

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3604

Appeal MA17-240

City of Thunder Bay

May 9, 2018

Summary: The city received a request for a specified report prepared for city councilors by the city solicitor's office. The city denied access to the record pursuant to the discretionary exemptions at sections 12 (solicitor-client privilege) and 6(1)(b) (closed meeting) of the *Act*. In this order, the adjudicator upholds the city's decision under section 12.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 12 and 6(1)(b).

Orders and Investigation Reports Considered: PO-1779, MO-2206, MO-2227, and MO-2231.

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyer's Association*, 2010 SCC 23, [2010] 1 S.C.R. 815 and *Criminal Lawyer's Association v. Ontario (Ministry of Public Safety and Security)*, 2007 ONCA 392.

BACKGROUND:

[1] The City of Thunder Bay (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a report [specified number] prepared for city councillors by the city solicitor's office.

[2] In its decision, the city denied access to the record pursuant to the discretionary exemptions at sections 12 (solicitor-client privilege) and 6(1)(b) (closed meeting) of the *Act*.

[3] The requester, now the appellant, appealed the decision to this office.

[4] Mediation did not resolve the appeal. Consequently, this appeal was moved to the next stage, where an adjudicator conducts an inquiry under the *Act*.

[5] I sought and received representations from the parties. Pursuant to this office's *Code of Procedure* and *Practice Direction Number 7*, non-confidential copies of the parties' representations were shared.

[6] In this order, I uphold the city's decision to deny access pursuant to section 12 of the *Act*.

RECORDS:

[7] The record at issue is a report [specified number], including its attachments.

ISSUES:

- A. Does the discretionary exemption at section 12 apply to the record?
- B. Does the discretionary exemption at section 6(1)(b) apply to the record?
- C. Did the institution exercise its discretion under sections 12 or 6(1)(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[8] 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.

[9] 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 institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[10] At common law, solicitor-client privilege encompasses two types of privilege: (i)

solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[11] 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.¹ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.² 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.³

[12] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.⁴

[13] 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.⁵ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.⁶

Parties' representations

[14] The city submits that both branches of solicitor-client privilege applies to the record, but more particularly, the common law solicitor-client privilege. It submits that the record meets the four-part test to determine whether a record held by an institution is subject to common law solicitor-client privilege. First, it is clear that the record is a written communication. Second, the record was expressly communicated in a confidential manner as it was clearly marked "confidential", and was presented at a closed session meeting of City Council. The record also clearly states the reason for its confidentiality, that is to receive "advice that is subject to solicitor-client privilege, including communications necessary for that purpose". Third, the record is a communication between a client, the city, and its legal advisor, the city solicitor. The city submits that the city solicitor presented the record at the closed session on a specified date to the mayor, nine members of city council, and three senior officials at the city. Fourth, the record is directly related to the formulating and giving of legal advice.

[15] In support of its position, the city referred to Order MO-2227. In that order, former Senior Adjudicator John Higgins found that a number of records (including

¹ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

² Orders PO-2441, MO-2166 and MO-1925.

³ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

⁴ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁵ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁶ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

emails, handwritten notes, typewritten notes, and report excerpts prepared by and written by the City of Toronto Solicitor to city staff) were confidential solicitor-client communications directly related to the seeking or giving of legal advice. As a result, they were subject to common law solicitor-client communication privilege, and, therefore, exempt under branch 1.

[16] In addition, the city submits that solicitor-client privilege also applies to all of the attachments to the record. These attachments include such things as newspaper articles, memo, by-laws, internet articles, and a draft code of conduct. It asserts that all these documents come within the protection of confidentiality afforded by solicitor-client privilege, as they represent the city solicitor's 'working papers' and are communications that form part of the 'framework' of the solicitor-client relationship. The city also asserts that they were used to help formulate and justify the city solicitor's legal advice to her client, the city. It further asserts that if any of these documents were individually disclosed, it could be reasonably expected to permit an assiduous requester to discern the legal advice sought and provided in the record.

[17] Finally, the city submits that there has been neither expressed or implied waiver of privilege over the record.

[18] The appellant submits that solicitor-client privilege does not apply as the record does not contain communication of a confidential nature. He submits:

... [the record] is really providing councillors with the non-confidential information they needed to make a final decision on a public policy of broad application that was ripe for debate by the politicians of the municipality. At this point, the solicitor's report was not a document internal to the administration, a fact that distinguishes the present appeal from the fact situation in Order MO-2227 employed by the city to justify its position.

...

...This is about making public policy, something done all the time by municipal councils with the open advice of administration. I assert that the solicitor's report could just have easily been written by a member of the city clerk's office, for example.

...

...I would argue that the solicitor here is speaking about the hiring of an integrity commissioner as a matter of public policy and the implications of that policy that collectively affects all current and future council members. This is not a confidential matter.

[19] As evidence that the record at issue is not inherently confidential, the appellant

refers to a municipal report he attaches to his representations, which recommends a code of conduct. He also quotes the following from the municipal report, under the heading "Financial Implication":

There are no financial implications to this report. The establishment of the Office of the Integrity Commissioner and subsequent appointment of an Integrity Commissioner is addressed in a separate report from the City Solicitor, and that report will address any financial implication.

[20] He asserts that the wording from the above passage indicates that the report contains "administrative information" rather than confidential legal advice. The appellant submits that financial implications of hiring an Integrity Commissioner could have been written by employees of the municipality rather than the solicitor.

[21] In addition, the appellant submits that the record does not relate to litigation or an action before a tribunal of some sort. He submits that the municipality is not in legal jeopardy here, a situation that requires the confidential advice of legal counsel.

[22] In the alternative, the appellant submits that there is a public interest in the release of the record. He submits that the attached newspaper article indicates that there is a strong public interest in a code of conduct and the appointment of an integrity commissioner for the city.

Findings and analysis

[23] For the reasons that follow, I find that the record and its attachments are exempt under solicitor-client privilege.

[24] I am satisfied that the record is a written communication, and the communication is of a confidential nature. I note that the record is marked "confidential" and was presented at a closed session meeting of council on a specified date. Although the appellant argues that the second part of the test has not been met ("the communication is of a confidential nature"), his argument fits more accurately under the fourth part of the test ("the communication must be directly related to the seeking, formulating, or giving of legal advice"). He argues that the record is not legal advice but is about public policy, as it deals with establishing the Office of the Integrity Commissioner and a code of conduct. He also argues that an administrative staff, instead of the city solicitor, could have easily written the record.

[25] Based on my review, I find that the record, including the attachments, meets the fourth part of the test. I am satisfied that it is communication directly related to the giving of legal advice. Without disclosing the record itself, I am able to state that in it the city solicitor discusses the implications or ramifications of new legislation, which directly affects municipalities. She also discusses a number of other legal issues. I acknowledge that some of the legal advice may relate to public policy but it does not remove her advice from the legal realm.

[26] The appellant also argues that there is a public interest in the release of the record. On June 17, 2010 the Supreme Court of Canada issued a decision confirming the constitutionality of the public interest override section, and confirming that the solicitor-client privilege exemption should not be read into to the public interest override section.⁷ As such, I will not consider whether the public interest override in section 16 applies to the record.

B: Does the discretionary exemption at section 6(1)(b) apply to the record?

[27] Due to my findings that section 12 applies to the record and its attachments, it is unnecessary for me to consider whether the discretionary exemption at section 6(1)(b) applies to the record.

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

[28] 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.

[29] 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.

[30] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁸ This office may not, however, substitute its own discretion for that of the institution.⁹

[31] The city submits that it had considered a number of relevant factors when it exercised its discretion under section 12. It submits that it considered the record at issue, and the purpose and intent of section 12 when exercising its discretion, besides considering the general principles of the *Act*. The city also submits that disclosure of the record would not increase public confidence in it. It finally submits that the record is only a couple of years old, and its historic practice is to withhold information from the

⁷ See *Ontario (Public Safety and Security) v. Criminal Lawyer's Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

⁸ Order MO-1573.

⁹ Section 43(2).

public where the requested information is subject to solicitor-client privilege.

[32] Having regard to the circumstances of this appeal, I am satisfied that the city considered a number of relevant factors when exercising its discretion under section 12. I find that it did not take into account irrelevant considerations or fail to take into account relevant considerations. I note that the appellant makes a bald assertion that the city has improperly exercised its discretion. However, he does not provide any details or evidence to support his assertion. Accordingly, I am satisfied that the city properly exercised its discretion to apply section 12 to the record at issue, and I uphold the city's decision that the record at issue and its attachments qualifies for exemption under section 12 of the *Act*.

ORDER:

1. I uphold the city's decision to deny access to the record at issue and its attachments, and dismiss this appeal.

Original Signed by: _____

Lan An
Adjudicator

_____ May 9, 2018