

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-3992-F

Appeal MA18-179-2

The Corporation of the City of North Bay

December 22, 2020

Summary: This final order involves a review of whether the remaining records are exempt under section 12 (solicitor-client privilege) of the *Act*. In Interim Order MO-3876-I, the adjudicator upheld the city's decision, in part, that the records in the first two categories of records are subject to the solicitor-client privilege at section 12. She ordered the city to disclose the non-exempt records in these two categories. In this final order, the adjudicator upholds the city's decision that the remaining records are subject to solicitor-client privilege.

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

Orders Considered: Orders MO-1276 and MO-2231.

Cases Considered: *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319 and *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

BACKGROUND:

[1] The Corporation of the City of North Bay (the city) charged the appellant with an offence under the *Conservation Authorities Act*.¹

¹ R.S.O. 1990, c. C.27.

[2] Subsequently, the appellant submitted a request to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all emails between the appellant and city staff and all emails from city staff, which mention the appellant's name, or his specified address.

[3] The city granted partial access to the responsive records, and relied on the exemptions at sections 12 (solicitor-client privilege) and 14(1) (personal privacy) of the *Act* to deny access to the withheld information.

[4] The appellant appealed the city's access decision to this office.

[5] In Interim Order MO-3876-I, I noted that the records at issue were emails, which fell into 10 categories. I found that the first two categories were subject to the solicitor-client privilege at section 12, in part. I ordered the city to disclose the non-exempt records in these two categories. I deferred my determination of the application of section 12 to the remaining eight categories pending further information from the city.

[6] In compliance with the interim order, the city submitted two affidavits, providing additional information about the remaining eight categories of records.

[7] I invited and received the appellant's representations in response to the city's affidavits. His representations were shared with the city, who provided a response. I then provided the appellant with an opportunity to respond to the city's response to his representations but he declined to provide further representations.

[8] In this final order, I uphold the city's decision that the records in the remaining eight categories are subject to solicitor-client privilege and are exempt from disclosure under section 12.

RECORDS

[9] The remaining records at issue are emails, which fall into eight categories:

- Emails between the Court Clerk/Assistant to the Assistant City Solicitor and various city staff, various NBMCA² staff, named individuals (positions unknown), Assistant City Solicitor, a named lawyer (non-city staff), a named law clerk (non-city staff), and the City Solicitor.
- Emails between the Assistant to the City Solicitor and various city staff, various NBMCA staff, the Assistant City Solicitor, and the City Solicitor.

² North Bay Mattawa Conservation Authority.

- Emails between the Assistant to the City Clerk and various city staff, various insurer staff and the police chief.
- Emails between the Chief Plan Examiner and various city staff, various insurer staff, various NBMCA staff, the Assistant City Solicitor, and the City Solicitor.
- Email sent by a named insurance adjuster to the By-law Enforcement Officer.
- Emails categorized as "Financial Services" between various city staff and various city staff, various insurer staff, the City Solicitor, a named lawyer (non-city staff), and the police chief.
- Email sent from the Zoning Administrator to the Manager of Planning Services.
- Email sent from the Manager of Planning Services to the Zoning Administrator.

[10] During my initial inquiry, I asked the city to provide me with a sworn affidavit in support of its reliance on the exemption at section 12 and the exclusion at section 52(2.1).³ In response, the city provided a "Document Listings", which included the type of document, the date, and the names of individuals appearing in the "From" and "To" fields of the email strings. It did not provide a sworn affidavit nor did it provide the content of the subject matter for each record. It also did not identify many of the people included in the communications, or explain whether they are city staff or third parties.

[11] In compliance with the interim order, the city then provided two sworn affidavits in which it attached as exhibits "indices" containing additional information about the content of the outstanding categories of records. As well, in his affidavit, the City Solicitor identified all the people included in the communications and the position they held either at the city or with third parties.

[12] For clarity, the affidavit of the Assistant City Solicitor provided additional information covering the first category of emails while the affidavit of the City Solicitor provided additional information covering the remaining seven categories of emails in the above list.

³ During the inquiry, the city confirmed that it was no longer relying on the exclusion at section 52(2.1) as all the NBMCA proceedings have been completed. The appellant also confirmed that the prosecution has resolved. As such, I removed this issue from the appeal.

ISSUES:

- A. Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the information at issue?
- B. Did the city exercise its discretion under section 38(a)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A: Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the information at issue?

[13] In Interim Order MO-3876-I, I found that the records contain the personal information of the appellant and other individuals. Accordingly, I considered his access to the first two categories of emails under Part II of the *Act*. I will also consider his access to the remaining eight categories of emails under Part II as well as I find these records would also contain the appellant's personal information.

[14] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[15] Section 38(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, **12**, 13 or 15 would apply to the disclosure of that personal information.

[16] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.⁴

[17] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[18] In this case, the city relies on section 38(a) in conjunction with section 12.

⁴ Order M-352.

[19] 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.

[20] Section 12 consists of two branches: branch 1 (“subject to solicitor-client privilege”) is based on the common law, while branch 2 (“prepared by or for counsel employed or retained by an institution...”) is a statutory privilege. Branch 2 of section 12 is a statutory exemption that is available in the context of counsel employed by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

[21] Given my finding in this order, I will only address branch 2.

Branch 2: statutory privilege

[22] 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.”

Statutory solicitor-client communication privilege

[23] 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.⁵ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.⁶ 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.⁷

[24] 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.⁸ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.⁹

⁵ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁶ Orders PO-2441, MO-2166 and MO-1925.

⁷ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

⁸ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁹ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

Statutory litigation privilege

[25] This privilege applies to records prepared by or for counsel employed or retained by an institution “in contemplation of or for use in litigation.” 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

[26] The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.¹¹

[27] In contrast to the common law litigation privilege, termination of litigation does not end the statutory litigation privilege in section 12.¹²

Representations

[28] As stated earlier, the city submitted two affidavits, one sworn by its Assistant City Solicitor while the other sworn by its City Solicitor.

[29] In her affidavit, the Assistant City Solicitor explained that she acted as counsel for the NBMCA, prosecuting the appellant in the Ontario Court of Justice for the offence of undertaking/permitting development in a river or stream valley with depressional features. She also responded to the appellant’s appeal to a Provincial Judge at the Ontario Court of Justice until the matter was transferred to new counsel at a named law firm. Subsequent to the transfer of the file to new counsel, she continued to have some minor involvement in assisting new counsel and the NBMCA.

[30] The Assistant City Solicitor also explained the situation with her assistants. As her regular assistant was on sick leave then on maternity leave, her position was covered by another employee, who is ordinarily the Court Clerk Monitor. This employee commenced working in the Legal Department as of September 18, 2017, first in training with the Assistant City Solicitor’s regular assistant and, as of October 2, 2017, on her own as Assistant to the Assistant City Solicitor.

[31] The Assistant City Solicitor advised that she does not believe the first nine emails in the first category are subject to litigation privilege.¹³ These emails were sent and received during the time that the named employee was still in her position of Court Clerk Monitor.

¹⁰ See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.) [*Big Canoe*]; *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC) [*Goodis*].

¹¹ *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

¹² *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

¹³ I understand that the city has disclosed these nine emails to the appellant.

[32] However, the Assistant City Solicitor advised that she believes that the remainder of the emails (emails set out at items 10 through 30) in the first category are subject to litigation privilege. These emails were sent and received during the time that the named employee was working in her capacity as Assistant to the Assistant City Solicitor. She explained that these emails were sent in the context of the ongoing litigation in the Provincial Offences Court between the appellant and the NBMCA.

[33] In his affidavit, the City Solicitor explains that the records at issue in all eight categories are due to three separate matters involving the appellant, namely:

1. the appellant and his partner's lawsuit against the North Bay Police Services and specific police officers;
2. the prosecution of the appellant in relation to an offence under the *Conservation Authorities Act (CAA)*; and
3. a potential litigation matter between the city and the appellant.

[34] The City Solicitor advises that the lawsuit against the North Bay Police Services has not been withdrawn and a trial date has not been scheduled. He attached indices to his affidavit, which listed the emails, email threads and attachments pertaining to this lawsuit. The City Solicitor advises that he is relying on solicitor-client communication privilege and/or litigation privilege to withhold these communications.

[35] With respect to the prosecution under the *CAA*, the City Solicitor advises that the appellant was prosecuted in the Ontario Court of Justice with the offence of undertaking/permitting development in a river or stream valley with depressional features as prohibited by Ontario Regulation 177/06, section 2(1)(b), contrary to the *CAA*. He also attached indices to his affidavit, which listed the emails, email threads and attachments pertaining to this prosecution. The City Solicitor advises that the city is relying on solicitor-client communication privilege and/or litigation privilege to withhold these communications.

[36] With respect to the possible litigation matter between the city and the appellant, the City Solicitor advises that the appellant threatened to seek indemnification from it if the release of the NBMCA's report harmed his property value. Specifically, the appellant's counsel wrote:

...

Thus, if the NBMCA now alleges that the garage is located too close to the ravine edge, it is an error and omission by the [city's] inspectors.

Should the NBMCA prepare a report setting out negative inferences about [the appellant's] property, which inferences harm the property value, the

[appellant and his partner] will have no alternative but to seek indemnification from the [city] based on the negligence of its inspectors.

[37] The City Solicitor advises that, as such, given that the appellant was contemplating bringing a lawsuit against the city, he notified the city's adjusters, who in turn notified the International Program Group's Senior Claims Examiner to ensure that the city's interests would be protected.

[38] The City Solicitor also attached to his affidavit indices, which listed the emails, email threads and attachments pertaining to the possible litigation between the city and the appellant.

[39] In response, the appellant submits that litigation privilege over the emails pertaining to the prosecution would have expired when the prosecution ended. He submits that his access request does not and cannot reopen that litigation.

[40] In response to the appellant's representations, the city submits that when it received the original request, the emails, email threads and attachments relating to the prosecution of the appellant under the *CAA* was ongoing, therefore branch 1 of the section 12 exemption was claimed by the City Solicitor. However, the city submits that if the appellant is now seeking to rely on the fact that the litigation has since ended then the City Solicitor will also rely on and claim branch 2 in order to protect privilege over those communications.

Analysis and findings

[41] For the reasons below, I find that the city has demonstrated that the remaining eight categories of emails qualify for exemption under section 12 of the *Act*.

[42] With respect to the remaining eight categories of emails, I find that they can be grouped into three groups: (1) relating to the prosecution of an offence under the *CAA*; (2) relating to the appellant's lawsuit against the North Bay Police Services (the police); and (3) relating to the appellant's potential lawsuit against the city.

Statutory litigation privilege

Emails relating to the CAA prosecution

[43] As stated above, the city relies on the statutory litigation privilege to protect the emails contained in the first group of emails, that is, those relating to a prosecution of an offence under the *CAA*.

[44] Litigation privilege protects records created for the dominant purpose of existing

or reasonably contemplated litigation.

[45] In *Blank v. Canada (Minister of Justice)*,¹⁴ the Supreme Court of Canada states the following about litigation privilege:

Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.¹⁵

[46] In this case, it is clear that the group of emails received or sent from the Assistant City Solicitor, who is one of the city's counsel, or her assistant pertained to the Assistant City Solicitor's prosecution of an offence under the *CAA*. Although new counsel were not in-house city counsel, the city retained them to handle the continuation of the appellant's appeal on this matter to the Ontario Court of Justice. Some of these emails are emails received or sent from new counsel or new counsel's support staff to the Assistant City Solicitor's Assistant and/or the Assistant City Solicitor. In my view, the dominant purpose of these emails is to deal with the existing litigation with the appellant. I am also satisfied, based on my review of the parties to the emails, that the communications took place within the requisite zone of privacy. Accordingly, they are exempt under the statutory litigation privilege.

[47] Also, in group one are three email threads in which an email from the Assistant City Solicitor to a number of city staff and NBMCA staff was part of the thread.¹⁶ The first of these email threads ends with an email from the City Engineer to the Manager of Planning Services and the Assistant City Solicitor. The second email thread ends with an email from the City Clerk to the Chief Plan Examiner while the last thread ends with an email thread exchange between the Chief Plan Examiner and the City Clerk. In my view, city staff created these email threads to discuss issues relating to the prosecution, and I find that they were created for the dominant purpose of existing litigation. I am also satisfied, based on my review of the parties to the emails, that the communications took place within the requisite zone of privacy. Accordingly, they are also exempt under the statutory litigation privilege.

¹⁴ [2006] 2 SCR 319 [*Blank*].

¹⁵ *Blank*, cited above, at para. 27.

¹⁶ These email threads can be found in Appendices "F" and "O" of Exhibit "C" to the City Solicitor's affidavit.

[48] Although all the proceedings relating to that prosecution and the appeal has ended, the statutory litigation privilege over those emails and email threads does not end with the termination of the litigation.¹⁷

[49] With respect to the remaining emails relating to the prosecution of an offence under the *CAA*, I find that they are exempt under the statutory litigation privilege for the following reasons. All of these emails relate to the prosecution against the appellant. The City Solicitor, who is also one of the city's counsel, sent or received some of these emails for the dominant purpose of litigation. The City Solicitor's two assistants also sent or received a majority of these emails on behalf of the City Solicitor for use in the litigation. As such, I am satisfied, based on my review of the parties to the emails, that the communications took place within the requisite zone of privacy. Accordingly, they are also exempt under the statutory litigation privilege.

Emails relating to the appellant's lawsuit against the police and his potential lawsuit against the city

[50] First, I am satisfied, based on the evidence the city provided, that the appellant's potential lawsuit against the city was reasonably contemplated at the time that these email records were created.

[51] With respect to the emails relating to the potential litigation between the city and the appellant and the appellant's lawsuit against the police, I am satisfied that the groups of emails received or sent from the City Solicitor or his assistant were prepared in contemplation of the potential litigation or in defending the lawsuit against the police. I am also satisfied that the other emails between various city staff, city staff and city's adjusters, or city staff and the police chief/police officers are about these two (reasonably contemplated or existing) litigation matters. As such, I am satisfied, based on my review of the parties to the emails, that the communications took place within the requisite zone of privacy. Accordingly, they are also exempt under the statutory litigation privilege.

Statutory solicitor-client communication privilege

[52] As stated above, the City Solicitor also relies on branch 2 of the section 12 privilege, specifically the statutory solicitor-client communication privilege, to protect the emails or email threads in the remaining seven categories. As I have found that the majority of these emails or email threads are exempt under the statutory litigation privilege, there is no need to determine whether they are also exempt under the statutory communication privilege. However, there are seven email threads and one email in which only the solicitor-client communication privilege is claimed. As such, I will

¹⁷ *Big Canoe*, cited above.

consider whether these email threads and email are exempt under solicitor-client communication privilege.

[53] On my review of the indices containing these email threads and email, I find that the City Solicitor is a party to the communications in each of the email threads and the email and that the other parties are all city employees. As such, I am satisfied that these email threads and email either contain a response from the City Solicitor for legal advice, or they were created so that legal advice may be sought and provided as required. I find that these email threads and email contain confidential communications between legal counsel and his client regarding the three legal matters involving the appellant (and his partner), and therefore fall within the ambit of the solicitor-client communication privilege in Branch 2 of section 12 of the *Act*.

[54] With respect to waiver, there is no evidence before me to suggest that the city has waived its privilege. Accordingly, I find that there has not been a waiver of solicitor-client privilege in relation to the exempt emails and email threads.

[55] I will now turn to the city's exercise of discretion in withholding the emails and email threads that are exempt under the statutory litigation privilege and the solicitor-client communication privilege.

B: Did the city exercise its discretion under section 38(a)? If so, should this office uphold the exercise of discretion?

[56] The section 38(a) 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.

[57] 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.

[58] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁸ This office may not, however,

¹⁸ Order MO-1573.

substitute its own discretion for that of the institution.¹⁹

[59] The city submits that it properly exercised its discretion. It submits that it considered all of the relevant and, in particular, found that the wording of the exemption and the protection of the litigation privilege and solicitor-client communication privilege were most compelling. The city also submits that it was acting and continues to act in good faith. It finally submits that it took into account all relevant factors and did not take into account any irrelevant factors.

[60] Based on my review of the parties' representations and the exempt emails, I find that the city properly exercised its discretion. I find that the city took into account the above-noted two factors. It also appears that the city took into consideration the privacy rights of the appellant and other identifiable individuals. I am satisfied that the city did not act in bad faith or for an improper purpose. I am also satisfied from my review of the city's representations and affidavits that the city took into account the fact that the records contain the personal information of the appellant. Accordingly, I uphold the city's exercise of discretion in deciding to withhold the exempt records pursuant to the section 38(a) in conjunction with section 12.

ORDER:

I uphold the city's decision that section 38(a), read with section 12, applies to exempt the emails in the remaining eight categories.

Original Signed By: _____
Lan An
Adjudicator

December 22, 2020 _____

¹⁹ Section 43(2).