

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3580

Appeal MA17-370

City of Windsor

March 27, 2018

Summary: The city received a request for access to an agreement between the city and a named company, as well as a document that was discussed *in camera* during a city council meeting. The city withheld access to portions of the agreement under the mandatory exemption in section 10(1) (third party information) of *MFIPPA*, and to the entirety of the document that was discussed *in camera* under the discretionary exemption at section 12 (solicitor-client privilege). In this order, the adjudicator finds that section 10(1) does not apply to the withheld portions of the agreement and she orders the city to disclose that information to the appellant. The adjudicator upholds the city's section 12 claim over the document that was discussed *in camera* during a city council meeting. The adjudicator considers the parties' positions on the application of the public interest override at section 16, but determines that it is not applicable in this appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1), 12, and 16.

Cases Considered: *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23.

Orders and Investigation Reports Considered: Order MO-1172.

OVERVIEW:

[1] The City of Windsor (the city) received a request under the *Municipal Freedom of*

Information and Protection of Privacy Act (the *Act*) for access to a copy of a document “that Windsor city council discussed in camera during the May 8, 2017 city council meeting” as well as “copies of any documents which indicate a deal or arrangement with [a named company] or any of its representatives regarding a project development at [an identified location].”

[2] The city located responsive records and, after notifying a company whose interests may be affected by disclosure (the affected party), granted partial access to them. The city relied on sections 10 (third party information) and 12 (solicitor-client privilege) of the *Act* to deny access to the withheld portions.

[3] The requester appealed the city’s decision to this office, becoming the appellant in this appeal. The appellant took the position that it was in the public interest that the information be disclosed. Accordingly, the possible application of section 16 of the *Act* (public interest override) was added as an issue in the appeal.

[4] During mediation, the city disclosed additional information to the appellant, after receiving consent from the affected party. As a result, only access to the dollar amount severed from section 5 of an agreement between the city and the affected party and the entirety of a memo from a city solicitor to city council remained at issue in the appeal.

[5] The appeal could not be resolved at mediation. The file was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator began the inquiry by inviting representations from the city on the facts and issues pertaining to the legal memo, and from both the city and the affected party with respect to the withheld dollar figure in section 5 of the agreement. Specifically, the affected party was asked to provide representations on the possible application of sections 10 and 16 of the *Act* with respect to the withheld dollar figure in the agreement. Only the city provided representations.

[6] The adjudicator then invited the appellant to provide representations in response to the Notice of Inquiry and the city’s representations, which were shared in accordance with *Practice Direction Number 7* of the IPC’s *Code of Procedure*. The appellant provided representations.

[7] The file was then transferred to me to complete the inquiry. For the reasons that follow, I find that the third party exemption does not apply to the withheld dollar figure in the agreement, and I order that information be disclosed. In addition, I find that the city solicitor’s memo is exempt from disclosure pursuant to section 12, and I uphold the city’s exercise of discretion in withholding it. I consider the parties’ submissions on the application of section 16, but determine that it is not applicable in this appeal.

RECORDS:

[8] At issue in this appeal is the dollar figure severed from section 5 of an agreement between the city and the affected party (identified as Record 2 in the city's index of records) and the entirety of a memo from the Deputy City Solicitor to the mayor and members of city council (identified as Record 9 in the city's index of records).

ISSUES:

- A. Does the mandatory exemption at section 10(1) for third party information apply to the dollar figures severed from the agreement at issue (Record 2)?
- B. Does the discretionary exemption at section 12 for solicitor-client privilege apply to the memo from a city solicitor to city council (Record 9)?
- C. Did the city exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?
- D. Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the section 10(1) exemption?

DISCUSSION:

Issue A: Does the mandatory exemption at section 10(1) for third party information apply to the dollar figure severed from the agreement at issue (Record 2)?

[9] The appellant seeks the dollar figure withheld from section 5 of Record 2, which is an agreement between the city and the affected party. This information was withheld pursuant to section 10(1) of the *Act*. This mandatory exemption states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[10] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.¹ Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.²

[11] For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or commercial or financial; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b) and/or (c) of section 10(1) will occur.

[12] Neither the city nor the appellant addressed the application of section 10(1) to the dollar amount severed from the agreement. However, since section 10(1) of the *Act* is a mandatory exemption, I am required to consider its possible application. In reaching my conclusions, I have reviewed the information at issue, section 10(1) of the *Act*, court decisions, and previous orders of this office.

Part 1: type of information

[13] To satisfy Part 1 of the section 10(1) test, the city must show that the withheld information reveals information that is a trade secret or scientific, technical, commercial, financial, or labour relations information.

[14] For the reasons that follow, I find that information at issue in the agreement reveals commercial and financial information. Previous IPC orders have defined those terms as follows:

¹ *Boeing Co v Ontario (Ministry of Economic Development and Trade)*, [2005] OJ No 2851 (Div Ct)], leave to appeal dismissed, Doc M32858 (CA) (*Boeing Co*).

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.³ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁴

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.⁵

[15] I accept these definitions for the purpose of this appeal.

[16] I find that the information at issue in section 5 of the agreement constitutes both commercial and financial information. The information sought by the appellant is a portion of the terms of the contract between the city and the affected party. Specifically, the redacted portion of section 5 of the agreement sets out the amount of bond money that the affected party would provide to the city pursuant to the agreement. As I find that this specific dollar value qualifies as commercial and financial information, Part 1 of the section 10(1) test has been met.

Part 2: supplied in confidence

[17] To satisfy Part 2 of the section 10(1) test, the city must show that the dollar amount in the agreement was "supplied" to the city in confidence, either implicitly or explicitly. Both the "supplied" and "in confidence" components of the test must be met. If the city fails to establish both of these components, Part 2 of the section 10(1) test is not met, and the dollar amount must be disclosed to the appellant.

[18] For the reasons that follow, I find that the dollar amount in section 5 of the agreement was mutually generated, rather than "supplied" by the affected party, for the purposes of section 10(1).

[19] Previous orders of the IPC have found that information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.⁶ Typically, the contents of a contract involving an institution and a third party will not qualify as having been "supplied" for the purpose of section 10(1).

³ Order PO-2010.

⁴ Order P-1621.

⁵ Order PO-2010.

⁶ Orders PO-2020 and PO-2043.

[20] Even if this particular agreement was preceded by little or no negotiation between the affected party and the city, or its terms reflect information that originated from one of them, the general rule remains that contractual terms are considered to have been mutually generated rather than “supplied”.⁷

[21] There are two exceptions to this general rule: The “inferred disclosure” and “immutability” exceptions. The inferred disclosure exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.⁸ The immutability exception applies where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs, and product samples or designs.⁹

[22] In the absence of representations from the parties, including the affected party with whom the city entered into the agreement at issue, there is no evidence before me to suggest that disclosure of the dollar figure would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the city. There is also not sufficient evidence to establish that the dollar figure was in any way immutable or not susceptible to negotiation between these parties. Therefore, having reviewed the information at issue, I am satisfied that neither the inferred disclosure nor the immutability exceptions apply.

[23] As noted above, the parties resisting disclosure must meet both the “supplied” and “in confidence” components of Part 2 of the section 10(1) test. The city and affected party have failed to meet the “supplied” component. In addition, I have not been provided with any evidence to indicate that the information was supplied with an expectation of confidentiality, either implicit or explicit. Therefore, the requirements of Part 2 of the section 10(1) test have not been met.

[24] Given that Part 2 of the section 10(1) test has not been met, it is not necessary for me to consider Part 3 (harms), as all three parts of the test must be met for the mandatory exemption to apply.

[25] Accordingly, I conclude that the dollar amount in section 5 of the agreement is not exempt from disclosure pursuant to section 10(1) of the *Act*.

⁷ This approach was approved by the Divisional Court in *Boeing Co*, cited above, and in *Miller Transit Limited v Information and Privacy Commissioner of Ontario et al*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).

⁸ Order MO-1706, cited with approval in *Miller Transit*, above at para 33.

⁹ *Miller Transit*, above at para 34.

Issue B: Does the discretionary exemption at section 12 for solicitor-client privilege apply to the memo from a city solicitor to city council (Record 9)?

[26] The city relies on section 12 of the *Act* to deny access to the memo that was discussed *in camera* during a May 2017 city council meeting. Section 12 states:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[27] Section 12 contains two branches. Branch 1 (“subject to solicitor-client privilege”) is based on the common law. Branch 2 (“prepared by or for counsel employed or retained by an institution...”) is a statutory privilege. The city must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[28] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege, and (ii) litigation privilege.

[29] 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.¹⁰ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.¹¹ The privilege 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.¹²

[30] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.¹³

[31] 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.¹⁴ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.¹⁵

[32] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

¹⁰ *Descôteaux v Mierzwinski* (1982), 141 DLR (3d) 590 (SCC).

¹¹ Orders PO-2441, MO-2166 and MO-1925.

¹² *Balabel v Air India*, [1988] 2 WLR 1036 at 1046 (Eng CA).

¹³ *Susan Hosiery Ltd v Minister of National Revenue*, [1969] 2 Ex CR 27.

¹⁴ *General Accident Assurance Co v Chrusz* (1999), 45 OR (3d) 321 (CA); Order MO-2936.

¹⁵ *Kitchener (City) v Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div Ct).

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.¹⁶

[33] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.¹⁷

[34] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.¹⁸ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.¹⁹

Branch 2: statutory privilege

[35] Branch 2 is a statutory privilege that applies where the records were “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.” The statutory and common law privileges, although not identical, exist for similar reasons.

[36] Like the common law solicitor-client communication privilege, the statutory solicitor-client communication privilege covers records prepared for use in giving legal advice.

Representations

[37] The city maintains that the memo meets the criteria for both branches of privilege under the *Act*, as it was prepared by counsel employed by the city for use in giving legal advice. The city submits that the record is clearly subject to solicitor-client privilege and that there has been no loss of privilege because privilege has not been waived.

[38] The appellant does not provide representations on the application of section 12. He does, however, mention that following the *in camera* meeting of city council, the mayor said, “City Council wasn’t left with a lot of options,” and suggested that if the city had not proceeded in a particular way, it would have faced and lost a lawsuit.

Analysis and findings

[39] Having reviewed the memo, I am satisfied that it is a document that was prepared by counsel employed by the city for use in giving legal advice. The record is a

¹⁶ *S & K Processors Ltd v Campbell Avenue Herring Producers Ltd* (1983), 45 BCLR 218 (SC).

¹⁷ *R v Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

¹⁸ J Sopinka *et al*, *The Law of Evidence in Canada* at p 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v Big Canoe*, [1997] OJ No 4495 (Div Ct).

¹⁹ *General Accident Assurance Co v Chrusz*, cited above; Orders MO-1678 and PO-3167.

memo that was prepared by the Deputy City Solicitor for *in camera* consideration by the mayor and members of city council. The memo contains the solicitor's legal advice in response to a question from a councillor. While not necessarily determinative, markings on the record clearly indicate that it was intended to be confidential, as the words "personal and confidential" and "private and confidential" appear on its face. I am satisfied that the record constitutes communication of a confidential nature between a solicitor and client that was prepared for the purpose of giving legal advice, and therefore meets the criteria for solicitor-client communication privilege under both Branch 1 (common law) and Branch 2 (statutory) of section 12.

[40] The city maintains that privilege has not been lost through waiver; however, the appellant's submissions indicate that the bottom line of the advice contained in the city solicitor's memo may have been shared with those present at an open city council meeting. While the appellant does not specifically raise the issue of waiver, his representations suggest that it is a relevant consideration.

[41] In Order MO-1172, this office upheld the City of Vaughan's decision to refuse access to a copy of a confidential memorandum from a deputy city manager and city solicitor to city council. The adjudicator rejected the argument that a public report's reference to a portion of the bottom line of the advice contained in the memorandum constituted waiver of privilege. The adjudicator noted that, in fact, public disclosure of such information may be necessary in the interest of transparency.

[42] In that order, the adjudicator found that there had been no express waiver of privilege, as she was satisfied that in making the relatively minimal disclosure the city did not intend to waive privilege. The adjudicator was also satisfied that there had been no implicit waiver, as there was no basis for finding that fairness or consistency required disclosure in the circumstances. Among other factors, there was no evidence that the city provided access to the legal opinion to anyone other than city officials, and the city took active steps to preserve the confidentiality of the opinion.

[43] Subsequent orders of this office have applied similar reasoning to uphold privilege where public disclosure of some information gave rise to claims of implied waiver,²⁰ and I adopt that approach in this appeal.

[44] In this case, the mayor may have disclosed to those present at the city council meeting the bottom line or a portion of a conclusion reached in the privileged memo from the city solicitor; however, I am satisfied that the disclosure can be described as relatively minimal. There is no evidence before me to suggest that anyone other than the mayor and city councillors were provided access to the legal memo, and the city has taken steps to maintain its confidentiality. I find that there has been no express waiver of privilege, and that the relatively minimal disclosure does not amount to implied

²⁰ Orders MO-2945-I, MO-2500, MO-2573-I and MO-1233.

waiver, as the circumstances do not require full disclosure in the interests of fairness or consistency.

[45] As there has been no express or implied waiver of privilege, I find that the memo is exempt from disclosure under section 12 of the *Act*, subject to my review of the city's exercise of discretion, below.

Issue C: Did the city exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

[46] After deciding that records or portions of them fall within the scope of a discretionary exemption, an institution is obliged to consider whether it would be appropriate to release the records, regardless of the fact that they qualify for exemption. Section 12 is a discretionary exemption, which means that the city could choose to disclose the information, despite the fact that it may be withheld under the *Act*.

[47] In applying section 12, the city was required to exercise its discretion. On appeal, the Commissioner may determine whether the city failed to do so. In addition, the Commissioner may find that the city erred in exercising its discretion where it did so in bad faith or for an improper purpose; where it took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to the city for an exercise of discretion based on proper considerations.²¹ According to section 43(2) of the *Act*, however, I may not substitute my own discretion for that of the city.

[48] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²²

- 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 is seeking his or her own personal information

²¹ Order MO-1573.

²² Orders P-344 and MO-1573.

- 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.

Representations

[49] The city submits that bad faith, improper purposes, irrelevant considerations, and failing to take into account relevant considerations are not evident in its decision not to disclose the memo to the appellant.

[50] The city states, "given the heightened status of this privilege, the City submits that its decision not to release the solicitor-client privileged record [...] is deserving of the utmost deference."

[51] The city submits that there is a "heavy onus" on the appellant to justify why the document should be released. The city refers to *Lavallee, Rackel & Heintz v Canada (Attorney General)*,²³ in which the Supreme Court of Canada held that "solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance".

[52] The appellant does not directly address whether the city exercised its discretion properly in applying section 12 to the memo; however, the appellant submits that the city's reliance on solicitor-client privilege is not aligned with the spirit of the *Act*. The appellant states, "[a]ny time city officials want to eliminate transparency on whichever issue, they need only run their memos through the legal department, and then they can claim solicitor-client privilege."

Findings

[53] Although the city did not provide robust representations on its exercise of discretion, on my review of the materials before me and the parties' submissions, I am satisfied that the city did not err in exercising its discretion to withhold the memo under

²³ 2002 SCC 61.

section 12. I accept that considerations relevant to its exercise of discretion include the importance of maintaining solicitor-client privilege and the fact the record does not contain any personal or other information of the appellant. The city's assessment was that such considerations outweigh any factors that may favour disclosure, and I see no basis for disturbing the exercise of discretion based on that assessment.

[54] Lastly, regarding the appellant's position that solicitor-client privilege can be claimed by an institution simply by "running their memos through the legal department," I note that the record in this case is a legal opinion drafted by counsel. I also note that previous orders have confirmed that a record does not necessarily qualify for exemption pursuant to the solicitor-client privilege exemption simply because it has been reviewed by a lawyer.²⁴

[55] I therefore uphold the city's decision to withhold the memo under section 12 of the *Act*.

Issue D: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 10(1) exemption?

[56] 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.

[57] I found that the third party exemption at section 10(1) does not apply to the information at issue in the agreement and there is, therefore, no need to consider whether the section 10(1) exemption can be overridden by a compelling public interest in disclosure.

[58] Both parties provided representations on whether there is a compelling public interest in disclosure of the memo, which is subject to the solicitor-client privilege exemption in section 12. The city maintains that none of the considerations in support of the public interest override apply, as the memo does not shed light on the operations of the city government, nor does the interest clearly outweigh the status of solicitor-client privilege. The appellant describes the events leading up to the *in camera* meeting in which the memo was discussed, and maintains that the city is using solicitor-client privilege to avoid transparency in contentious and very public matters.

[59] Section 12 is not listed as one of the exemptions in respect of which the public interest override is available. The Supreme Court of Canada, in *Ontario (Public Safety and Security) v Criminal Lawyers' Association*,²⁵ upheld the constitutional validity of this

²⁴ See, for example, Order PO-1038.

²⁵ 2010 SCC 23.

statutory scheme, noting that consideration of the public interest is already incorporated in the discretionary language of the exemption.

[60] Therefore, I conclude that the public interest considerations cannot override the application of section 12 of the *Act* to the memo.

ORDER:

1. I order the city to disclose the dollar figure in section 5 of the agreement (Record 2) by **May 2, 2018** but not before **April 27, 2018**.
2. I uphold the city's decision to deny access to the memo (Record 9) pursuant to the exemption at section 12 of the *Act*.

Original Signed by: _____
Jaime Cardy
Adjudicator

_____ March 27, 2018