

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3635-I

Appeal MA16-737

Durham Regional Police Services Board

July 12, 2018

Summary: A media requester sought access to emails (including attachments) regarding questions posed by a named reporter to police personnel. The police granted partial access to the records, and relied on section 12 (solicitor-client privilege) of the *Act* to deny access to the remaining records. In this order, the adjudicator upholds the police's application of section 12 to the records, but orders the police to exercise their discretion pursuant to that section.

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

Orders and Investigation Reports Considered: Orders PO-3836, PO-3811 and PO-3856.

BACKGROUND:

[1] The Durham Regional Police Services Board (the police) received a request, pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for access to the following:

I seek a copy of any emails, including attachments, regarding media questions and/or articles by [a named reporter] sent to or from (including electronic CCs) any of the following Durham Regional Police Service members: Chief [named], [a named police personnel], [another named police personnel].

The request is between the dates of July 19, 2016 to present.

[2] The police found records responsive to the request and issued a decision granting partial access to the records. Some records were disclosed in their entirety while the remaining records were withheld in their entirety. The police relied on section 12 of the *Act* (solicitor-client privilege) to deny access to the withheld records.

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

[4] As the appeal was not resolved at the mediation stage, it was moved to the adjudication stage, where an adjudicator conducts an inquiry under the *Act*.

[5] During the inquiry, the adjudicator initially assigned to this appeal sought and received representations from the police and the appellant. Pursuant to this office's *Code of Procedure* and *Practice Direction Number 7*, a non-confidential copy of the police's representations was shared with the appellant. This file was subsequently transferred to me to continue the adjudication of the appeal.

[6] In this order, I uphold the police's application of section 12 to the records at issue, but order them to exercise their discretion under that section.

RECORDS:

[7] The records at issue consist of a number of email chains.

ISSUES:

- A. Does the discretionary exemption at section 12 apply to the records at issue?
- B. Did the police exercise their discretion under section 12? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[8] The police claim that the solicitor-client privilege exemption in section 12 of the *Act* applies to the records.

[9] 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.

[10] Section 12 contains two branches. Branch 1 (“subject to solicitor-client privilege”) is based on the common law, and encompasses two heads of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons. Given my finding in this order, I will only address the first branch.

[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

[12] 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 During this “continuum of communications” between the solicitor and a client, privilege will attach.⁴

[13] Confidentiality is an essential component of the privilege. Therefore, the police must demonstrate that the communication was made in confidence, either expressly or by implication.⁵

[14] Under Branch 1, the actions by, or on behalf of, a party may constitute waiver of common law solicitor-client privilege. 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.⁶ Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.⁷ Waiver has been found to apply where, for example, the record is disclosed to another outside party; the communication is made to an opposing party in litigation; or the document records a communication made in open court.⁸

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

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.) (*Balabel*).

⁴ *Balabel*, *supra*.

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

⁶ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

⁷ 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.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.).

⁸ Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.); Orders MO-1514 and MO-2396-F; and Orders P-1551 and MO-2006-F.

Representations

[15] The police submit that both branches of section 12 applies to the records.

[16] With respect to Branch 1, the police assert that solicitor-client communication privilege applies. They rely on *Descôteaux v. Mierzwinski*⁹ for the principle that solicitor-client privilege attaches to all communications within the framework of the solicitor-client relationship. The police also rely on *Balabel v. Air India*¹⁰ for the principle that privilege will attach 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. The police further rely on Order MO-2622, where former Adjudicator Donald Hale found that records involving a series of direct communications passing between members of the police service and its legal counsel fall within the ambit of the solicitor-client communication privilege aspect of Branch 1.

[17] The police explain that the appellant raised a series of questions directed at the police chief concerning the decision-making of the police chief and police personnel relating to the secondary activity of a specific member of the police service. Due to the questions posed by the appellant, a named media staff engaged in confidential communications with the police chief and legal counsel. As such, the police assert that the records represents a "continuum of communications" surrounding questions from the appellant. They state:

The Records clearly constitute confidential written communications between the chief, legal counsel and police personnel. It is clear that there is a solicitor-client relationship between the police personnel and the lawyer involved and that the subject matter of the Records relates directly to seeking, formulating or giving of legal advice...

...

... However, it is clear from the Records that there were communications and meetings between counsel and her clients, as part of the continuum of passing information and keeping informed so that advice may be sought and given as required. It is trite that privilege will attach to such communications.

[18] Finally, the police assert that the privilege attached to the records has not been waived.

[19] In response to the police's representations, the appellant submits that solicitor-client privilege does not attach to the records. He relies on *Currie v. Symcor*¹¹ for the

⁹ *Descôteaux, supra.*

¹⁰ *Balabel, supra.*

¹¹ 2008 CanLII 37901 (ON SCDC).

principle that although solicitor-client privilege is very broad, the legal advice given must not be purely business advice. He submits the following:

The emails at issue were generated by a police force trying to strategize its response to questions and articles that potentially cast it in an unfavourable light. The correspondence was, in whole or at least in part, to devise a public relations strategy, and not to seek or provide legal advice. As such, any advice sought or given in this correspondence was of a business nature, and should not be considered privileged.

[20] In addition, the appellant submits that the “continuum of communications” is not constant and does not automatically render all communications between the client and the solicitor privileged. He relies on *Jacobson v. Atlas Copco Canada*¹² for the principle that “a message does not become privileged merely by sending a copy of it to a lawyer.” He points out that, in *Jacobson*, Justice Ellies found that the crux of whether the email in question was privileged or not fell on its author’s intent. Consequently, the appellant submits that the intention here was on charting the police through a potential public relations storm. He further states:

... A public institution such as a police service must not be allowed to skirt accountability by merely including a lawyer on its communications. The bar to obtain privilege, as Justice Ellies found, must be higher.

[21] Finally, the appellant relies on *Humberplex Developments Inc. v. TransCanada Pipelines Ltd.*¹³ for the principle that the records cannot be considered privileged if they were sent for review by both legal and non-legal personnel. Applying that principle, he submits that if the police chief sent an email to legal and non-legal personnel then it cannot be primarily for the purpose of seeking legal advice, and, therefore, it cannot be considered privileged.

[22] In reply, the police submit that it is clear on the face of the records that a continuum of communications existed between legal counsel and her clients, which is undoubtedly subject to privilege. In response to the appellant’s citation of *Jacobson*, the police submit that in this case the records were prepared by or for in-house counsel retained by the police regarding matters, which arose from the appellant’s questions and in response to which counsel provided advice. In response to the appellant’s citation of *Humberplex*, the police submit that Master Short relied on the American jurisprudence, not the Canadian jurisprudence. The police point out that, in *Jacobson*, the Ontario Superior Court disagreed with the excerpt relied upon by Master Short (which was cited by the appellant) and expressed that it should be restricted to the facts in *Humberplex*.

¹² 2015 ONSC 4 (CanLII) (*Jacobson*).

¹³ 2011 ONSC 4815 (CanLII) (*Humberplex*).

Analysis and findings

[23] Having carefully reviewed the records and the parties' representations (including case law cited by both parties), I am satisfied that the records qualify for exemption under section 12 of the *Act*.

[24] The records at issue form part of six email chains and therefore contain duplicate information. The majority of the recipients of these emails include police personnel and legal counsel while a few of these emails did not include legal counsel. Based on my review, I am satisfied that the records either contain a response from legal counsel, or they were created to keep both police personnel and legal counsel informed so that legal advice may be sought and provided as required. I find that these records contain confidential communications between legal counsel and her client regarding legal matters, and therefore fall within the ambit of the solicitor-client communication privilege in Branch 1 of section 12 of the *Act*.

[25] With respect to the emails which did not include legal counsel, past orders of this office have recognized that email exchanges between non-legal staff can form a part of the "continuum of communication" covered by solicitor-client privilege.¹⁴ This includes where disclosure would "indirectly reveal information exchanged between the [counsel] and [client] for the purpose of keeping both [...] informed so that legal advice may be sought and given as required,"¹⁵ and where emails between non-legal staff refer to the need for the communications to be sent to legal counsel.¹⁶

[26] I note the appellant characterizes the intent behind the email chains as the police "trying to strategize its response to questions and articles that potentially cast it in an unfavourable light." I disagree. Legal counsel was included in these email chains for the purpose of providing legal advice to her client with respect to a number of issues.

[27] Although the appellant relies on *Humberplex*, I agree with the Court in *Jacobson* that the excerpt cited by the appellant should be restricted to the facts in *Humberplex*.

[28] Based on my review of the records, I am satisfied that they contain information that would reveal the content of discussions between legal counsel and the police. I am also satisfied that disclosure of these records would indirectly reveal information exchanged between legal counsel and the police for the purpose of keeping both informed so that legal advice may be sought and given as required. Having regard to the content of these pages in the context of the records as a whole, I find that they form part of the "continuum of communication" which falls within Branch 1 of the solicitor-client privilege exemption at section 12 of the *Act*.

¹⁴ Orders P-1409, P-1663, and PO-2624.

¹⁵ Order MO-2789.

¹⁶ Order PO-2624.

[29] With respect to waiver, the police submit that all of the individuals copied within the original confidential email communications with legal counsel were in the employ of the police and involved in some manner with the issues contained in the email chains. As there is no evidence before me to suggest that waiver has occurred, I find that there has not been a waiver of solicitor-client privilege in relation to the records.

[30] I will now turn to the police's exercise of discretion in withholding the records that are covered by the section 12 exemption.

B: Did the police exercise their discretion under section 12? If so, should this office uphold the exercise of discretion?

[31] Where a record falls 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 it qualifies for exemption. The solicitor-client privilege exemption in section 12 is discretionary, which means the police could choose to disclose information, despite the fact that it may be withheld under the *Act*.

[32] In applying the exemption, the police were required to exercise their discretion. On appeal, the Commissioner may determine whether the police failed to do so. In addition, the Commissioner may find that the police erred in exercising their discretion where, they took into account irrelevant considerations; or where they failed to take into account relevant considerations. In either case, I may send the matter back to the police for an exercise of discretion based on proper considerations.¹⁷ However, I may not substitute my own discretion for that of the police.¹⁸

Relevant considerations

[33] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁹

- 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

¹⁷ Order MO-1573.

¹⁸ Section 43(2).

¹⁹ Orders P-344 and MO-1573.

- 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.

[34] As I upheld the police's decision to apply section 12 to the records at issue, I must review their exercise of discretion in choosing to withhold the records pursuant to that section.

[35] The appellant submits that the records concern a matter of significant public interest. He explains that the background to his request was the following:

A veteran Durham police officer co-owned an unlicensed marijuana dispensary that advertised illegal drug products on its website. The officer had received permission from the police service to have this secondary employment. Although police Chief [named] has said the force would never approve a side job that it knew was illegal, the service has never publicly explained why this was allowed to happen. Furthermore, the board, tasked with overseeing the police services, kept its discussion about the matter behind closed doors. While this controversy unfurled within the force, Durham police were cracking down on storefront medical marijuana dispensaries that popped up in its municipalities, and even publicly commented on why they conducted raids.

[36] The appellant argues:

The seemingly contradictory approach could leave a member of the public to question whether Durham police are fairly applying the same rules to everyone. The disclosure of the disputed records will help in increasing public confidence in the operation of Durham police.

...

The need to at least appear to be transparent and accountable is a compelling reason enough to release the records. The requester is a widely read news outlet, whose print editions are read by more than three million people weekly. The content of these records should be shared with those readers, allowing them to scrutinize the operations of a public police service. In doing so, disclosure would increase public confidence in the police service.

[37] He concludes by requesting that I send this matter back to the police for them to re-exercise their discretion.

[38] Although the police provided representations and reply representations, their representations simply state that they decided not to disclose the records.

[39] Given the absence of representations from the police on this issue and, hence, any evidence from the police on their exercise of discretion, I am unable to determine whether they properly exercised their discretion under section 12. Accordingly, I will order the police to exercise their discretion under that section.

ORDER:

1. I uphold the police's application of section 12 to the records at issue.
2. I order the police to exercise their discretion under section 12 in accordance with the analysis set out above and to advise the appellant and this office of the result of this exercise of discretion, in writing. The police are required to send the results of their exercise of discretion, and their explanation to the appellant, with a copy to this office no later than **August 24, 2018**.
3. I remain seized of this matter pending the resolution of the issue outlined in provision 2.

Original Signed by: _____

Lan An
Adjudicator

July 12, 2018
