

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4311

Appeal MA19-00720

City of Niagara Falls

December 23, 2022

Summary: The City of Niagara Falls (the city) received a request under the *Act* for access to a specified grading report. The city withheld the grading report in full under the discretionary exemptions at 7(1) (advice and recommendation) and 12 (solicitor-client privilege) of the *Act*. The appellant appealed the city's decision to the Information and Privacy Commissioner of Ontario. In this order, the adjudicator finds that the report is not exempt under section 12. However, she finds that some portions of the report are exempt under section 7(1) and orders the non-exempt portions to be disclosed to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 7(1) and 12.

Orders Considered: Orders PO-3651-I and MO-3929.

OVERVIEW:

[1] In late 2018 and early 2019, the City of Niagara Falls (the city) received numerous complaints from residents of a specified townhome complex regarding deficiencies that they have observed throughout the townhome complex. Consequently, the city retained Canadian Home Inspection Services (CHIS) to deliver, among other things, a grading report titled "May 2019 Exterior Grading Report" (the grading report).

Subsequently, the city received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the grading report.

[2] In response, the city issued a decision denying access to the grading report under sections 7(1) (advice and recommendations).¹ The city's decision letter also stated that the grading report was commissioned to assist it in determining its position regarding claims being made against it by certain residents. As such, the city claimed that the grading report was covered by litigation privilege. The city subsequently advised the appellant that it relies on the discretionary exemptions in sections 7(1) and 12 (solicitor- client privilege) to withhold the grading report.

[3] The requester, now the appellant, was not satisfied with the city's decision and appealed it to the Office of the Information and Privacy Commissioner (IPC).

[4] Mediation was not possible, and the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct a written inquiry under the *Act*.

[5] The adjudicator initially assigned to this appeal invited the city and the appellant to provide representations on the issues in this appeal. She received representations from both parties. This appeal was subsequently transferred to me to continue the adjudication. I have reviewed the parties' representations and have decided that I do not require further submissions before making my decision.

[6] In this order, I find that the grading report is not exempt under section 12. However, I find that some portions of the grading report are exempt under section 7(1) and order the non-exempt portions to be disclosed to the appellant.

RECORDS:

[7] The sole record at issue is the grading report prepared by CHIS, which is 32 pages long.

ISSUES:

- A. Does the discretionary exemption at section 12 apply to the grading report?
- B. Does the discretionary exemption at section 7(1) apply to the grading report?
- C. Did the city exercise its discretion under section 7(1)? If so, should this office uphold the exercise of discretion?

¹ I note that the city also claimed the application of an exclusion to withhold access to the grading report but the city later withdrew its reliance on it.

DISCUSSION:

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

[8] The city claims that section 12 applies to exempt the grading report from disclosure.

[9] Section 12 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It states:

A head may refuse to disclose a record that is subject to solicitor- client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[10] Section 12 contains two different exemptions, referred to in previous IPC decisions as “branches.” The first branch (“subject to solicitor-client privilege”) is based on common law. The second branch (“prepared by or for counsel employed or retained by an institution...”) is a statutory privilege created by the *Act*. The institution must establish that at least one branch applies. Here the city relies on both branches. Specifically, it relies on both the branch 1 and branch 2 communication and litigation privileges.

Branch 1: common law privilege

[11] At common law, solicitor-client privilege encompasses two types of privilege:

- solicitor-client communication privilege, and
- litigation privilege.

Common law solicitor-client communication privilege

[12] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.² This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.³ The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that

² Orders PO-2441, MO-2166 and MO-1925.

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

advice can be sought and given.⁴

[13] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.⁵ The privilege does not cover communications between a lawyer and a party on the other side of a transaction.⁶

Common law litigation privilege

[14] Common law 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.⁷ Litigation privilege protects a lawyer’s work product and covers material going beyond solicitor-client communications.⁸ 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.⁹ The litigation must be ongoing or reasonably contemplated.¹⁰

Branch 2: statutory privilege

[15] The branch 2 exemption 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.

[16] The statutory litigation privilege 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.¹¹

Findings and analysis

[17] As stated above, the city relies on both branches of section 12. The city bears the onus of establishing that the common law or statutory solicitor-client privilege applies to the grading report. Given the brevity of the city’s representations, I have very

⁴ *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.

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

⁶ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

⁷ *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).

⁸ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

⁹ *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

¹⁰ Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

¹¹ See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.

little information before me to support the city's position, aside from the grading report itself. Having considered the city's representations and the content of the grading report, I find for the following reasons, that neither branch of the section 12 exemption applies to the grading report.

[18] The city submits that there is both written and oral communication of a confidential nature between the city and its legal advisors directly relating to the seeking, formulating and giving legal advice relating to the allegations made by the residents of the townhome complex and to retaining CHIS to perform an assessment. To be clear, no records are before me except for the grading report. Moreover, the city did not provide evidence of either written or any communication between its staff and its legal advisors about the grading report to support its claim that the grading report forms part of "a continuum of communications" between legal counsel and their client regarding the townhome complex or the grading report. I note that the grading report contains a letter preface authored by CHIS and addressed to the city's chief building official. This letter is clearly not a communication between the city staff and its legal advisors; no legal advisor is included in the communication. As such, I am unable to find that the common law solicitor-client communication privilege applies to the grading report.

[19] The city also claims that the grading report was prepared for counsel employed by it for use in giving legal advice with respect to any liability arising from the city's obligations under the statute or otherwise. Similar to my analysis above, the city has not provided me with sufficient evidence to establish the branch 2 statutory solicitor-client communication privilege. The city has not provided sufficient evidence to support its position that the grading report was prepared by CHIS for city counsel for the use in giving legal advice. As noted above, the letter accompanying the report was directed to the city's chief building official. Accordingly, I find that the branch 2 statutory solicitor-client communication privilege is not established.

[20] The city also argues that the grading report is subject to the common law litigation privilege exemption. It submits that it engaged CHIS (the third party consultant) to produce such a report in contemplation of litigation by both the residents of the townhome complex and the condominium corporation of the townhome complex. The city notes that certain residents alleged that the city failed to inspect or failed to conduct a reasonable inspection during the construction of the townhome complex which could potentially open the city to a negligence claim. The city also argues that the grading report was prepared to assist the city in the settlement of any litigation.

[21] For a record to be covered by common law or statutory litigation privilege, litigation must be ongoing or reasonably contemplated at the time of the record's creation.¹² Determining whether litigation was "reasonably contemplated" is a question

¹² Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

of fact that must be decided in the specific circumstances of each case.¹³ In Order PO-3651, Adjudicator Cathy Hamilton commented on what constitutes “contemplated” litigation, in part by saying:

[I]n order to conclude that there was “contemplated” litigation, there must be evidence that litigation was reasonably in contemplation, which requires more than a vague or general apprehension of litigation.

[22] In the appeal before me, the city has provided insufficient evidence of any ongoing or reasonably contemplated litigation between it and the residents of the townhome complex (or the condominium corporation). I acknowledge that the city hired CHIS to prepare the grading report but the city’s reasons for doing so are not established by its representations or any evidence it provided. It appears from the minutes and the emails the appellant attached to her representations that the city was interested in remedying the deficiencies with the townhome complex.¹⁴

[23] Having regard to the information before me, I am not persuaded that there was more than a “vague or general apprehension of litigation” by the city. Accordingly, I find that litigation was not ongoing or reasonably contemplated, as required for litigation privilege (common law or statutory) to apply.

[24] As I have found that section 12 does not apply to the grading report, I will now turn to discuss whether the section 7(1) exemption applies.

B: Does the discretionary exemption at section 7(1) (advice or recommendation) apply to the grading report?

[25] Section 7(1) of the *Act* exempts certain records containing advice or recommendations given to an institution. This exemption aims to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.¹⁵

[26] Section 7(1) states:

A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

“Advice” and “recommendations” have distinct meanings. “Recommendations” refers to a suggested course of action that will

¹³ Order PO-3561.

¹⁴ I note that although the appellant provided representations and attachments, they did not address the common law or statutory solicitor-client privilege exemption.

¹⁵ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

ultimately be accepted or rejected by the person being advised. Recommendations can be express or inferred.

"Advice" has a broader meaning than "recommendations." It includes "policy options," which are the public servant or consultant's identification of alternative possible courses of action. "Advice" includes the views or opinions of a public servant or consultant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.¹⁶

"Advice" involves an evaluative analysis of information. Neither "advice" nor "recommendations" include "objective information" or factual material.

[27] Section 7(1) applies if disclosure would "reveal" advice or recommendations, either because the information itself consists of advice or recommendations or the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.¹⁷

[28] The relevant time for assessing the application of section 7(1) is the point when the public servant or consultant prepared the advice or recommendations. The institution does not have to prove that the public servant or consultant actually communicated the advice or recommendations. Section 7(1) can also apply if there is no evidence of an intention to communicate, since that intention is inherent to the job of policy development, whether by a public servant or consultant.¹⁸

[29] Examples of the types of information that have been found *not* to qualify as advice or recommendations include:

- factual or background information,¹⁹
- a supervisor's direction to staff on how to conduct an investigation,²⁰ and
- information prepared for public dissemination.²¹

¹⁶ See above at paras. 26 and 47.

¹⁷ Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

¹⁸ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

¹⁹ Order PO-3315.

²⁰ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

²¹ Order PO-2677

Section 7(2) and (3): exceptions to the exemption

[30] Sections 7(2) and (3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7(1).

Representations

[31] The city submits that the grading report contains clear and specific recommendations regarding the remedial work for the inadequacies/inconsistencies between the grading plan and the as build condition of the townhome complex. It submits that the recommendations provided by CHIS are in accordance with the city's responsibilities under the master lot grading plan, in the context of itemizing areas of concern, and prescribing effective recommendations for any required remedial work together with cost estimates. The city also submits that the recommendations contained in the grading report were communicated between CHIS, city council, city senior staff, including the city's legal advisor(s), chief building officer, director of planning, building and development and risk manager, in the course of a deliberative process of decision making.

[32] Regarding the exception at section 7(2)(a), the city submits that the grading report entails a comprehensive inspection of the property, noting any defects that may affect the property value and also includes conclusions and recommendations pertaining to the unforeseeable costs and financial liabilities related to the site. The city submits that some observations and notations are on the basis of reasonable presumptions and professional opinion, which must not be subject to the interpretation as factual information.

[33] In the alternative, the city submits that to the extent the grading report contains factual information, it is not possible to sever the advice and recommendation from the grading report and still leave meaningful factual information. The city submits that the factual information contained in the grading report is so intertwined with the advice and recommendations that it was not possible to disclose factual information without disclosing exempt information.

[34] The appellant does not address the application of section 7(1) in her representations.

Analysis and findings

[35] Based on my review of grading report, I find that some portions of the grading report contain advice or recommendation within the meaning of section 7(1).

[36] In particular, I accept that the grading report contains CHIS's advice and recommendations to the city regarding the lot grading and drainage around the townhome complex. I find that the grading report contains evaluative analysis of the

information collected by CHIS and the suggested course of actions to remedy the issues, including cost estimates to remedy the defects. I accept that CHIS's recommendations were meant to be accepted or rejected by the city employees or city council.

[37] While I find that the grading report is exempt under section 7(1), I find that portions of it are subject to the mandatory exemption in section 7(2)(a).

[38] Section 7(2)(a) states:

Despite subsection (1), a head shall not refuse under subsection to disclose a record that contains,

(a) factual material;

[39] Based on my review, the information under the headings "Methodology", "Description" and "Observations" for the different unit blocks²² cannot be exempt under section 7(1). I also find that some information in the preface letter cannot be exempt under section 7(1). I further find that this information can be severed from the advice and recommendations in the rest of the report.

[40] Accordingly, subject to my review of the city's exercise of discretion below, I find that some portions of the grading report are exempt from disclosure under section 7(1).

C: Did the city exercise its discretion under section 7(1)? If so, should this office uphold the exercise of discretion?

[41] The section 7(1) exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[42] In addition, the IPC 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; or
- it fails to take into account relevant considerations.

[43] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.²³ The IPC cannot, however,

²² CHIS divided the 70 units into 17 blocks.

²³ Order MO-1573.

substitute its own discretion for that of the institution.²⁴

[44] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:²⁵

- 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, and
 - the privacy of individuals should be protected.
- the wording of the exemption and the interests it seeks to protect,
- whether the requester is seeking their 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, and
- the historic practice of the institution with respect to similar information.

[45] The city submits that it properly exercised its discretion under section 7(1). It submits that it was not acting in bad faith or for an improper purpose in denying access to the grading report. The city explains that in an attempt to sever the grading report and disclose any material which is not exempt, the city delivered letters to the unit owners of the townhome complex, together with a release, setting out, among other things, a list of the building code deficiencies as it pertained to each individual unit and an estimated cost to repair the deficiencies, which findings were derived from the

²⁴ Section 43(2).

²⁵ Orders P-344 and MO-1573.

grading report.

[46] The appellant's representations did not address the city's exercise of discretion.

[47] Based on my review of the city's representations and the nature and content of the exempt information, I find that the city properly exercised its discretion to withhold the exempt information pursuant to the discretionary exemption at section 7(1) of the *Act*. I note that the city took into account the following relevant considerations: the nature of the information and the wording of the exemption and the interests it seeks to protect. I am satisfied that the city did not act in bad faith or for an improper purpose. Accordingly, I uphold the city's exercise of discretion in deciding to withhold the exempt information pursuant to the section 7(1) exemption.

ORDER:

1. I order the city to disclose the non-exempt information in the grading report to the appellant by **January 30, 2023** but not before **January 16, 2023**. I have identified the portions that the city must **not** disclose by highlighting those portions in yellow on the copy of the grading report provided to the city with this order.
2. In order to verify compliance with this order, I reserve the right to require the city to provide me with a copy of the report disclosed upon request.

Original Signed By: _____
Lan An
Adjudicator

December 23, 2022 _____