

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3748

Appeal MA17-281

The Corporation of the City of London

March 26, 2019

Summary: The city received a request for access to all correspondence and files in relation to two identified properties since 2010. The city granted access, in part, and relied on the mandatory personal privacy exemption at section 14(1) and the discretionary solicitor-client privilege exemption at section 12 of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), along with the exclusion at section 52(3)2 to deny or exclude the remainder of the responsive records. During mediation, the appellant clarified that he is only interested in pursuing access to the responsive records withheld pursuant to section 12. In this order, the adjudicator upholds the city's decision, in part, that the records at issue are subject to the solicitor-client privilege at section 12. The adjudicator orders the city to disclose a portion of one record.

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: Order MO-3725.

BACKGROUND:

[1] The Corporation of the City of London (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all correspondence and files in relation to two identified properties since 2010.

[2] In its decision, the city granted partial access to the records. The city advised that pursuant to the mandatory personal privacy exemption at section 14(1) of the *Act*, 102 records were partially severed while one record was withheld in full. Pursuant to

solicitor-client privilege exemption at section 12 of the *Act*, the city partially severed two records and 26 records were withheld in full. Finally, pursuant to section 52(3)2 of the *Act*, two records were excluded from the *Act* because they were collected, prepared, maintained or used for issues relating to the employment of a person by the institution.

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

[4] During mediation, the appellant confirmed that he will not be seeking access to the records withheld or excluded pursuant to sections 14(1) and 52(3)2 of the *Act*. He continues to seek access to the records that were withheld pursuant to section 12 of the *Act*. The city provided an index of records to the appellant and to the mediator.

[5] As no further mediation was possible, this appeal was moved to the adjudication stage, where an adjudicator conducts an inquiry under the *Act*.

[6] During the inquiry, I sought and received representations from the city and the appellant. Pursuant to this office's *Code of Procedure* and *Practice Direction Number 7*, non-confidential copies of the parties' representation were shared.¹

[7] In this order, I uphold the city's decision, in part, that the records at issue are subject to the solicitor-client privilege at section 12. I order the city to disclose the information severed from Record 1.

RECORDS:

[8] The records at issue are emails between various city staff and the city solicitor pertaining to two identified properties.

[9] During the inquiry, the city provided an affidavit sworn by its Manager of Records and Information Services, which included descriptive details of each record at issue and whether Branch 1 or 2 (as described below) is claimed to be applicable.²

[10] The appellant clarified that he is only pursuing access to the following records from the index:

- Records 5, 6, 7, 13, 14, 15, 16, 24 and 27 of the records that were withheld in full; and
- Record 1 of the records that were partly severed.

¹ Some portions of the city's representations were withheld as they met the criteria for withholding representations found in this office's *Practice Direction Number 7: Sharing of representations*.

² These descriptive details of the records were not shared with the appellant as they met the criteria for withholding representations found in this office's *Practice Direction Number 7: Sharing of representations*.

[11] Accordingly, only the above-noted records are at issue in this appeal.

ISSUES:

- A. Does the discretionary exemption at section 12 apply to the records at issue?
- B. Did the city exercise its 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 at issue?

[12] The city claims that the solicitor-client privilege exemption applies to the records at issue.

[13] 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.

[14] 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.

Branch 1: common law privilege

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

Solicitor-client communication privilege

[16] 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.³ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.⁴

[17] 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.⁵ During this “continuum of communications” between the solicitor and a client, privilege will attach.⁶

[18] 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.⁷

Litigation privilege

[19] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a “zone of privacy” in which to investigate and prepare a case for trial.⁸ Litigation privilege protects a lawyer’s work product and covers material going beyond solicitor-client communications.⁹ It does not apply to records created outside of the “zone of privacy” intended to be protected by the litigation privilege, such as communications between opposing counsel.¹⁰ The litigation must be ongoing or reasonably contemplated.¹¹

Representations

[20] The city submits that the records at issue are subject to both Branches of section 12.

[21] More specifically, the city submits that litigation privilege applies to records 6, 7, 24, 27 and Record 1 while solicitor-client communication privilege applies to records 16, 15, 14, 13, and 5.

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

⁴ Orders PO-2441, MO-2166 and MO-1925.

⁵ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.) (*Balabel*).

⁶ *Balabel*, *supra*.

⁷ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁸ *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

⁹ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

¹⁰ *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

¹¹ Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

[22] The city submits that litigation privilege applies for the following reasons:

By virtue of the rights of appeal contained in the *Planning Act*, the appellant had the right to commence litigation against the City before the Ontario Municipal Board [OMB] on the issue of zoning as of **November 4, 2015** and on the issue of plan of subdivision as of **January 3, 2016**. The appellant advised City Staff of its intention to commence litigation before the [OMB] in December 2015/January 2016.

Records 6, 7, 24 and 27 were created after the rights of the appellant to appeal to the OMB had crystalized, and more importantly were created after the Appellant had advised the Corporation of its intention to appeal the planning application to the OMB.

At the time when each of these records were created, there was not just a mere apprehension of future litigation; rather, the city had been expressly informed by the appellant of its intention to pursue an appeal to the OMB. These records relate directly to legal advice sought and received within the context of that litigation.

...

Partially severed record 1 was created after the filing of the Appellant's appeal to the OMB. Record 1 pertains to legal advice sought in connection with that ongoing litigation. It is made for the purpose of obtaining legal advice, and expressly identifies the intention to seek legal advice, the nature of the legal advice sought, and the solicitor from whom the advice will be sought, and the timing and purpose of the same.

[23] The city also submits the following about solicitor-client communication privilege:

As identified in the Affidavit of [named affiant], records 5, 13, 14, 15 and 16 deal with the seeking of legal advice pertaining specifically to both potential litigation concerning the removal of trees from the property in February of 2015 as well as the processing of the Appellant's planning application, which had been underway for some time as of that date...

[24] In response, the appellant submits that his application relating to a proposed development of his property had not been appealed to the OMB at the time all the records at issue (excluding Record 1) were prepared. He relies on the finding in Order MO-1688 where Adjudicator Rosemary Muzzi found that litigation privilege does not apply where there is only a "vague and general apprehension of litigation." He also

relies on *RSJ Holdings Inc. v. City of London*¹² for the principle that a matter is not protected by litigation privilege simply because there is a statutory right of appeal by a person affected by the matter or because the matter may be subject to a court challenge.

[25] The appellant also submits that solicitor-client privilege does not apply to Record 1 as that record is a communication between city staff members. He points out that solicitor-client privilege only applies to communications between clients and lawyers.

[26] In addition, the appellant disagrees with the city that there was potential litigation because his appeal rights had "crystalized." He submits that the fact he had the right to appeal does not mean that an appeal was going to be filed and it certainly does not provide automatic litigation privilege. The appellant also submits that the city has not provided any details as to when or how it advised the city that he intended to pursue an appeal to the OMB.

[27] Finally, the appellant submits that he legally removed the trees on his property in 2015, and, as such, city staff has no reason to be seeking legal advice on the tree removal matter. Consequently, he submits that the city's position that emails about the tree removal are subject to solicitor-client privilege is dubious.

Analysis and findings

[28] For the reasons below, I find that the records at issue (excluding Record 1) are exempt under common law solicitor-client communication privilege. I acknowledge that the appellant provided lengthy arguments against litigation privilege, but do not find that it is necessary to discuss these arguments due to my finding under common law solicitor-client communication privilege.

[29] I am satisfied that the records (excluding Record 1) fall under common law solicitor-client communication privilege. I find that disclosure of these records would reveal 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 and aimed at keeping both informed so that advice can be sought and given.

[30] However, I do not find that Record 1 is exempt under solicitor-client privilege. This email is not a communication between a solicitor and their client. The details under the heading "Description" states that it is a communication between the city staff planner to the city ecologist (copying another city staff member). The details under the heading "Exemption" also does not describe a communication between a solicitor and their client. It also does not describe a communication representing a "continuum of

¹² 2005 CanLII 43895 (C.A.)

communication” between city employees and legal counsel. Although Record 1 was created after the appellant filed its appeal to the OMB, I do not find that it falls under litigation privilege because it is not a communication from or to counsel for the purpose of investigating and/or preparing for that appeal or indeed for any other litigation. Accordingly, I do not find that this record qualifies for exemption under section 12 of the *Act*.

[31] On the basis of the representations before me, I am satisfied that no waiver of privilege has occurred with respect to the records at issue in this appeal. I note that the appellant is not taking a position on the issue of loss of privilege. Accordingly, I find that the records (excluding Record 1) qualify for exemption under section 12, subject to my finding on the city’s exercise of discretion.

[32] As I have found that the information severed in Record 1 is not exempt under section 12 and the city has not claimed it is exempt under any other discretionary exemptions, I will order the city to disclose this record to the appellant.

[33] In his representations, the appellant raised an additional issue, the possible application of the public interest override at section 16 of the *Act*, which was not included in the Notice of Inquiry. However as the public interest override in section 16 does not apply to section 12, I will consider the appellant’s public interest arguments in my review of the city’s exercise of discretion.

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

[34] 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 city could choose to disclose information, despite the fact that it may be withheld under the *Act*.

[35] In applying the exemption, 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 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.¹³ However, I may not substitute my own discretion for that of the city.¹⁴

¹³ Order MO-1573.

¹⁴ Section 43(2).

Relevant considerations

[36] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁵

- 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
- 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.

[37] As I upheld the city's decision to apply section 12 to all the records at issue (excluding Record 1), I must review its exercise of discretion in choosing to withhold these records pursuant to that section.

¹⁵ Orders P-344 and MO-1573.

Representations

[38] The city submits that it properly exercised its discretion to withhold the records at issue. It submits that the following factors were considered:

- whether the information should be made public in the interests of transparency and accountability, weighed against the wording of the exemption and the interests that exemption seeks to protect;
- whether the appellant was seeking his own information;
- the nature of the information and to what extent it is significant or sensitive to the city, appellant and any affected person;
- whether disclosure would prejudice the city's legal interests or negatively affect its legal rights.

[39] The city also submits that it did not exercise its discretion in bad faith, for an improper purpose nor did it take into account irrelevant considerations. It submits:

There is no evidence of any bad faith on the part of the Head in the exercise of her discretion in processing this request for information or in this appeal.

The allegations of bad faith raised in the appellant's submissions appear to confuse the issue of alleged bad faith in the Head's exercise of discretion vs. alleged bad faith in the city's processing of the appellant's planning application. That the appellant is dissatisfied with the outcome of its land use planning application is not grounds for a finding of bad faith within the context of the Head's exercise of discretion under the *Act*. As noted in Order MO-3071, at paragraph 54, "the appellant's desire to determine whether legal action is warranted with regard to the City's practices and policies does not change the fact that the records are privileged."

...

... It follows that where there is no evidence of a deliberate attempt to harm, nor any inconsistency with the relevant context of the *Act*, and where there has been no evidence put forward by the Appellant of any harm in maintaining the litigation privilege and solicitor-client privilege over the records at issue, there should be no finding of bad faith.¹⁶ Where

¹⁶ Order MO-2049-F; Toronto (City), 2006 CanLII 50702.

such allegations amount to no more than mere speculation at best, as they do in this case, there should be no finding of bad faith.¹⁷

[40] In addition, the city submits the following:

Given the nature of the information contained in the records, including the fact that the subject matter of the records is at issue before the [OMB] in active litigation, the interests that the section 12 exemptions seek to protect outweigh the appellant's right to access because there is no sympathetic or compelling need for the appellant to receive the information, other than to further its own position in the ongoing litigation before the [OMB].

[41] Finally, the city submits that the appellant in both this proceeding and the OMB is a corporation, and not a person for whom personal information is at issue.

[42] The appellant submits that the city failed to take into account relevant considerations and acted improperly and/or in bad faith. He submits that the city failed to consider that he is seeking his own personal information as the records contain his own personal information regarding the development application. The appellant also submits that the purposes of the *Act* is to provide him with a right of access to information under the control of the city, and to provide him with a right of access to his personal information. As such, he submits that there is no reason why he should be deprived of obtaining this information. He finally submits that disclosure will increase public confidence in the operation of the city as individuals who file applications for development approvals should be confident that their applications will be dealt with in a fair, transparent, and open manner. The appellant submits that the city's conduct in preparing for litigation during the application process, before an appeal is even filed, completely undermines public confidence in what is supposed to be a collaborative, public, open process.

[43] In addition, the appellant submits that in failing to exercise its discretion under section 12 the city was acting at the very least improperly and possibly in bad faith. He states that the city did not support his removal of the trees on his property, although it was legal for him to remove them. As such, he alleges that the city has made his development extremely difficult, effectively using the *Planning Act* process to punish him for the tree removal. As well, he submits that the city has taken steps through Council's recommendation to the OMB on the appeal filed by him to create an environmentally protected area on the property that improperly includes the acres where the trees were removed. The appellant also submits:

¹⁷ Order MO-2945-I; Aurora (Town) (Re), [2013] O.I.P.c. No. 226, at paragraphs 76 and at 111-116.

In light of the history of this matter, the emails in question, which were prepared prior to the litigation before the [OMB], suggest that the city was in fact building a case against the applicant's development during the planning application process, which is meant to be a public, transparent, open and co-operative process.

[44] Finally, the appellant submits that there is a compelling public interest in the disclosure of the records. He states:

In the context of the development process, transparency starts with municipal staff and their relationship and communications with owners and citizens during the application process. Setting aside the history and circumstances of this case, there is an overriding public interest in preserving the public's confidence in the planning application process by disclosing these records.

Analysis and findings

[45] I have considered the circumstances of this appeal and the parties' representations. The appellant argues that the city acted in bad faith in light of the city's actions once he removed the trees on his property. However, there is no evidence that the city, in exercising its discretion, acted in bad faith. It appears that the appellant is confusing whether the city exercised its discretion in bad faith with its allegation that the city processed its planning application in bad faith.

[46] The appellant also argues that the city should have taken into consideration that he is requesting his own personal information. The city argues that the appellant is a corporation, and, as such, it does not have any personal information. In response, the appellant argues that the records could contain allegations of wrongdoing in relation to the removal of his trees, which would qualify as the appellant's own personal information. I do not have to make a finding about whether the records contain the appellant's personal information. However, I accept that the appellant has an interest in the records relating to his corporation. I find that this factor is one of many factors the city may take into consideration when it is exercising its discretion.

[47] Finally, the appellant argues that there is a compelling public interest in the disclosure of the records. He argues that there is an overriding public interest in preserving the public's confidence in the planning process by disclosing these records. I note that the city took transparency and accountability into consideration when it considered whether the records at issue should be made public.

[48] In sum, I find the city considered whether the information should be made public in the interests of transparency and accountability, weighted against the wording of the exemption and the interests that exemption seeks to protect; whether the appellant was seeking his own information; the nature of the information and to what extent it is significant or sensitive to the city, appellant and any affected person; and whether

disclosure would prejudice the city's legal interests or negatively affect its legal rights. I am satisfied that the city has not erred in its exercise of discretion with respect to its application of section 12 of the *Act*. I am also satisfied that it did not exercise its discretion in bad faith or for an improper purpose. Accordingly, I find that the city took relevant factors into account and I uphold its exercise of discretion on this appeal.

ORDER:

1. I uphold the city's decision, in part, that the records at issue are subject to the solicitor-client privilege at section 12.
2. I order the city to disclose Record 1 to the appellant by **May 3, 2019** but not before **April 29, 2019**.
3. I reserve the right to require the city to provide me with a copy of the record disclosed to the appellant.

Original Signed By: _____

Lan An
Adjudicator

_____ March 26, 2019