for access to records relating to severance and minor variance applications for a specific property. The appellant requested details of how the conditions of the severance applications were satisfied, including the reports that would have been filed as proof with the city's

Committee of Adjustment. Specifically, the appellant requested:

1. The notes, records and reports of the Chief Building Official that set out how and when he satisfied himself concerning the retaining wall removal, and the required grading and/or replacement; and
2. All documentation, records and reports filed by NPCA setting forth how the Applicants satisfied its conditions.
3. The notes, records and reports of how the Chief Building Official satisfied himself that the [specific] retaining wall as amended meets the side yard set-back requirements of the applicable zoning bylaw. [sic]

[2] The city located records responsive to the request, including an agreement entered into by the city relating to the retaining wall (the Agreement), an undertaking, email correspondence, letters, photos, plans, drawings, and building permit and inspection documents. The city issued a decision granting the appellant partial access to the responsive records. It relied on the mandatory personal privacy exemption in section 14(1) and the discretionary solicitor-client privilege exemption in section 12 to withhold some records in part and others in their entirety. The city subsequently located additional responsive records and issued a second access decision again granting the appellant partial access.

[3] The appellant was not satisfied with the city's decision and appealed it to the Office of the Information and Privacy Commissioner (the IPC). In his appeal letter, the appellant asked that the city identify its "authority" for entering into the Agreement which, he argued, should not be subject to solicitor-client privilege. The appellant also argued that without the proper requisite authority, the Agreement is unlawful and the solicitor-client privilege invoked by the city should not protect it or any related legal advice that led the city to act unlawfully. The appellant raised the possible application of the public interest override in section 16 of the *Act*.

[4] Mediation was attempted and the appellant confirmed that he was interested in pursuing only the records withheld under section 12, and not those withheld under section 14(1). Accordingly, section 14(1) of the *Act* and the information in the records withheld under it are no longer at issue in this appeal. The appellant specified that he sought access to the "legal authority" that the city relied on to enter into the Agreement, including any notes, meeting records, resolution or directive, and he asserted that additional responsive records should exist regarding this issue. The city advised that there are no responsive records relating to its authority to enter into the Agreement. The city stated that the process is governed by the *Planning Act* and it offered to meet with the appellant to discuss the issues of the appeal.

[5] A mediated resolution of the appeal was not possible and at the request of the appellant, the appeal was transferred to the adjudication stage of the appeal process

for a written inquiry under the *Act*.

[6] During my inquiry, I sought and received representations from the city and the appellant and shared them with the parties in accordance with the IPC's *Practice Direction Number 7*. In addition to providing representations, the city provided a revised access decision disclosing to the appellant one of the records at issue in its entirety, and redacted versions of the remaining three records at issue. Upon receiving the city's revised decision, the appellant confirmed that he wished to pursue access to the remaining records at issue in this appeal.

[7] I did not seek representations from the parties on the possible application of the public interest override in section 16 because section 12 is not included in the list of exemptions noted in section 16 of the *Act*. Since section 16 cannot override section 12, it has no application in this appeal. However, the public interest is addressed in the city's exercise of discretion in relying on section 12.

[8] In this interim order, I uphold the city's decision to withhold the information in two records under section 12, its exercise of discretion, and the reasonableness of the city's search. However, I find that Record 1 is not a solicitor-client communication and I should notify an affected party prior to deciding whether this record should be disclosed.

## **RECORDS:**

[9] The records that remain at issue in this appeal are the withheld portions of the following 10 pages of emails:

- C(2) pages 1-4 – Record 1
- C(2) pages 5-8 – Record 2
- C(2) pages 10-11 – Record 3.

## **ISSUES:**

- A. Does the discretionary exemption at section 12 apply to the records?
- B. Was the city's exercise of discretion under section 12 proper?
- C. Was the city's search for responsive records reasonable?

## **DISCUSSION:**

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

[10] The discretionary solicitor-client privilege exemption in section 12 protects privileged records from disclosure under the *Act*. Section 12 contains two branches; branch 1 which arises from the common law, and branch 2 which is a statutory privilege arising from section 12 of the *Act*. Section 12 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.

[11] Branch 1 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 city must establish that at least one head of privilege applies to the records at issue.<sup>1</sup>

[12] At common law, 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> The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.<sup>3</sup> The privilege applies to “a continuum of communications” and covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.<sup>4</sup> Confidentiality is an essential component of the privilege. Therefore, the city must demonstrate that the communication was made in confidence, either expressly or by implication.<sup>5</sup>

[13] Branch 2, the statutory solicitor-client communications privilege, exists to protect direct communications of a confidential nature between an institution and its counsel, be it internal counsel or other counsel retained or employed by it. The statutory privilege applies where the records were prepared by or for the institution’s counsel for use in giving legal advice.

### ***The city’s representations***

[14] The city states that the information withheld in Record 1 is an email from its

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

<sup>2</sup> *Descôteaux v Mierzwinski* (1982), 141 DLR (3d) 590 (SCC).

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

<sup>4</sup> *Balabel v Air India*, [1988] 2 WLR 1036 at 1046 (Eng CA).

<sup>5</sup> *General Accident Assurance Co v Chrusz* (1999), 45 OR (3d) 321 (CA); Order MO-2936.

Committee Secretary & Planning Clerk to counsel for the owner of the property at issue, copied to the property owner and three other city officials. The city submits that although the information in this record was provided in the form of an email from a city employee to third parties, the record provides "a flavour" of the legal advice given by the city solicitor and therefore, release of this record would have the effect of compromising the solicitor-client privilege it maintains exists in relation to the legal advice it received from its solicitor. The city also maintains that it did not waive solicitor-client privilege in this record. It argues that it was necessary to disclose the crux of the legal advice it received to the property owner's lawyer in order for it to carry out its mandate and further its business. The city explains that without disclosing the nature of the advice to the property owner's lawyer, it could not relay the requirements that were deemed necessary to satisfy one of the conditions imposed on the severance and minor variance.

[15] In support of its submission that Record 1 is privileged, the city cites the following passages from Order M-1165:

It is often necessary or desirable for a public body to refer to the crux of the advice its solicitors provide to it in order to carry out its mandate and responsibilities. In many cases, the public body will intend to retain the privilege, while at the same time provide a minimal degree of public disclosure to ensure the proper discharge of its functions. In the usual case this should not of itself constitute express waiver of the privilege attaching to the underlying solicitor-client communications.<sup>6</sup>

. . .

A decision-maker must be cognizant of the environment in which institutions operate and their responsibilities with respect to the public interest, which may include maintaining a 'policy of transparency' regarding information which is used in the decision making process.<sup>7</sup>

[16] The city states that Record 2 is an email string containing five redactions. It submits that three of the redactions contain requests for legal advice from a city official to the city solicitor. It submits that the emails containing these redactions are direct communications of a confidential nature between a solicitor and an employee of a client made for the purpose of requesting legal advice. It also submits that another redacted email in Record 2, which contains the legal advice provided by the city solicitor to the city official, is also a direct confidential communication between a solicitor and an employee of a client made for the purpose of giving legal advice. The city asserts that both common law and statutory solicitor-client communication privilege attach to these four redacted emails.

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<sup>6</sup> See page 4 of Order M-1165 quoting Order MO-1172.

<sup>7</sup> See page 5 of Order M-1165 quoting *Stevens v Canada (Prime Minister)* 1998 CanLII 9075 (FCA).

[17] The last redacted email in Record 2, the city states, is an email from one city official to another confirming that legal advice was received and relaying the substance of the legal advice. The city argues that although this communication is not between a solicitor and client, it should be protected by section 12. The city relies on Order PO-2087-I to support its submission. It notes that Order PO-2087-I found records prepared by non-legal staff in a ministry qualified for exemption because they referred to or reflected the legal advice contained in other records at issue that were privileged. The city also submits that the passing of information stemming from a legal opinion to a city employee other than the one who originally sought the legal advice, does not constitute a waiver of solicitor-client privilege that attaches to the underlying solicitor-client communication. It cites Order P-1511 in support:

I do not agree with the appellant that, by revealing the contents of the legal opinion to other employees of the Ministry, the Ministry has waived solicitor-client privilege. The inclusion of Branch 2 in this exemption was designed to address this very issue. That is, the legislature recognized that there is often not one client in the government context, but that there is a commonality of interest amongst different departments and ministries of the government. Therefore, in passing the information contained in the legal opinion on to other departments or individuals within the Ministry, it has not waived the privilege in this document.<sup>8</sup>

[18] The city concludes its representations by stating that the redaction in Record 3 contains legal advice and direction given by the city solicitor to a city employee. It submits that both common law and statutory solicitor-client communication privilege attach to this email.

### ***The appellant's representations***

[19] In his representations, the appellant focusses on the Agreement and his belief that the city had no legal authority to enter into it under the *Planning Act*. He asserts that the city's legal basis for entering into the Agreement should be disclosed and asks me to find that the records are not exempt under section 12.

[20] He argues that the concept of "solicitor-client" contemplates a more arm's length relationship than one of an employee – the city solicitor – providing legal advice to other employees, and that the client in this situation is the city, not its employees. The appellant submits that Record 1 should be disclosed to him.

### ***Analysis and findings***

[21] Record 1 is not a solicitor-client communication. It was not prepared by or for counsel employed or retained by the city, and it was not prepared for use in giving or

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<sup>8</sup> At page 4.

seeking legal advice. It is an email string between the city and a third party, specifically, opposing counsel in the severance and minor variance matter. The withheld portion of Record 1 – an email from a city official sent to the property owner’s lawyer, and copied to the property owner and to other city officials – is part of the email string. I do not accept the city’s position that solicitor-client communication privilege applies to this email communication between two parties who are clearly not in a solicitor-client relationship. I note that the orders relied on by the city in its representations considered actual solicitor-client communications; a letter from a city official to the city solicitor seeking legal advice in Order M-1165, and a legal opinion from the city solicitor to city officials in Order MO-1172. The reasoning in those two orders does not apply to a record that is not a privileged communication between a solicitor and her client. Nor do the waiver arguments that the city makes about Record 1 apply to it. I find that Record 1 is not exempt under section 12. The city has not claimed any other exemptions for this record. As a result of my finding and based on the nature of the information contained in Record 1, the property owner may have an interest in the appeal. Because the property owner has not been notified of either the request or the appeal, I will notify him in accordance with section 39(3) of the *Act* prior to deciding whether Record 1 should be disclosed.

[22] Record 2 is a solicitor-client communication. The emails that make up the email string were prepared by or for the city solicitor for the purpose of seeking or giving legal advice and are direct communications of a confidential nature. I do not accept the appellant’s argument that the city’s employees are not the “client” of the city solicitor as it directly contradicts the words of section 12 which specify that the statutory solicitor-client communication privilege applies to a record that was prepared by or for counsel employed by an institution for use in giving legal advice. As the recipient of the legal advice, the city’s employees representing the city’s interests in the minor variance application were the city solicitor’s clients. I find that the severances in Record 2 are exempt under branches 1 and 2 of section 12, subject to my review of the city’s exercise of discretion below.

[23] Record 3 is an email string consisting of emails between the appellant and the city about the property, and a final email among city employees only, including the city solicitor. The sole severance appears in the final email and contains instructions from the city solicitor to the city employees on action to be taken with respect to the property. I am satisfied that the redacted information is a direct communication of a confidential nature prepared by the city solicitor for the purpose of giving legal advice. I find this severance is also exempt under branches 1 and 2 of section 12, subject to my review of the city’s exercise of discretion below.

**B. Was the city’s exercise of discretion under section 12 proper?**

[24] The section 12 exemption is discretionary, and permits the city to disclose information, despite the fact that it could withhold it. The city must exercise its discretion, and on appeal, the Commissioner may determine whether the city failed to

do so.

[25] In addition, the Commissioner may find that the city 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.

[26] In either case the IPC may send the matter back to the city for an exercise of discretion based on proper considerations,<sup>9</sup> however, it may not substitute its own discretion for that of the city.<sup>10</sup>

[27] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>11</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
- the wording of the exemption and the interests it seeks to protect
- 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

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<sup>9</sup> Order MO-1573.

<sup>10</sup> Section 43(2).

<sup>11</sup> Orders P-344 and MO-1573.



- the historic practice of the institution with respect to similar information.

### ***The city's representations***

[28] The city states that it recognizes the purposes of the *Act* that requesters be provided with a right of access to government information and that necessary exemptions from that right should be limited and specific. It submits that it exercised its discretion by balancing the appellant's right of access against its right to withhold solicitor-client communications, and releasing some information in the records while only withholding the portions that contain requests for legal advice or legal advice.

[29] The city asserts that it exercised its discretion in good faith and not for an improper purpose after considering: the wording of the exemption and the important interests it seeks to protect – namely, to ensure full and ready access to legal advice and to ensure that clients can confide in their solicitor without the resulting communications being disclosed; that the appellant is not seeking his own personal information and does not have a sympathetic or compelling need to receive the information; and that the city has historically withheld solicitor-client privileged information. The city asks me to uphold its exercise of discretion.

[30] The appellant suggests that the city exercised its discretion for an improper purpose. He believes that the city's purpose was to grant a severance without regard to the laws in place that governed and confined it. He states that the city misled him by stating unequivocally that it would not grant any extension of time to fulfill the severance conditions, and then doing the opposite within a few days. The appellant argues that the city failed to take into account relevant considerations, including the very restrictive provisions of the *Planning Act*, when it delivered the severance certificate.

[31] He explains that under section 53(39) of the *Planning Act*, the city is permitted to give consent only when it "is satisfied that the conditions have been fulfilled." He submits that this provision does not give the city the authority to extend a condition in order to fulfill that condition. He continues that section 53(41) of the *Planning Act* is very clear in addressing conditions that are not fulfilled. The appellant argues that the city's response to him that its purported authority to enter into the Agreement is found in the *Planning Act* is incorrect and improper.

### ***Analysis and findings***

[32] Regarding the appellant's argument that the city exercised its discretion for an improper purpose, I have found that Record 1 is not exempt under section 12. Accordingly, in reviewing the city's exercise of discretion, I consider only the severances that I have upheld as exempt under section 12.

[33] I am satisfied that the city exercised its discretion under section 12 when it decided to deny access to the severed portions of Records 2 and 3. I am also satisfied

that the city took relevant factors into account in exercising its discretion to withhold the severances I have upheld as exempt under section 12, including the purpose of the exemption and the interests it seeks to protect. Whether or not the city's legal advice was correct, the city is permitted under the *Act* to withhold information that is solicitor-client privileged. I do not accept the appellant's assertion that the city exercised its discretion to withhold the exempt severances for an improper purpose because the legal advice was allegedly incorrect.

**C. Was the city's search for responsive records reasonable?**

[34] While the appellant raised the issue of the reasonableness of the city's search for records, he did not address it in his representations. The city provided three affidavits detailing the searches conducted by city staff for responsive records. I accept the city's affidavits as sufficient evidence that it made a reasonable effort to identify and locate responsive records as required by section 17.<sup>12</sup> The three affidavits establish that experienced city employees knowledgeable in the subject matter of the request expended a reasonable effort to locate records which reasonably related to the request.<sup>13</sup> Accordingly, I uphold the reasonableness of the city's search for responsive records.

**INTERIM ORDER:**

1. I uphold the city decision to withhold the severances in Records 2 and 3 under section 12 and its exercise of discretion in respect of these records.
2. I uphold the reasonableness of the city's search for responsive records.
3. I remain seized of this matter in order to make a final determination on disclosure of Record 1 pending my notification of the property owner.

Original Signed by: \_\_\_\_\_  
Stella Ball  
Adjudicator

\_\_\_\_\_ March 31, 2017

<sup>12</sup> Orders P-85, P-221 and PO-1954-I.

<sup>13</sup> Orders M-909, PO-2469 and PO-2592.