



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

ORDER M-859

Appeal M_9600227

City of North York



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NATURE OF THE APPEAL:

The appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the City of North York (the City). The request was for access to copies of specified communications and correspondence respecting the time differential for various vehicles responding to a specific call received by the North York Fire Department.

The City identified 42 responsive records, granted access to 6 records and denied access to 36 records under the following section of the Act:

- solicitor-client privilege - section 12

The appellant appealed the City's decision. A Notice of Inquiry was sent to the City and the appellant. Representations were received from both parties.

PRELIMINARY ISSUE:

In his representations, the appellant makes reference to an earlier request for "communication cards" which is related to an earlier request and appeal with the same institution. In Order M_685, Inquiry Officer Anita Fineberg examined the City's response to the appellant's earlier request for records related to the same incident, including communication cards. In Appendix A to Order M-685, Inquiry Officer Fineberg indicates at Item 6, Record 8e, that all communication cards were disclosed to the appellant and were no longer at issue in that order. The City confirms that all communication cards were disclosed to the appellant. Accordingly, I am satisfied that the communication cards are not at issue in this appeal.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 12 of the Act consists of two branches, which provide a head 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 the City for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the City must provide evidence that the record satisfies either of two tests:

1. (a) there is a written or oral communication, **and**

- (b) the communication must be of a confidential nature, **and**
- (c) the communication must be between a client (or his agent) and a legal advisor, **and**
- (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

- 2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation

[Orders 49, M-2 and M-19]

A record can be exempt under Branch 2 of section 12 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

- 1. the record must have been prepared by or for counsel employed or retained by the City; **and**
- 2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[See Order 210]

The City is relying on the second part of Branch 1 (records created or obtained especially for a lawyer's brief for either existing or contemplated litigation) and Branch 2 (records prepared for counsel employed or retained by the City in contemplation of litigation).

Branch 2

The records consist of notes, memoranda and letters created after the City's Fire Department responded to a fire which eventually destroyed the house on a property. The City received a notice of claim from the adjusters representing the property owner's insurers, and subsequently received several other notices of claim from other adjusters, insurance companies and solicitors representing various parties who suffered losses in the fire.

The City states that it has retained a law firm to act on its behalf with respect to the notices of claim related to the damages resulting from the fire. In addition, the City's legal department is maintaining a watching brief on these actions. The City indicates that all of the records for which it claims section 12 were prepared **for** counsel who are City employees or outside counsel retained by the City. Based on these submissions, I am satisfied that the records were prepared by or for counsel employed or retained by the City.

Most of the records postdate the first statement of claim received by the City, and it is clear on the face of these records that they were prepared for use in litigation.

With respect to the records which predate the first statement of claim, in order for a record to qualify as being prepared in contemplation of litigation, it must be established that:

- (a) the dominant purpose for the preparation of the record must be contemplation of litigation; and
- (b) there must be a reasonable prospect of such litigation at the time of preparation of the record; litigation must be more than just a vague or theoretical possibility.

[Order 52]

Having reviewed the records and the City's submissions, I find that these documents were clearly created outside the ordinary course of documenting the involvement of the fire department with a fire. I am satisfied that, given the circumstances under which these records were requested and created by or for the City and the amount of detail they contain, the dominant purpose for preparing these statements was the contemplation of litigation.

Based on the submissions of the City, I am satisfied that, at the time of the creation of the records, litigation was more than a vague or theoretical possibility. Given the events that transpired when the firefighters attended at the fire scene as recorded in some of the records, I accept the City's position that there was a reasonable prospect of litigation at the time of the creation of the records.

Accordingly, I find that the requirements of Branch 2 of the section 12 exemption have been met.

ORDER:

I uphold the City's decision.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

November 15, 1996