



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

ORDER MO-1454

Appeal MA-000123-2

The New City of Hamilton



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NATURE OF THE APPEAL:

This is an appeal from a decision of the City of Hamilton/Region of Hamilton-Wentworth (now the City of Hamilton, and referred to in this order as “the City”) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). As background, the requester (now the appellant) made a 24-part request to the City for documents relating, essentially, to work it performed on two projects for the City, as well as the process by which the City awarded work on another, unrelated project, for which it submitted a bid. The City did not issue a decision letter in response to the request within the time prescribed by the *Act*. The appellant appealed the lack of an access decision, and the result was Order MO-1311, in which the City was ordered to issue a decision on access by a specified date.

The City issued its decision, in which it listed some 37 records as being responsive to the request. Of these, access was granted to four records in part. In denying access to the severed portions of the four records and to the other records, the City relied on the discretionary exemptions in sections 7 (advice or recommendations) and 12 (solicitor-client privilege) of the *Act*, and the mandatory exemptions in sections 10 (third party information) and 14 (unjustified invasion of personal privacy). Section 15 was also cited by the City as the basis for denying access to one record, but during the course of mediation through this office, the City agreed to and has disclosed this record, as well as some other records.

I sent a Notice of Inquiry to the City and to two affected parties, initially, seeking their representations on the issue in this appeal. I have received no representations from any of them. I then sent the Notice to the appellant and invited representations, which have been received by me.

RECORDS:

The records remaining in dispute are listed and described briefly by the City in an attachment to its decision letter. Since they are not numbered, I have numbered them, using the order in which they are listed by the City, as Records 1 to 36.

Records 1 to 8, 10 to 11, 13 to 14, 16 to 17, 19 to 24, 27 to 28 and 32 to 36 consist of e-mail messages or memos amongst members of the City’s staff. Some of these records (for example, Record 6) consist of a string of e-mail messages, including an original message and replies to that message.

Records 9 and 12 are memos from a member of the City’s staff to an internal file. Record 15 is a letter and fax cover sheet from an architectural firm to the City. Record 18 is a letter from the City to the same architectural firm. Records 25 and 26 are a letter from another architectural firm to the City and a document entitled “Change Order”. Record 29 is a handwritten note by a member of the City’s staff. Record 30 is a letter from the same firm which authored Records 25 and 26, and Record 31 consists of attachments to that letter.

Records 20, 21, 23 and 24 have been released in part. The rest of the documents have been withheld in their entirety.

The City relies on the provisions of section 12 with respect to Records 1 to 17, 19, 22, 27 to 29 and 32 to 36. Although section 12 is not listed by the City as an exemption applicable to Record 5, this record also appears in Records 6, 7 and 8, for which section 12 has been claimed. The City relies on section 7 with respect to Records 5, 8 to 9, 11 to 12, 19, 21, 23, 32, and 35 to 36, or parts of those records. The City relies on section 14 of the *Act* with respect to the denial of access to Records 10, 20, 24 or parts of those records. Finally, the City refers to section 10 in its decision to deny access to Records 15, 18, 25 to 26 and 30 to 31.

CONCLUSION:

I uphold the City's decision to deny access to some of the records on the basis of solicitor-client privilege, but order disclosure of other records.

DISCUSSION:

Since the application of section 12 will dispose of most of the issues in this appeal, I will turn to consider that section first.

SOLICITOR-CLIENT PRIVILEGE

Introduction

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.

The appellant has submitted that there is no information to suggest that any records or information provided to or by counsel were prepared or retained in contemplation of or for use in litigation. It is said that there is no litigation between the appellant and the City nor is any litigation contemplated subject to the nature of the documents disclosed pursuant to this request and any other information that may become available to the appellant in the future.

Section 12 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 12 to apply, it must be established that one *or* the other, or both, of these heads of privilege apply to the records at issue. Accordingly, it need not be established that there is contemplated or actual litigation

On my review of the records, I find that it is the solicitor-client communication privilege, rather than litigation privilege, which is relevant to the records.

Solicitor-client communication 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 [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].

As I have indicated, the City has made no representations in support of its application of section 12 to some of the records in dispute. In addition to the submissions set out above, the appellant states generally that the onus is on the City to establish the exemptions cited and given that it has not made any representations, it has not met its onus.

The absence of representations from the City is not fatal to its position in these matters. It is open to me to review the records in order to determine whether information contained within them supports the application of the exemptions claimed by the City. In this appeal, Records 1 to 8, 10 to 11, 13 to 14, 16 to 17, 28 and 34 to 36 are all e-mail messages sent to or from the City's Senior Solicitor or another individual in the department of legal services within the City. Records 19, 27, 32 and 33 are memos between members of the City's legal department

and members of its staff. Record 29 is a handwritten notation of a telephone call or meeting between the Senior Solicitor and another member of the City's staff. It is apparent on the face of these records that these messages, memos and notes form part of a "continuum of communications", between members of the City's staff and members of its legal department, made for the purpose of obtaining or giving legal advice. Further, even without any specific words to that effect, as these are all internal communications, to and from the legal department, it is reasonable to presume that they are confidential.

Record 9 is a memo to an internal file from the Community Co-ordinator for the City's Culture and Recreation Department. Although this individual is one of the persons involved in the communications in the records discussed above, there is nothing on the face of this document which supports its characterization as a communication given for the purpose of giving or receiving legal advice. I am not satisfied that section 12 applies to exempt this record from disclosure.

Record 12 is a memo from the same individual who authored Record 9, and is also stated to be "to file". In this case, however, it is apparent from the memo that its purpose is to provide the City's Senior Solicitor with certain information in relation to a matter on which legal advice is sought. Section 12 therefore applies to exempt this record from disclosure.

Record 15 is a letter and fax cover sheet sent from an architectural firm to the City's Senior Solicitor. The letter appears to be the firm's response to a letter from the City expressing some concerns about a construction project in which the firm is involved. As this letter is not part of communications between a solicitor and client, section 12 does not apply. It should be noted that Record 15 contains, in addition to the text of the letter from the architectural firm, handwritten notes in the margins of the letter. I have been given no information about the author, purpose or context of these notes, and accordingly have no basis on which to apply section 12 to these notes.

Record 22 is an e-mail message, which appears to be from a member of the City's staff to the Director of the City's Culture and Recreation Department. I am unable to determine whether the individual who sent this message is a member of the legal department, and there is nothing in the message which identifies her as such. I have no evidence, therefore, which supports the application of the solicitor-client exemption to this record.

In sum, I am satisfied that section 12 applies to exempt Records 1 to 8, 10 to 14, 16 to 17, 19, 27 to 29 and 32 to 36. It does not apply to Records 9, 15 and 22.

ADVICE OR RECOMMENDATIONS

The City has relied on section 7 to exempt Records 5, 8, 9, 11, 12, 19, 32, 35, 36 and portions of Records 21 and 23 from disclosure. As I have found section 12 to apply to Records 5, 8, 11, 12, 19, 32, 35 and 36, it is unnecessary to consider them here. The following discussion therefore relates to Record 9 and the severed portions of Records 21 and 23 only. Section 7(1) of the *Act* states:

A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

. . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

A number of previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)].

In Order P-434 Assistant Commissioner Tom Mitchinson made the following comments on the "deliberative process":

In my view, the deliberative process of government decision-making and policy-making referred to by Commissioner Linden in Order 94 does not extend to communications between public servants which relate exclusively to matters which have no relation to the actual business of the Ministry. The pages of the record which have been exempt[ed] by the Ministry under section 13(1) [of the provincial *Act*] in this appeal all deal with a human resource issue involving the appellant and, in my view, to find that this type of information is exemptible under section 13(1) of the *Act* would be to extend the exemption beyond its purpose and intent.

This approach has been applied in several subsequent orders of this office [Orders P-1147 and P-1299, dealing with the provincial equivalent of section 7(1)].

Information in records which would reveal the advice or recommendations is also exempt from disclosure under section 7(1) of the *Act* [Orders 94, P-233, M-847, P-1709].

On my review of the material before me, I find that none of the records at issue here contain the sort of advice or recommendations contemplated by the exemption in section 7. Record 9 is a memo to an internal file recording discussions between the City employee and an outside architect. The portions of Records 21 and 23 which have been withheld by the City appear to

contain directions from a supervisor to a member of City staff, rather than advice or recommendations within the meaning of the section 7(1) exemption [see Order P-363, dealing with the provincial equivalent of section 7(1), upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)*, Toronto Doc. 721/92 (Ont. Div. Ct.)].

Accordingly, I find that section 7 does not apply to exempt Record 9 and the severed portions of Records 21 and 23 from disclosure.

PERSONAL INFORMATION/INVASION OF PRIVACY

The City has denied access to Record 10 and portions of Records 20 and 24 in reliance on section 14. Since I have found Record 10 to be exempt under section 12 of the *Act*, it is unnecessary to consider it here.

On Record 20, there is a reference to section 14(2)(g); there is no indication in the materials indicating what part of section 14 the City applied in its decision to withhold part of Record 24.

"Personal information" under the *Act* is defined in section 2(1) to mean recorded information "about an identifiable individual", including the personal opinions or views of the individual except if they relate to another individual [paragraph (e)], the views or opinions of another individual about the individual [paragraph (g)] and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual [paragraph (h)].

Where records contain personal information within the meaning of the *Act*, they may qualify for exemption under section 14(1) which prohibits the disclosure of such information to another person, unless the disclosure does not constitute an unjustified invasion of personal privacy.

Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official government capacity, and found that in some circumstances, information associated with a person in his or her professional or official government capacity will not be considered to be "about the individual" within the meaning of section 2(1) definition of "personal information": see, for instance, Orders P-257, P-427, P-1412 and P-1621 and Reconsideration Order R-980015.

I have reviewed the severed portions of Records 20 and 24, and am unable to find that they contain the personal information of any individual. These portions contain the opinions of the authors of these messages about the quality of work done by a contractor who performed work at a fire station. The information does not qualify as personal information about the contractor, since it is a company and not an individual. Neither does it qualify as the personal information of the authors expressing the opinions. There is no evidence that these opinions were given in a personal rather than a professional or employment capacity.

I find, therefore, that the severed portions of Records 20 and 24 do not contain the personal information of any individual within the meaning of section 2(1). As they contain no

personal information, they do not qualify for exemption under section 14(1), and accordingly must be disclosed.

THIRD PARTY INFORMATION

The City has relied on the provisions of section 10 to exempt Records 15, 18, 25, 26, 30 and 31 from disclosure. I have described these records above. Briefly, they consist of correspondence from and to outside architectural firms, about certain projects for the City in which these firms were involved. Records 15 and 18 document an expression of dissatisfaction from the City, and the architectural firm's response. Records 25 and 26 document a change to a project, the options suggested by the architectural firm and the decision. Records 30 and 31 document fee revisions submitted by an architectural firm to the City.

Section 10(1) of the *Act* provides:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 10(1) exists in recognition of the fact that in the course of carrying out public responsibilities, governmental agencies often find themselves in possession of information about the activities of private businesses. In Order PO-1805 Senior Adjudicator David Goodis, discussing the purposes of the provincial equivalent to section 10(1), stated that this provision was designed to "protect the 'informational assets' of businesses or other organizations which provide information to government institutions".

Although, as stated in other orders, one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of information which, while in the possession of government, constitutes confidential information of a third party which could be exploited by a competitor in the marketplace.

In applying section 10(1), previous orders have held that in order to support an exemption from disclosure under this section, institutions or affected parties must establish each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 10(1) will occur.

[Orders 36, P-373, M-29 and M-37]

As I have indicated, the City has made no representations. The two architectural firms were notified as affected parties and given the opportunity to make representations, but have not. The appellant points out it is in the unenviable position of having to submit representations without any information as to the specific basis or rationale for the refusal to disclose the documentation. Nevertheless, it submits that it has no information which suggests that the exemption provided by section 10 of the *Act* applies to any of the records in issue. It submits that none of the information was intended to be supplied in confidence, nor will disclosure of the information lead to any undue loss or gain.

On my review of the records at issue, I find that at least some of the information contained in them qualifies as either "technical" or "commercial" information. However, I find no evidence that any of the information in these records was "supplied in confidence" by the third parties to the City, as required by section 10(1). Further, there is no evidence that disclosure of the information could reasonably be expected to result in the harms set out in that section.

As all three parts of the three-part test under section 10(1) must be met in order for this exemption to apply, I therefore conclude that Records 15, 18, 25, 26, 30 and 31 do not qualify for exemption under this section.

ORDER:

1. I order the City to disclose Records 9, 15, 18, 22, 25, 26, 30, 31, and the severed portions of Records 20, 21, 23 and 24.
2. Disclosure is to be made by sending the appellant a copy of the records by no later than August 13, 2001 but no earlier than August 3, 2001.
3. I uphold the City's decision to withhold the remaining records.

4. In order to verify compliance with provisions 1 and 2 of this order, I reserve the right to require the City to provide me with a copy of the records which are disclosed to the appellant.

Original signed by: _____
Sherry Liang
Adjudicator

_____ July 13, 2001