



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

ORDER MO-1205

Appeal MA-980251-1

City of Toronto



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The appellant submitted two requests to the City of Toronto (the City) under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The first request was for all records generated by, or in the possession of, the City and its predecessor the former Municipality of Metropolitan Toronto, including all relevant committees and sub-committees, relating to the drafting, adoption and/or implementation of (i) By-Law No. 168-97, adopted December 18, 1997, and (ii) By-Law No. 449-1998, adopted July 10, 1998. The second request was for similarly described records generated by, or in the possession of, the Toronto Licensing Commission and its predecessor the Metropolitan Licensing Commission. The appellant explained that the by-laws referred to amend By-Law No. 20-85 to enact certain measures regarding collision reporting centres and vehicle repair facilities. The appellant further stated:

To facilitate the gathering of these records, we understand that, at minimum, the following committee/sub-committees of City Council and Metro Council have been involved in the formulation and adoption of the above By-Laws: the Human Services Committee of Metro Toronto Council; Metro Toronto Council's Special Purpose Committee on Towing Rates; the Metro Towing Task Force; and City Council's Emergency and Protective Services Committee.

To the extent that there may be any question in this regard, we would also ask that you include within the foregoing requests all relevant records that may have been generated by, or are in the possession of, the City Solicitor, including his predecessor, the Metropolitan Solicitor.

In its reply to the request, the City stated the Toronto Licensing Commission is designated as a separate institution under the Act and, therefore, the City was forwarding the portion of the request related to the Commission to that institution pursuant to section 18 of the Act. The City explained that the remaining portion of the request would involve a search of records maintained by two City departments, "City Legal" and "City Clerk", and that each department would review their records independently and provide the appellant with a separate response.

In a further reply, the City stated that access was denied to all responsive records held by the "City Solicitor" pursuant to one or more of the exemptions at sections 6 ("draft by-laws"), 7 ("advice or recommendations") and 12 ("solicitor-client privilege") of the Act. The City explained:

[] These records consist of draft by-laws, or contain advice or recommendations of officers or employees of the institution and/or are subject to solicitor-client privilege or were prepared by or for counsel employed or retained by the institution for use in giving legal advice or in contemplation of or for use in litigation.

The appellant appealed the City's decision to deny access to records held by "City Legal" or the "City Solicitor" to this office.

During mediation, the City clarified that it was relying specifically on paragraph (1)(a) of section 6, section 7(1), and both solicitor-client communication privilege and litigation privilege under section 12.

I provided a Notice of Inquiry setting out the issues in this appeal to the appellant and the City. I received representations from the City only.

RECORDS:

The records at issue originally consisted of 56 pages containing draft by-laws (with and without solicitor's handwritten notes), correspondence, e-mails and solicitor's notes. During mediation, the City withdrew its application of section 6(1)(a) to pages 36-40, while maintaining its claim that these records were exempt under section 12. The City and the appellant also agreed that pages 7-11 were not responsive to the request, since they relate to a by-law not specified in the request. As a result, pages 1-6 and 12-56 remain at issue (51 pages in total).

DISCUSSION:

DRAFT BY-LAWS

The City claims that pages 1-6, 12-17, 28-32, 44-46 and 54-56 are exempt pursuant to section 6(1)(a) of the Act, which reads:

A head may refuse to disclose a record,

that contains a draft of a by-law or a draft of a private bill;

Pages 1-6, 12-17, 28-32, 44-46 and 54-56 clearly on their face consist of draft by-laws. Each set of pages contains either a "draft" notation, or handwritten comments or suggested changes, and sets out a proposed by-law to amend City By-Law No. 20-85. Therefore, these records fall within the scope of section 6(1)(a).

Section 6(2)(a) contains an exception to the section 6(1)(a) exemption, which reads:

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

in the case of a record under clause (1)(a), the draft has been considered
in a meeting open to the public;

The City submits:

. . . the exception to the exemption in s. 6(2)(a) does not apply to any of the records to which the exemption is claimed. The City notes that it had originally applied the section 6

exemption to records 36-40. At mediation, the City withdrew the application of section 6(1)(a) to those records, but maintained the application of section 12 to those records.

The records in question all contain draft versions of by-laws that were not considered in a public meeting . . .

During mediation, the City re-examined each of the records for which section 6(1)(a) was claimed, and decided to withdraw its claim respecting pages 36-40. In doing so, the City acknowledged that this record was considered in a City council meeting open to the public and thus the section 6(2)(a) exception would apply.

In the circumstances, I am satisfied that the remaining draft by-laws (other than pages 36-40) were not considered in a meeting open to the public. Accordingly, I find that the section 6(1)(a) exemption applies to pages 1-6, 12-17, 28-32, 44-46 and 54-56.

SOLICITOR-CLIENT PRIVILEGE

Section 12 of the Act 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.

This section consists of two branches, which provide an institution with 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).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution 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, 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 an institution; 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].

Although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation. In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships [Order P-1342; upheld on judicial review in Ontario (Attorney General) v. Big Canoe, [1997] O.J. No. 4495 (Div. Ct.)].

The City has claimed the application of solicitor-client communication privilege, either under Branch 1 or Branch 2, to all of the records at issue in this appeal. The City also has claimed litigation privilege, under Branch 1, to pages 1-6, 12-17, 19-24, 26-46 and 48-56. Since I have found that pages 1-6, 12-17, 28-32, 44-46 and 54-56 are exempt pursuant to section 6(1)(a) of the Act, I will not consider the application of section 12 to these records. I will apply solicitor-client communication privilege, and then (if necessary) litigation privilege, to the relevant remaining records (pages 18-27, 33-43, 47-53). In my analysis I will apply common law principles of solicitor-client privilege, without differentiating between the two branches, for the reasons set out above.

Solicitor-client communication privilege

General principles

At common law, solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

This privilege has been described by the Supreme Court of Canada as follows:

... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [Descôteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to “a continuum of communications” between a solicitor and client:

. . . the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as “please advise me what I should do.” But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [Balabel v. Air India, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

Solicitor-client communication privilege has been found to apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice [Susan Hosiery Ltd. v. Minister of National Revenue, [1969] 2 Ex. C.R. 27, cited in Order M-729].

Pages 18-27, 41-43, 49-53

The City submits with respect to pages 18-27:

[Pages 18-27] are communications between a solicitor in the legal department and the Deputy Metropolitan Solicitor which were prepared in confidence by the Deputy Metropolitan Solicitor[] in his capacity as the solicitor's legal advisor. The solicitor's submissions to the Deputy Metropolitan Solicitor sought his legal advice with respect to her work on behalf of her client . . . [T]hese records meet the criteria for exemption under [solicitor-client communication privilege in] section 12.

More specifically, the City submits:

[Page 18] is a series of three confidential e-mail communications between the Deputy Metropolitan Solicitor and a solicitor in the legal department . . . In the [first e-mail communication], the Deputy Metropolitan Solicitor seeks legal advice from the solicitor respecting the status of a draft by-law. The [second] communication provides legal advice to the Deputy Metropolitan Solicitor. The [third] communication confirms the legal advice. Accordingly each of the criteria of [solicitor-client communication privilege] is met, being confidential written communications, directly related to providing legal advice, between a legal advisor and a solicitor in the legal department.

[Pages 19-24] are a memorandum . . . from a solicitor in the legal department providing legal advice and recommendations to her legal advisor, the Deputy Metropolitan Solicitor. The memorandum was submitted in confidence to the Deputy Metropolitan Solicitor relating to the provision of legal advice.

[Page 25] is a memorandum from a solicitor in the legal department to the Deputy Metropolitan Solicitor . . . The solicitor seeks the Deputy Metropolitan Solicitor's legal advice respecting the legal interpretation of a document. The memorandum is submitted in confidence to the Deputy Metropolitan Solicitor in his capacity as the solicitor's legal advisor.

. . . [Pages 26-27] are exempt from production under [solicitor-client communication privilege in] section 12. [These records] are a confidential memorandum from a solicitor in the legal department to the Deputy Metropolitan Solicitor covering [Pages 28-32], which are a draft version of a by-law. In [Pages 26-27], the solicitor provides legal advice to the Deputy Metropolitan Solicitor and seeks the legal advice of the Deputy Metropolitan Solicitor respecting her draft version of a by-law. The Deputy Metropolitan Solicitor provides legal advice to the solicitor in the form of handwritten comments. Accordingly . . .

[Pages 26-27] meet the criteria for exemption under [solicitor-client communication privilege in] section 12.

The City made very similar submissions with respect to pages 41-43 and 49-53.

In my Order PO-1663, I addressed the application of solicitor-client privilege in circumstances involving the drafting of a regulation under the Pension Benefits Act. Various documents, including memoranda and draft versions of the regulation, were circulated among the members of the drafting team, which included legal counsel and senior government officials. In that case I stated the following:

These records consist of communications among various members of the drafting team and senior officials providing instructions on the draft Regulation. It is clear on the face of Records 2, 6, 8, 9, 15 and 17, and on the basis of the Commission's representations, that the Commission's Senior Legal Counsel received each of these records in the course of the drafting process, either as an addressee (Records 15, 17) or as a person who was "carbon copied" (Records 2, 6, 8, 9).

.

The Commission submits that each of these communications was made on a confidential basis for the dominant purpose of giving or receiving legal advice from the Commission's Senior Legal Counsel. The appellant submits that these communications were not made for this purpose. More specifically, in the case of Records 8, 9 and 15, the appellant states that "[a] memo merely summarizing comments made concerning draft regulations" does not meet the test of "seeking, formulating or giving of legal advice".

In my view, the appellant's characterization of solicitor-client communication is overly restrictive and not consistent with the common law, which indicates that the privilege applies to a "continuum of communications" between a lawyer and client (see Balabel above). The fact that the communication does not set out "facts and issues and legal principles" does not remove it from the scope of solicitor-client privilege, as long as the communication was made for the dominant purpose of obtaining legal advice (see [Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner) (1997), 102 O.A.C. 71 (Div. Ct.)] and Descôteaux above).

In the circumstances, given what was clearly Senior Legal Counsel's key role in providing advice in the Regulation drafting process, I accept the Commission's argument that these communications were made for the dominant purpose of obtaining legal advice. Further, I accept the Commission's submission that these communications were made with an intention to keep them confidential among the members of the drafting team.

Based on the above, I find that Records 2, 5, 6, 8, 9 and 13 to 18 are subject to solicitor-client communication privilege . . .

In my view, there are strong parallels between the circumstances of this case and those in PO-1663. In both cases, the documents at issue record communications among members of a “drafting team”, including lawyers, in the course of providing legal advice to, and seeking instructions from, the client, with the ultimate purpose of enacting subordinate legislation. In my view, each of these communications in pages 18-27, 41-43 and 49-53 was made for the dominant purpose of seeking or obtaining legal advice. Further, I accept the City’s submission that these communications were made with an intention to keep them confidential. Therefore, I find that pages 18-27, 41-43 and 49-53 are subject to solicitor-client communication privilege.

Pages 33, 48

The City submits with respect to page 33:

. . . [This] record is an e-mail communication and is a memorandum to file prepared by a solicitor in the legal department summarizing a telephone conversation between the solicitor and her client . . . Record 33 is a written record of a confidential conversation between the solicitor and her client. It is a communication, written in confidence, summarizing the client’s instructions to the solicitor and is directly related to the client seeking legal advice from a solicitor.

The City submits that page 48 consists of handwritten notes of a City solicitor in a memorandum to file. The City states that “the notes identify legal issues relating to a draft by-law and are directly related to the formulation and provision of legal advice to the solicitor’s client.”

These records are not in themselves communications to or from a lawyer and a client. However, these records fall within the “continuum of communications” as described in Balabel, and could be described as part of the solicitor’s “working papers” [Susan Hosiery Ltd.]. Further, I am satisfied that these records were prepared with an intention to keep them confidential. Therefore, I find that these records qualify for exemption under the section 12 solicitor-client communication privilege.

Pages 34-40

The City submits:

[Pages] 34-40 [constitute] a confidential e-mail message between a solicitor in the Legal Department and a client department of the City, being the City Clerk. [These records] are copies of the direct e-mail communications between the solicitor and the client and include a reply copy of the client’s e-mail to the solicitor and a draft copy of the by-law as an

attachment. The whole correspondence provides legal advice from the solicitor to the client respecting the form and content of the proposed by-law. The City submits that records 34-40 are exempt from production under [solicitor-client communication privilege] in section 12 because they are a confidential written communication between the solicitor and her client directly related to the provision of legal advice.

In the circumstances, for similar reasons as set out above under the heading "Pages 19-27", I am satisfied that these records consist of confidential communications between members of the City's "drafting team" for the purpose of obtaining or providing legal advice and, therefore, these records fall within the scope of the section 12 solicitor-client communication privilege.

Page 47

The City submits that this record is not responsive to the request, since it relates solely to the matters covered by pages 7-11 which the City and the appellant agreed were not responsive to the request. In the alternative, the City submits that page 47 is subject to solicitor-client communication privilege under section 12, because it is a confidential communication between two City solicitors directly related to seeking and formulating legal advice to be provided to a client.

Page 47 relates to a different draft by-law to amend By-Law 20-85, distinct from the two by-laws referred to in the appellant's request (By-Law No. 168-97, adopted December 18, 1997 and By-Law No. 449-1998, adopted July 10, 1998). Arguably, page 47 is not responsive on this basis. However, I need not make a finding on the responsiveness issue since, in my view, for reasons similar to those expressed above, this record is subject to solicitor-client communication privilege under section 12.

Waiver

Even if section 12 solicitor-client communication privilege applies to a communication at the time it is made, that privilege may be lost through waiver. Waiver of common law solicitor-client privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive the privilege [S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd. (1983), 35 C.P.C. 146 (B.C. S.C.); Order P-1342].

In Order M-260, former Inquiry Officer Anita Fineberg considered the issue of waiver of solicitor-client privilege:

Only the client may waive the solicitor-client privilege. Waiver of the solicitor-client privilege may be express or implied. As the appellant has not specifically stated whether she claims the waiver was express or implied, I shall examine both issues.

In the recent text Solicitor-Client Privilege in Canadian Law, R.D. Manes and M.P. Silver, (Butterworth's, 1993) at pp. 189 and 191, the authors distinguish between the two types of waiver:

Express waiver occurs where the client voluntarily discloses confidential communications with his or her solicitor.

Generally waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. Fairness is the touchstone of such an inquiry.

.

In S. & K. Processors Ltd. . . . McLachlin J. noted:

However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require ...

In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. (pp. 148-149)

The following passage from Wigmore on Evidence, vol. 8 (McNaughton rev. 1961), as set out in The Law of Evidence in Canada (Markham: Butterworth's, 1992), by Sopinka, Lederman and Bryant at p. 666, was quoted with approval by the Ontario Court (General Division) in the recent case of Piché v. Lecours Lumber Co. (1993), 13 O.R. (3d) 193 at 196:

A privileged person would seldom be held to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not.

There is nothing in the material before me to indicate that the City has waived privilege with respect to any of the records I found to be exempt under section 12, with the exception of pages 36-40.

As stated above, the City withdrew its reliance on the section 6(1)(a) exemption for the draft by-law comprising pages 36-40, on the basis that it was considered in a City council meeting open to the public, and thus section 6(2)(a) applies.

In my view, by in effect disclosing this version of the draft by-law to the public by way of an open council meeting, the City has voluntarily evinced an intention to waive privilege with respect to this document. Therefore, the City has expressly waived any privilege which may attach to pages 36-40.

Conclusion

I find that the solicitor-client communication privilege in section 12 applies to pages 18-27, 33-35,

41-43 and 47-53 in their entirety. Section 12 solicitor-client communication privilege does not apply to pages 36-40.

Litigation Privilege

I found above that all remaining records for which section 12 was claimed (i.e., those not claimed and found to be exempt under section 6) are exempt pursuant to solicitor-client communication privilege, with the exception of pages 36-40, the draft by-law considered by City council at a meeting open to the public. I also found above that the City expressly waived privilege with respect to this version of the draft by-law. This waiver applies with equal force to litigation privilege, as well as solicitor-client communication privilege. Therefore, I find that pages 36-40 cannot be subject to litigation privilege, even if this privilege applied at the time the draft by-law was created.

ADVICE OR RECOMMENDATIONS

The City claimed that pages 19-24 were exempt under section 13(1) (“advice or recommendations”). I have already found these records to be exempt under section 12. Therefore, it is not necessary to consider the application of the section 13 exemption in this appeal.

ORDER:

1. I order the City to disclose pages 36-40 to the appellant by **May 12, 1999**.
2. I uphold the decision of the City with respect to the remaining records.

Original signed by: _____
David Goodis
Senior Adjudicator

_____ April 21, 1999