



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

# **ORDER MO-1214**

**Appeal MA-980233-1**

**City of Hamilton**



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## **NATURE OF THE APPEAL:**

The appellant made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the City of Hamilton (the City). The request was for access to details surrounding a purported review that was apparently conducted by the City's Law and Treasury Departments of a Feasibility Study prepared by Automatic Mart Corp. The appellant identified that his request pertained to the time period of April 7, 1998 to July 24, 1998.

The City located records responsive to the appellant's request and provided partial access to them. Exemptions in sections 7, 11(d), 12, 14 and 15 of the Act were applied by the City to withhold certain records or parts of records from disclosure.

The appellant appealed the City's denial of access. The appellant also indicated that he believes that additional responsive records exist.

During mediation of the appeal, the City agreed to disclose all of the records which were withheld in full and, consequently, sections 7, 11(d) and 15 are no longer at issue. Of those records originally withheld in part, the City agreed to disclose the feasibility study and an e-mail dated April 29, 1998, 3:25 PM. The City also agreed to disclose part of an e-mail dated April 29, 1998, 2:28PM.

I sent a Notice of Inquiry to the City and the appellant. Representations were received from the City. In its representations, the City withdrew its application of section 14 to the third paragraph of the e-mail dated July 16, 1998 1:07PM. Accordingly, section 14 is no longer at issue in this appeal. The City's application of section 12 to this same record will be reviewed below.

## **RECORDS:**

The records remaining at issue consist of the severed portions of seven pages of e-mails.

## **DISCUSSION:**

### **SOLICITOR-CLIENT PRIVILEGE**

#### ***Branches 1 and 2***

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 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:

[IPC Order MO-1214/May 19, 1999]

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.

[Order 49, see also Orders 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 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]

***Scope of Branches 1 and 2 determined with reference to the common law***

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 submits that the records are covered by the solicitor-client communication privilege. The City advises that the records are not subject to litigation privilege.

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.

The City claims that the third and fourth paragraphs of the April 29, 1998 2:28PM e-mail contain a request for legal advice respecting the contents of the appellant's feasibility study and statement made by the appellant in the study.

I have reviewed this record, and I am satisfied that it is a confidential communication between a solicitor and a client. Only the third paragraph, however, is directly related to seeking legal advice. Accordingly, I find that the third paragraph qualifies for exemption under section 12 of the Act. The fourth paragraph, which relates to financial issues associated with the study, is not directly related to seeking, formulating or giving legal advice, and does not qualify for exemption under section 12.

The City submits that the May 11, 1998 12:52PM e-mail is part of a continuum of communications flowing from the April 29 e-mail message. The City claims that the information is directly related to formulating legal advice for the client. The May 11, 1998 4:20PM e-mail shares the evaluation of the feasibility study and subsequently discusses ways to "fight back". The severed information consists of proposed courses of action, an analysis of the consequences of pursuing those proposed courses of action and reasons why the proposed courses of action are appropriate under the circumstances. I am satisfied that these two records are confidential communications between a solicitor and a client which are directly related to formulating or giving legal advice, and section 12 applies.

Solicitor-client communication privilege has also 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]. The City submits that the July 16, 1998 1:07PM, 1:13PM, and 4:43PM e-mails contain the deliberations of city solicitors with respect to formulating advice for their client. Having reviewed these records, I agree, and find that section 12 applies.

The City does not refer to the July 16, 1998 3:56PM e-mail in its representations. This e-mail is from the City's Director of Culture and Recreation to the City Treasurer, with a copy to the City Solicitor. The first two paragraphs do not relate to the seeking, formulating or giving of legal advice and, in my view, do not qualify for exemption under section 12 of the Act. The third paragraph refers to the fact that a request for

legal advice was made, and the fourth paragraph suggests a possible current location of the City's copy of the study. Neither of these paragraphs refers in any direct way to the nature of the request for legal advice or the response received. In my view, this record is not sufficiently detailed to attract the application of the solicitor-client communication privilege, and I find that section 12 does not apply.

### **REASONABLENESS OF SEARCH**

The City submits that on receipt of the appellant's request, the Freedom of Information Coordinator contacted the then Director of Culture and Recreation, the City Treasurer, and the City Solicitor and requested any and all information relevant to the eight questions in the request.

The City indicates that the Director of Culture and Recreation contacted the Manager of Arena & Technical Services, who provided the Freedom of Information Coordinator with records responsive to the request. In fact, the City submits that the Manager of Arena & Technical Services provided two records which were outside of the dates specified in the appellant's request. The City indicates that it included these records with those identified as responsive to the request and disclosed them to the appellant.

The City also indicates that the City Treasurer retrieved one record, and contacted the Manager of Budgets to determine whether there were any other records within the Treasury Department's possession. The Manager of Budgets reported that, "... we do not have anything else other than that which was provided (one page)..."

The City says that the City Solicitor provided copies of responsive e-mail notes between herself and other Law Department members and the Treasury and Culture and Recreation Departments. The City submits that the e-mail messages represent the only responsive records within the Law Department.

Where a requester provides sufficient details about the records which he is seeking and the City indicates that further records do not exist, it is my responsibility to ensure that the City has made a reasonable search to identify any records which are responsive to the request. The Act does not require the City to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under section 17 of the Act, the City must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Having reviewed the circumstances of this appeal and the representations before me, I am satisfied that the City's search for records which are responsive to the request was reasonable in the circumstances.

### **ORDER:**

1. I order the City to disclose the fourth paragraph of the April 29, 1998 2:28PM e-mail message and the Thursday July 16, 1998 3:56PM message to the appellant by sending him a copy by **June 9, 1999**.
2. I uphold the City's decision not to disclose the remaining records.
3. I find that the City's search for records responsive to the request was reasonable in the circumstances.
4. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of the record disclosed to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_  
Holly Big Canoe  
Adjudicator

\_\_\_\_\_ May 19, 1999