



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-739

Appeal M_9500716

City of Mississauga



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NATURE OF THE APPEAL:

The City of Mississauga (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to documentation concerning a by-law passed by the City to deal with lap dancing. The City identified 16 responsive records and provided the requester with full access to eight of them. The City denied access to the remaining eight records in their entirety pursuant to section 12 of the Act (solicitor-client privilege).

The requester (now the appellant) appealed the City's decision.

Mediation was not successful, and a Notice of Inquiry was sent to the City and the appellant. Representations were received from both parties.

In its representations the City withdrew the exemption claim for Record 15, and subsequently released this record to the appellant. The records which remain at issue in this appeal are Records 9, 10, 11, 12, 13, 14 and 16, which were described to the appellant in an index attached to the City's decision letter. The appellant agreed that he was not interested in receiving any personal information contained in any records, and any such information is therefore excluded from the scope of this appeal.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 12 of the Act reads 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.

Section 12 consists of two branches, which provide an institution with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and
2. a record which 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 (Branch 2).

For a record to be subject to the common law solicitor-client privilege (Branch 1), the City must provide evidence that (1) the record either constitutes a written or oral communication of a

confidential nature between a client and legal advisor which relates directly to seeking, formulating or giving legal advice; or (2) the document was created or obtained especially for a lawyer's brief for existing or contemplated litigation.

For a record to qualify for exemption under Branch 2, the City must establish that the document was prepared by or for counsel employed or retained by an institution and the document must have been prepared (1) for use in giving legal advice, or (2) in contemplation of litigation, or (3) for use in litigation.

The appellant submits that the records are not subject to solicitor-client privilege because they were not produced for or in contemplation of litigation. In his view, the records were prepared to determine whether the City should pass a by-law to deal with lap dancing, and what effect such a by-law would have on adult entertainment club owners. The appellant's representations are restricted to the application of the common law solicitor-client privilege and do not address Branch 2.

The City claims that Records 9, 10, 13 and 14 meet the requirements for exemption under Branch 2. Having reviewed these records, I find that they were all prepared either by or for counsel or an articling student employed by the City for use by various lawyers in giving legal advice to the Mayor and a City Councillor on the proposed lap dancing by-law under consideration at that time. Therefore, I find that these four records satisfy the requirements of Branch 2 of the section 12 exemption.

Turning to Branch 1, the City claims that Records 11, 12 and 16 qualify under the first part of the common law solicitor-client privilege.

All three of these records appear to be the type which would qualify under this part of Branch 1: they are written or oral communications, with indications of confidentiality, between the City Solicitor and her client (the Mayor), which relate directly to the giving of legal advice on the proposed lap dancing by-law. However, all of these records are "cc'd" to other individuals. I must therefore assess whether or not the distribution of these records to persons other than the client negates or waives the privilege.

The City's representations address the issue of waiver. As far as Record 11 is concerned, the representations state:

While the document is copied to a person other than the person to whom the document is directed, such an action does not constitute a waiver of the privilege that attaches to the document in so far as the person to whom the document is copied is a member of municipal staff and, as a consequence, there is no disclosure of the document outside the confines of the municipal corporation such as might constitute a waiver of the privilege which attaches to it.

Similar representations were made regarding Record 12, which was not actually sent to the Mayor but was discussed with another City employee, as evidenced by this person's handwritten notes on the face of the record.

Record 16 was copied to two individuals, one of whom is also a City employee. The City's position with respect to the effect of disclosure to this employee is essentially the same as for Record 11. The second person copied on Record 16 is a Peel Regional Police Officer. In speaking to the impact of disclosure to this person, the City states:

The City submits that the privilege that attaches to a document may be waived either in whole or in part. In the case of the present document, the presence of the restrictive language that labels the document makes it clear that the document, while disclosed to more than one person was clearly not done so as a complete waiver of that privilege but was, rather, disclosed only to a limited number of individuals to whom it was in the City's interest to disclose the document.

I am prepared to accept that disclosure of Records 11 and 12 to other City employees does not constitute waiver, and that these two records qualify for exemption under the first part of Branch 1 of section 12.

Similarly, I find that the fact that Record 16 was copied to the City's Director of Enforcement does not constitute waiver. The issue as far as Record 16 is concerned is whether disclosure of the record to someone outside the City is sufficient to negate what would otherwise constitute solicitor-client privilege.

Manes & Silver, make the following point at page 207 of Solicitor Client Privilege in Canadian Law (1993):

In essence, where the client authorizes the solicitor to reveal a solicitor-client communication, either it was never made with the intention of confidentiality or the client has waived the right to confidentiality. In either case, there is no intention of confidentiality and no privilege attaches. For example, it has been held that documents prepared with the intention that they would be communicated to a third party, or where on their face they are addressed to a third party, are not privileged. [Nova Scotia Pharmaceutical Society v. R. (1988), 88 N.S.R. (2d) at 72-75 (T.D.), ([1988] N.S.J. No, 444).

In the Nova Scotia Pharmaceutical Society case, Burchall J. made the following statements in relation of a certain group of records at issue in that case:

The five remaining items bear dates in the year 1974 but in each instance there is an indication on the face of the document that it was addressed to a third party and, accordingly, the claim of privilege is also rejected as to these items because they manifest an intention that the contents would be communicated to a third party.

It is possible for two or more parties to have a joint interest in a record which could have an impact on solicitor-client privilege. In Johal v. Billan [1995] B.C.J. No. 2488 (B.C.S.C.) the court found that a husband and wife who had consulted the same solicitor for the purpose of drafting wills had waived the privilege between themselves, but maintained this privilege against third parties who did not share a joint interest with one or both of them. This judgement makes

reference to this interest being supported by Mr. Justice Sopinka in the text Law of Evidence in Canada, at page 638:

Joint consultation with one solicitor by two or more parties for their mutual benefit poses a problem of relative confidentiality. As against others, the communication to the solicitor was intended to be confidential and thus is privileged. However, as between themselves, each party is expected to share in and be privy to all communications passing between either of them and their solicitor, and accordingly, should any controversy or dispute subsequently arise between the parties, then, the essence of confidentiality being absent, either party may demand disclosure of the communication. ... Moreover, a client cannot claim privilege as against third persons having a joint interest with him in the subject-matter of the communication passing between the client and the solicitor.

Applying this reasoning to the circumstances of the present appeal, in my view, I have not been provided with evidence sufficient to establish a "joint interest" between the City and the police officer for the purposes of solicitor-client privilege. The City Solicitor clearly was not retained by the police officer, and her professional responsibilities relate exclusively to the City. Based on the representations submitted by the City, I am not convinced that the interests of the City and the police officer in regards to the lap dancing by-law are sufficiently connected to be accurately characterized as a "joint interest".

Having reviewed the representations and considered the circumstances of this appeal, I find that the copying of Record 16 to the police officer is either evidence that the document was not intended to be treated confidentially, or evidence that any solicitor-client privilege that might attach to the record has been waived. Therefore, Record 16 does not qualify for exemption under the first part of Branch 1 of section 12, and should be disclosed to the appellant, subject to the severance of the name of an individual referred to in the text of the record. I have attached a copy of Record 16 to the copy of this order sent to the City which highlights those portions of the record which should **not** be disclosed.

To summarize, I find that Records 9, 10, 13 and 14 qualify for exemption under Branch 2, and that Records 11 and 12 qualify under the first part of Branch 1 of section 12 of the Act. Record 16 does not qualify under the first part Branch 1 of this exemption and a severed copy of this record should be disclosed.

ORDER:

1. I uphold the City's decision to refuse to disclose Records 9, 10, 11, 12, 13 and 14.
2. I order the City to disclose Record 16 to the appellant by **April 10, 1996**, subject to the severance of the name of an individual referred to in the text and highlighted on the copy of this record attached to the copy of this order sent to the Freedom of Information and Privacy Co-ordinator at the City.

- 3, In order to verify compliance with Provision 2, I reserve the right to require the City to provide me with a copy of the record which is disclosed pursuant to that provision.

Original signed by: _____ March 21, 1996
Tom Mitchinson
Assistant Commissioner