

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER MO-4270-I

Appeal MA20-00171

City of Stratford

November 9, 2022

**Summary:** The City of Stratford (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a planning report prepared by a consultant. The city denied access to the report, claiming the application of the solicitor-client privilege exemption in section 12 of the *Act*.

In this interim order, the adjudicator finds that the record is exempt by reason of section 12. However, she does not uphold the city's exercise of discretion under section 12 and orders it to re-exercise its discretion.

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

### OVERVIEW:

[1] This order concerns whether a draft planning report provided to the city by the consultant who prepared it is exempt as being solicitor-client-privileged. The consultant specializes in preparing urban planning reports.

[2] The City of Stratford (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for the:

[name of consultant's] Planning Justification Report [for a specified address] Nov. 2019.

[3] The city issued a decision, denying access to the record pursuant to section 12 (solicitor-client privilege) of the *Act*.

[4] The requester, now the appellant, appealed the city's decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was assigned to attempt a resolution of this appeal.

[5] As mediation did not resolve this appeal, the appellant requested that the file move to adjudication, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry, and sought representations from the parties, which were shared in accordance with the IPC's *Practice Direction 7*.

[6] In this interim order, I find that the record is exempt by reason of section 12. However, I do not uphold the city's exercise of discretion under section 12 and order it to re-exercise its discretion.

## **RECORD:**

[7] The record at issue is the draft Planning Justification Report - November 2019, prepared by a consultant (the report or the draft report). The city has not provided the IPC with a copy of the report.

## **ISSUES:**

- A. Does the discretionary solicitor-client privilege exemption at section 12 apply to the report?
- B. Did the city exercise its discretion under section 12? If so, should this IPC uphold the exercise of discretion?

## **DISCUSSION**

### **Issue A: Does the discretionary solicitor-client privilege exemption at section 12 apply to the report?**

[8] At issue in this appeal is a draft Planning Justification Report dated November 2019. Although the city withholds the report, it has referred me to two other drafts, and the final report, all dated January 2020, that it published on its website. According to the city, these other reports are not the same as the report at issue in this appeal.

[9] Also, according to the city, these other reports were relied upon by the city to support the annexation of land (the land) and made available to the public by posting them on the city's website.

[10] The appellant's position is that as an adjoining landowner he is directly affected by the city Council's decision to annex the land on February 4, 2020. Prior to Council's decision, the appellant retained a professional land use consultant to try to collect information and data in respect to the annexation. The appellant states that his consultant, through inquiries of the City of Stratford and through inquiries of "Invest Stratford," learned that one of the background planning or justification reports used by the city in support of its decision to annex the land was the report at issue in this appeal.

[11] The city denies that the report at issue in this appeal was provided to Council or used by Council in its decision-making process and it also claims that it is exempt from disclosure because of the exemption for solicitor-client privilege at section 12 of the *Act*.

[12] In this order, I will determine whether the draft report is exempt by reason of section 12, which reads:

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 ("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. As explained below, the city relies on the branch 2 solicitor-client communication privilege.

### ***Representations***

[14] During mediation before the IPC, the appellant's counsel provided a letter setting out some context about the report. When I invited the city to make representations, I also included and invited the city to make representations about the context in the counsel's letter. The appellant's counsel explained the context this way:

...The annexation of lands by the City of Stratford to acquire additional industrial lands and in particular lands for a proposed significant industrial development known as the [name] is a matter of continuing controversy in the community. It is a proposed development that significantly and adversely affects my client as an adjacent landowner...

The requested report ... is clearly a document that staff and Council of the city were utilizing or relying upon in its decision-making process in moving forward with its decision to annex lands and request the [Minister's Zoning Order] (a request made without any public input or process) ...

[The] report was clearly prepared as planning information utilized by staff and Council for considering the annexation of lands. It would have no nexus to and have no purpose in providing any legal advice by the city's lawyer to its Council. Simply stated, this was, at best, an internal planning exercise, not a legal issue.

...It is not an appropriate technique nor an appropriate method of protection for such report to come through the office of the City Solicitor and thereby attempt to gain some type of protection under the provisions of the *Act*.

...Portions of the requested ... report ... were provided to [the appellant's] consultant. Further, in early 2020, the City of Stratford released a question and answers document relating to the annexation proposal. Under item 5, which was a request for the map of 242 acres of vacant land, the answer from the city was "Please see the planning justification report." However, the only publicly available report was the "draft Planning Justification Report" ...which contained no such mapping...

Once the city decided to disclose some of the documents, the city waived privilege on the entirety of the ...report.

[15] In response to the Notice of Inquiry and the appellant's counsel's letter, the city states that the report at issue in the present appeal was:

...prepared by [the consultant] ...for legal counsel retained by the city for the purpose of giving legal advice to the city. The report is a written communication and was expressly communicated in a confidential manner to the city's legal counsel and was relied upon by legal counsel to formulate and give legal advice to the city. There has been no express or implied waiver of privilege over the record on behalf of the city.

[16] The city states that the report at issue in this appeal is not the report referenced in the counsel's letter. It explains that the report referred to in the counsel's letter was used by the city in support of the annexation of land from the Township of Perth (the annexation report), the final version and drafts of which were made public (and which are referred to above).

[17] In response, the appellant again states that it is not appropriate for the city to shield reports that are intended to be used or relied upon by Council by simply cloaking those reports through the technique of addressing a document to the City Solicitor.

[18] The appellant also submits that in the absence of providing the IPC with a copy of the report, the city should have disclosed the following information to the IPC to demonstrate that the report was communicated in a confidential manner to the city's legal counsel and was relied upon by legal counsel to formulate and give legal advice to

the city:

- who the report was delivered to (and sent from), and
- the purpose that the report was to be used for that showed some evidence of legal advice versus planning advice.

[19] In reply, the city states that the record was prepared by the consultant, expressly communicated in a confidential manner to the city's legal counsel, and relied upon by legal counsel for the purpose of giving legal advice to the city. The city says that there has been no express or implied waiver of privilege over the record on behalf of the city.

[20] The city further states that the record was not used by the city as part of the municipal boundary adjustment process, was not made available publicly, nor was it provided to City Council. It states that some graphics/images prepared by the consultant that were factual in nature only were utilized during the municipal boundary adjustment process, however the report was not so utilized. It states that the report references figures, but it does not contain graphics, charts, figures or maps.

[21] In sur-reply, the appellant pointed out that in its representations, the city stated that the report was prepared for the city's legal counsel whereas in its reply representations it stated that it was given to counsel.

[22] I provided a copy of the appellant's sur-reply representations to the city, along with a copy of the IPC's *Protocol for appeals involving solicitor-client privilege claims where the institution does not provide the records at issue to the IPC* (the *Protocol*).<sup>1</sup> I asked it to provide representations in response to the appellant's sur-reply representations and to provide an affidavit in support of its section 12 claim of privilege, as it had offered to in its reply representations. In providing its affidavit, I asked the city to take into account the appellant's sur-reply representations and the IPC's *Protocol*.

[23] The city provided an affidavit (most of which was confidential), as well as representations as requested. In its representations, the city states that the record at issue was:

...prepared by [the consultant] and provided directly to legal counsel retained by the city, a copy of which was never provided to the city, and relied upon by legal counsel for the purpose of giving legal advice to the city as it related to the costs of servicing the annexed lands should such annexation proceed and meets the applicable test for branch 2, under section 12 of the *Act*. The draft report was provided directly to Stratford's City Solicitor.

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<sup>1</sup> <https://www.ipc.on.ca/wp-content/uploads/2020/06/2020-06-19-ipc-protocol-cases-involving-privilege-claims.pdf>

The draft report was never provided to City Council for consideration, it had no effect on the decision making or consideration process of Council of the City as it related to the Proposed Annexation Lands and whether or not to proceed with the proposed boundary adjustment through the annexation process as set out in, and prescribed by, the *Municipal Act, 2001*...

There has been no express or implied waiver of privilege over the record on behalf of the City.

[24] In response, the appellant submits that the city has repeatedly changed its description of the how the report was obtained and the purpose for which it was used. He states:

While both the city's January 15, 2021 letter to the IPC mediator and its August 10, 2021 response to the Notice of Inquiry stated that the [draft report] "was prepared for legal counsel retained by the City", its October 18, 2021 reply instead states the [draft report] was "given to legal counsel retained by the City and relied upon by legal counsel for the purpose of giving legal advice to the City."

This latter statement is repeated in the August 19, 2022 sur-reply by the City, with a notable addition, that being that the... Report "was relied upon by legal counsel for the purpose of giving legal advice to the City as it related to the costs of servicing the annexed lands should such annexation proceed."

### ***Findings***

[25] The record at issue is a draft Planning Justification Report, dated November 2019. The city relies on section 12, which for ease of reference I set out again:

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.

[26] Specifically, the city claims that the report is subject to solicitor-client communication privilege (branch 2) under section 12 of the *Act*. In other words, it argues that the report was provided to its counsel for use in giving legal advice.

[27] 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 and common law privileges, although not identical, exist for similar reasons.

[28] At common law, solicitor-client communication privilege covers records prepared for use in giving legal advice. 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.<sup>2</sup> The privilege may also apply to the lawyer's working papers directly related to seeking, formulating or giving legal advice.<sup>3</sup>

[29] Confidentiality is an essential component of the privilege. Therefore, to establish the exemption the institution must demonstrate that the communication was made in confidence, either expressly or by implication.<sup>4</sup>

[30] Based on my review of the city's representations, it is clear that the City's Solicitor is an external counsel retained by the city. The city uses the terms "City Solicitor" and "external counsel" interchangeably in its representations.

[31] Relying on the city's confidential and non-confidential representations and affidavit, along with its access decision letter, and considering the appellant's representations, I find that section 12 applies.

[32] The city's evidence is clear that the report at issue was provided to the City's Solicitor in confidence by the consultant in order for the City Solicitor to provide legal advice on it to city staff. I find that the branch 2 section 12 statutory solicitor-client communication privilege applies as the record was prepared by or for counsel employed or retained by city for use in giving legal advice.

[33] The appellant is concerned about discrepancies in the city's evidence; however, when I consider that the City Solicitor who was retained by the city and the external counsel referred to by the city are the same person, these discrepancies are resolved. The other discrepancies noted by the appellant are of no consequence given the city's confidential and non-confidential representations, which I accept.

[34] I have also considered but rejected that the statutory solicitor-client communication privilege over the draft report was waived by disclosing it to third parties or to City Council.

[35] Generally, disclosure to outsiders of privileged information is a waiver of privilege.<sup>5</sup>

[36] First of all, I accept the city's evidence that the draft report at issue in this appeal was never provided to the Stratford City Council. However, even if it were, this

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<sup>2</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

<sup>3</sup> *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

<sup>4</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

<sup>5</sup> J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

would not be waiver of privilege, given that it is council that governs the city.

[37] I also have no evidence before me that the privilege in the record has been waived through disclosure to third parties outside of the city. Based on my review of the entirety of the parties' extensive representations on the record and its relation to the other publicly available reports, I find that there is insufficient evidence for me to find that the actual information in the report has been provided to anyone outside of the city.

[38] I find that branch 2 solicitor-client communication privilege applies and the draft report is exempt under section 12. I will next address whether the city properly exercised its discretion under section 12.

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

[39] 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.

[40] In addition, I 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.

[41] In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>6</sup> I may not, however, substitute my own discretion for that of the institution.<sup>7</sup>

[42] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>8</sup>

- 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

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<sup>6</sup> Order MO-1573.

<sup>7</sup> Section 43(2).

<sup>8</sup> Orders P-344 and MO-1573.



- 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.

### ***Representations***

[43] The city states that when it exercised its discretion not to disclose the report, it took into account:

- The purpose 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 and
  - 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 requestor is seeking his or her own personal information.
- Whether disclosure would increase public confidence in the operation of the city.
- 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.

[44] The city repeats its representations provided above that the report was a draft document and was prepared for legal counsel retained by the city for the purpose of giving legal advice to the city and was expressly communicated in a confidential manner to the city's legal counsel and was relied upon by legal counsel to formulate and give legal advice to the city.

[45] The city also reiterates that there has been no express or implied waiver of privilege over the record on behalf of the city and that record was not made available to the public. It states that the release of this report would not increase public confidence in the operation of the city. It further states that the report does not contain personal information related to the appellant.

[46] The appellant states that in respect to the exercise of discretion, the city is relying upon irrelevant considerations, has not articulated any meaningful relevant considerations and is arguably using the shield of solicitor-client privilege for an improper purpose.

[47] He states that it is not a relevant consideration whether the report was draft as this does not address the concern that this report likely shaped Council's decision to annex lands and is fundamental to the underpinnings of the subsequent reports.

[48] The appellant submits that it would enormously increase public confidence in the conduct of the city to know what the report says and what was communicated to Council, as only then will the public understand the true narrative as to who was saying what to whom in the formulation of a decision to annex significant lands.

[49] The appellant also submits that almost all of the relevant considerations set out above favour a disclosure of the report. He states that there is no issue of privacy of individuals to protect. He submits that he is significantly affected by the decision to annex lands next to him, a decision that clearly has underpinnings in this report. He submits that disclosure of the full report may help to restore some public confidence into how the city came to make decisions to annex lands.

[50] In response, the city reiterates that the report was not the foundation for, nor did it affect the thinking of Council of the City of Stratford when considering whether to annex land referred to by the appellant in his representations.

### ***Findings***

[51] The appellant maintains that the record, which is a draft report, was considered by Council in reaching its decision to annex the lands adjacent to the appellant's property. However, the city has repeatedly maintained that the record was not considered by Council nor was it used in the decision-making process to annex the lands.

[52] As described above, I have accepted that the report was not provided to Council

and, therefore, could not have played a role in the decision-making process to annex these lands.

[53] However, the city has admitted that the report contains information about the costs of servicing the annexed lands should the annexation proceed. The city's solicitor was provided the report in order to provide legal advice to the city, and I have found that the report is privileged.

[54] Considering the information that I understand to be in the report and that it was of sufficient consequence to require the city to obtain legal advice about it, I find that the city has not taken into account the following relevant considerations in exercising its discretion as to whether to disclose the report, in whole or in part, to the appellant:

- whether the appellant, as an adjoining landowner to the annexed lands to which the report pertains, has a sympathetic or compelling need to receive the information;
- whether disclosure of the report, which contains information about the costs to the city of servicing the annexed lands, will increase public confidence in the operation of the city;
- the report, although privileged, is not a direct communication between a solicitor and a client;
- the extent to which the costs of servicing the annexed lands is significant to the appellant or to any other affected person; and,
- the historic practice of the city with respect to disclosing similar information, such as its disclosure of several other reports related to the annexation of the land.

[55] Because the city has not taken into account these relevant considerations, I find that the city has not exercised its discretion in a proper manner in not disclosing the report.

[56] In this appeal, I am not satisfied that the city has balanced the appellant's (or the public's) interests in the disclosure of the record with the importance of the section 12 solicitor-client privilege exemption in relation to the report.

[57] The appellant, in his extensive representations made in support of his appeal, may, in my view, have provided a sympathetic or compelling need to receive the information at issue, which the city has not considered.

[58] In summary, I find that the city has not taken into account the actual information in the report about the costs to the city of servicing the annexed land, the appellant's interest in the report, or how the public's knowledge of the information in the report will increase public confidence in the city as to the financial viability of its annexation of the

land and, therefore, is information that should be made available to the public.

[59] Accordingly, I am going to order the city to re-exercise its discretion concerning its application of section 12 to the record.

**ORDER:**

1. I uphold the city's finding that the discretionary exemption in section 12 applies to the record.
2. I do not uphold the city's exercise of discretion under section 12. I order the city to re-exercise its discretion to consider disclosing the record, or portions of the record, taking into account the considerations listed above.
3. If the city continues to withhold the record or portions of the record, I order it to provide the IPC and the appellant with representations about its re-exercise of discretion **by December 8, 2022**.
4. I remained seized of this matter, pending my findings regarding the city's re-exercise of discretion.

Original Signed by: \_\_\_\_\_  
Diane Smith  
Adjudicator

\_\_\_\_\_ November 9, 2022