

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3616

Appeal MA16-441

Town of Erin

May 28, 2018

Summary: The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* for emails relating to an environmental assessment from the Town of Erin. The town disclosed some records, withholding four emails and an email address found in another email, citing sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 12 (solicitor-client privilege) and 14 (personal privacy). The appellant sought access to the information the town withheld. The exemption for records subject to solicitor-client privilege applies to the four emails and the town's exercise of discretion to withhold the emails is upheld. The withheld email address is ordered disclosed by affected party consent.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 12, 14(1).

OVERVIEW:

[1] The Town of Erin (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to emails relating to a wastewater environmental assessment. At the town's request, the appellant provided the town with some relevant search terms to guide the town's search for responsive records.

[2] The town granted partial access to the responsive records it located. The town relied on the discretionary exemptions in sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations) and 12 (solicitor-client privilege) to withhold some records

entirely, and on the mandatory exemption in section 14 (personal privacy) to withhold portions of records.

[3] The appellant was not satisfied with the town's decision and appealed it to this office. Mediation did not resolve the appeal so it moved to the adjudication stage, where a written inquiry was conducted.

[4] The inquiry began by inviting representations from the town on the issues in a Notice of Inquiry. The appellant was then invited to provide representations on the same issues as the town and on the non-confidential portions of the town's representations. Finally, the affected party whose email address the town withheld was contacted. The affected party consented to the withheld email address being disclosed.

[5] This order finds that aside from the withheld email address that must be disclosed by consent, the remaining records can be withheld under the exemption for solicitor-client records in section 12 of the *Act*. The town's exercise of discretion to withhold the records is upheld.

RECORDS:

[6] The information at issue in this appeal comprises an email address and four entire emails as follows:

- an email address in Record 2 withheld under section 14(1)
- Record 8 (withheld in full under sections 6(1)(b), 7(1) and 12)
- Record 15 (withheld in full under sections 6(1)(b), 7(1) and 12)
- Record 16 (withheld in part under section 14(1) and in full under sections 6(1)(b), 7(1) and 12). This email includes a letter attachment and another email exchange.
- Record 25 (withheld in part under section 14(1) and in full under sections 7(1) and 12). The email includes a letter attachment.

DISCUSSION:

Does the section 14 personal privacy exemption apply to any withheld information?

[7] The town withheld the email address in Record 2 on the basis that disclosing it would be an unreasonable invasion of the personal privacy of an affected party under section 14(1).

[8] Section 14(1) prohibits an institution from releasing personal information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

[9] Section 14(1)(a) applies where an affected party provides written consent to the disclosure of his or her personal information.

[10] During the inquiry, the affected party provided written consent to the email address being disclosed. Therefore, even if the email address in question is "personal information", section 14(1) does not apply to it, and the town must disclose it to the appellant.

[11] The town also claims that records 16 and 25 contain personal information and that this personal information is exempt from disclosure under section 14(1). However, because I find below that records 16 and 25 are exempt from disclosure under section 12, I do not need to consider whether section 14 applies to portions of those records.

Does the solicitor-client privilege exemption at section 12 apply to records 8, 15, 16 and 25?

[12] 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.

[13] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. 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 privilege, although not identical to the common law privilege, exists for similar reasons.

[14] The town must establish that one or both branches apply. In its representations, the city asserts both branches apply to records 8, 15, 16 and 25.

[15] Branch 1 encompasses two heads of privilege as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege.¹

[16] 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.² The rationale for this privilege is to ensure that a client may freely confide in his or her

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

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

lawyer on a legal matter.³ 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.⁴

Analysis and findings

[17] I have reviewed the emails and attachments withheld under section 12 of the *Act*. I am satisfied that the records comprise confidential communications between a town representative and legal counsel seeking or receiving legal advice.

[18] Record 15 is an email from a lawyer for the township to the town’s mayor, copied to the town’s consulting engineer. It is expressly stated to be “confidential and subject to solicitor-client privilege”. I am satisfied from my review of the email that it comprises legal advice as described in the town’s representations shared with the appellant.

[19] The remaining records are emails from the town’s consulting engineer to the town’s lawyer. They are confidential communications, only copied to the town’s Chief Administrative Officer, and in the case of Record 25, also to the town’s mayor. From my review of the emails, they clearly fall within the continuum of communications between lawyer and client described above. Record 8 provides a town lawyer with information to enable the lawyer to provide advice to the town at a closed meeting. Records 16 and 25 seek legal advice and include background information to enable the town’s lawyer to provide that advice.

[20] The town submits that privilege in the records was not waived. From my review of the records and representations I find no evidence to suggest that privilege in the records was waived by the town.

[21] Subject to my findings on the town’s exercise of discretion, the emails can be withheld under the first branch of section 12 of the *Act*. Therefore, I will not consider whether the second branch of section 12 applies to the emails.

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

[22] 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, I may determine whether the institution failed to do so.

[23] In addition, I may find that the institution erred in exercising its discretion where,

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

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

for example, it did so in bad faith or for an improper purpose; took into account irrelevant considerations; or failed to take into account relevant considerations.

[24] In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations. I may not substitute my own discretion for that of the institution.⁵

[25] I am satisfied that the town exercised its discretion. The town's representations set out the context in which it created the records at issue. The town says it has partially completed a study process that will determine the town's approach to water and wastewater services and that it is concerned to protect the integrity of this process, recognising that there are many parties interested in this process. The town also submits that it considered various stakeholders' interests as well as advice from town staff in determining how to respond to the request. The town's representations refer to its belief that its communications with the appellant addressed the underlying motivation for the appellant's request for records and subsequent appeal. It is in this context that the town exercised its discretion and decided not to disclose the records that would reveal legal advice.

[26] I am satisfied that the town did not exercise its discretion in bad faith or for an improper purpose, take into account irrelevant considerations, or fail to take into account relevant considerations. I uphold the town's exercise of discretion to rely on section 12 to withhold the records at issue.

[27] As I have found section 12 applies to the records and have upheld the town's exercise of its discretion, it is not necessary for me to consider further the application of the other exemptions the town also relied on to withhold the records at issue.

ORDER:

1. I order the town to disclose the withheld email address in Record 2 by **July 4, 2018** but not before **June 28, 2018**.
2. I uphold the town's exercise of discretion to withhold the remaining records at issue under section 12 of the *Act*.

Original Signed by: _____
Hamish Flanagan
Adjudicator

_____ May 28, 2018

⁵ Section 54(2).