



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-1088

Appeal M-9700308

City of Toronto



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BACKGROUND:

On August 2, 1997, a water main maintained by the former Municipality of Metropolitan Toronto (the former Municipality) burst, causing extensive flooding of a neighbourhood in the former City of Toronto. Several residents who suffered water damage to their homes contacted their insurance carrier who assigned a Claims Representative (the appellant) to investigate the extent of the damage as well as any possible liability on the part of the Municipality.

NATURE OF THE APPEAL:

As part of his investigation, on August 8, 1997 the appellant made a request to the former Municipality, now the City of Toronto (the City), for access to any records regarding repairs to and the replacement of the affected water mains, as well as any records relating to their inspection or maintenance. The City located two responsive records and denied access to them, on the basis that they were exempt from disclosure under section 12 of the Act (solicitor-client privilege).

The appellant appealed the decision to deny him access to the records, which consist of two engineering reports dated September 11, 1997 and September 22, 1997.

A Notice of Inquiry was provided by this office to the City, the appellant and to the two engineering firms who prepared the reports (the affected parties). Because the records at issue appeared to contain information which may qualify as "third party information", the parties to the appeal were also asked to make submissions on the possible application of section 10 of the Act to the records, in addition to the exemption in section 12.

Representations were received from the appellant and the City.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

As noted above, the City has claimed the application of section 12 to each of the records. This section 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 the following 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]

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.

[Order 210]

The City submits that the records are exempt under the second part of Branch 1, as well as under Branch 2. It indicates that after the water main burst there existed a reasonable expectation that claims by residents for damages would be made under the City's insurance policy. Accordingly, it notified its insurance adjuster. The adjuster, on behalf of the City, notified its counsel who instructed the adjuster to commission the engineering inspection reports which now constitute the subject records. The City further argues that, as anticipated, legal proceedings by the residents who suffered damages were commenced against the City in November 1997. The City indicates that the records at issue will form part of its' counsel's brief with respect to this litigation. For this reason, the City argues that the records fall within the ambit of the second part of Branch 1 of the section 12 exemption.

In addition, the City submits that the records at issue are relevant to the ongoing litigation and that their premature disclosure would jeopardize counsel's ability to prepare for the trial of this case without fear of forced revelation of his legal theories and/or strategies with respect to the current action.

The appellant argues that because the City is composed of each of its residents, the individuals whom he represents share a common interest with the City. Accordingly, no solicitor-client privilege can exist in the records which would exclude their being shared with his clients. I cannot agree with this suggestion. The City's potential legal obligations to the persons who suffered damage as a result of the flooding caused by the water main break cannot be said to coincide with the legal interests of these same individuals.

I have reviewed both of the reports and find that they fit within the litigation privilege. They were created as a direct result of the claims filed against the City and provide the City, through counsel retained to represent its interests, with the results of the affected parties' investigations into the cause of the water main break. Therefore, I find that the records were created specifically for inclusion in the lawyer's brief with respect to litigation directly involving the City, and that it was reasonable to expect that litigation would occur at the time that the records were prepared. In my view, accordingly, both of the records qualify for exemption under the second part of Branch 1 of section 12.

As I have found that the records are exempt from disclosure pursuant to the second part of Branch 1 of section 12, it is not necessary for me to consider whether they are also exempt under the second branch of section 12, or under the section 10 exemption.

ORDER:

I uphold the City's decision to deny access to the responsive records.

Original signed by: _____
Donald Hale
Inquiry Officer

March 19, 1998