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

ORDER MO-1483

Appeal MA-010050-1

The New City of Hamilton

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NATURE OF THE APPEAL:

The New City of Hamilton (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "all records relating to the City of Hamilton's smoking by-law as it relates to Ivor Wynne Stadium."

The City initially identified a large number of potentially responsive records, and issued a fee estimate to the requester, which he paid. The City then completed a more detailed review of the identified records and provided the requester with an access decision, disclosing 62 records in whole or in part and denying access to 79 records or partial records on the basis of one or both of the following exemptions contained in the *Act*:

- Section 7 (advice and recommendations), and
- Section 12 (solicitor-client privilege)

The requester (now the appellant) appealed the City's decision. During mediation, the City issued a revised decision to the appellant, releasing a number of additional records.

Mediation was not successful in resolving all issues, and the appeal was transferred to the Adjudication Stage. I initially sent a Notice of Inquiry to the City, asking for representations on the remaining issues. The City provided representations on the issues, and also stated in its representations that:

- certain records and/or portions of records would be disclosed;
- certain records and/or portions of records initially identified as responsive, were now identified as not responsive to the request;
- the section 7 exemption claim was withdrawn;
- the City was not claiming the litigation privilege component of section 12 for any of the undisclosed records.

The City also provided the appellant with copies of the records or portions of records it agreed to disclose.

I then sent a revised Notice of Inquiry to the appellant, along with a copy of the City's representations. The appellant provided brief representations in response.

RECORDS:

There are 20 records or portions of records remaining at issue in this appeal. They consist of e-mail messages and a report. The records are numbered 2, 4, 10, 11, 12, 13, 35, 37, 40, 41, 45, 47, 48, 50, 52, 61, 63, 64, 65 and 70 (Record 45 is a duplicate of Record 37, and I will not discuss it separately in this order).

In addition, the City claims that the undisclosed portions of Records 1, 38 and 46 are not responsive to the appellant's request.

DISCUSSION:

RESPONSIVENESS

In his representation, the appellant questions whether the City can deny access to records on the basis that they are not responsive to his request. He states:

> Is the City able, under the *Act*, to withhold portions of records it considers non-responsive?
>
> I have often received records from institutions that contain information that is not in itself responsive to the request. It has always been my understanding that the *Act* provides a right of access to records, and allows information to be severed only if it falls under one of the exemptions. If a record contains responsive information, it is normally released in its entirety, subject to the exemptions.
>
> Therefore I question the right of [the City] to sever the contents of several records on the basis that they are non-responsive portions. These should be released in their entirety, subject to the exemptions under the *Act*.

The appellant raises two issues. The first concerns the City's ability to withhold portions of records based on its determination that they are not responsive to the request. The appellant appears to take the position that if a record contains both responsive and non-responsive information, the City must disclose the non-responsive portions unless they qualify for exemption under the *Act*.

It is clear from previous orders of this Office that records are often severed by an institution or an Adjudicator on the basis that certain portions do not fall within the scope of a request. Perhaps the most common example is a request for records relating to a motor vehicle accident, where certain notebook entries made by an investigating police officer are responsive, and other entries dealing with unrelated activities undertaken by that police officer on the same day are withheld on the basis that they fall outside the scope of the request. Another example might be an audit report dealing with the operation of a number of publicly funded bodies, where only one of these bodies is identified in a request. In my view, this approach to dealing with requests is both practical and supportable by the wording of the *Act*. Section 4 of the *Act* gives requesters a right of access to "a record or **part of a record**", presumably for the purpose of giving institutions flexibility when making decisions regarding responsiveness. Section 17 of the *Act* is also relevant in this regard. It imposes obligations on both institutions and requesters to clearly identify information responsive to a request and, where unclear, to actively work together to ensure that both parties understand what information is requested and what is not. To require all portions of records, whether responsive or not, to undergo an exemption-based review in the context of responding to a particular request would, in my view, impose an unnecessary and unproductive burden on the statutory access scheme.

The second issue the appellant raises is whether the information severed from Records 1, 38 and 46 is actually responsive to his request.

Former Adjudicator Anita Fineberg canvassed the issue of responsiveness of records in detail in Order P-880. In applying the direction provided by the Divisional Court in *Ontario (Attorney-General) v. Fineberg* (1994), 19 O.R. (3rd) 197, she concluded:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

In its representations, the City outlines its reasons for determining that the information at issue is non-responsive. A copy of these representations was provided to the appellant. The City takes the position that the appellant's request deals with the City's smoking by-law as it relates specifically to Ivor Wynne Stadium and has provided him with access to all portions of Records 1, 38 and 46 that deal with this topic. The withheld portions of these records deal with the smoking by-law as it relates to restaurants which, in the City's view, are not relevant to the request.

Having reviewed Records 1, 38 and 46, I concur with the City on this issue. The appellant's request is quite specific, and the portions of these records disclosed to him are those that are "reasonably related to the request", specifically those that deal with the City's smoking by-law "as it relates to Ivor Wynne Stadium"; and those portions not disclosed are those that deal with the by-law as it relates to a different category of business - restaurants. In my view, these withheld portions are not reasonably related to the Ivor Wynne Stadium and therefore fall outside the scope of the appellant's request.

Part of the reason for the appellant's concern may relate to the fact that the issue of responsiveness arose only at the time the City submitted its representations, which is a relatively late stage in the appeals process. In my view, the *Act* gives institutions the ability and the responsibility to deal with issues regarding responsiveness of records or portions of records at an early stage in the request process. Ideally, issues of this nature should not be raised for the first time at the appeal stage, when requesters might reasonably assume that any records identified as responsive by an institution should be treated in that manner on appeal. However, in my view, this requirement should not be applied rigidly. In the circumstances of this appeal, the City reviewed the withheld records and disclosed a number of them after the appeal had been filed, both during mediation and in response to receiving the Notice of Inquiry once the matter had proceeded to the Adjudication Stage. In what appears to have been an effort to maximize the

amount of disclosure provided to the appellant, the City identified the issue of responsiveness for the first time during this inquiry and, although I would encourage the City to undertake this type of review in its initial response to requesters, in my view, it has nonetheless made a proper determination on the responsiveness issue as it relates to Records 1, 38 and 46 in the circumstances of this appeal.

I should also note that the appellant is not precluded from submitting a new request for this withheld information, if he is interested in being providing with records on this other topic.

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.

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, the City must demonstrate that one or the other, or both, of these heads of privilege apply to the records at issue.

In its representations, the City indicates that it is not claiming litigation privilege, but submits that the records are subject to solicitor-client communication privilege.

Solicitor-client communication privilege

Introduction

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].

The Supreme Court of Canada has described this privilege 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.

The City submits:

> [Identified corporate counsel] are intricately involved with the drafting of a smoking by-law for the City of Hamilton. An indeterminate number of City staff involved with the drafting of a smoking by-law have solicited the advice and direction of legal counsel with respect to the smoking by-law and how it should be applied to restaurants, bars and sports facilities, in particular Ivor Wynne Stadium. This is evidenced in records 4, 37, 40, 52 and 640.
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> Records 2, 10, 11, 12, 13, 35, 41, 48, 50, 61, 63, 65 and 70 contain the advice and/or recommendations of the City's legal counsel. The record contents are the responses from the City counsels as a result of questions posed by staff, and legal directions being sought by staff.
>
> The drafting of a comprehensive smoking by-law for the City of Hamilton has been a somewhat protracted undertaking; beginning prior to the amalgamation of the City and the five area municipalities and continuing as of the date of these representations. The communications between City counsel and staff have been ongoing for this period.
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> The records for which solicitor-client communication privilege attaches contain a continuum of communications between the City counsels, and between City

> counsel and staff. The communications deal with the smoking by-law, its enforcement at Ivor Wynne Stadium, the draft "harmonized" by-law report, and in some instances apprising outside counsel of developments relative to the by-law and its enforcement.

I have reviewed the records or portions of records for which the section 12 exemption claim is made. Records 2, 10, 11, 12, 13, 35, 41, 48, 50, 61, 63, 65 and 70 all consist of e-mail communications from City counsel to co-counsel and/or staff concerning the smoking by-law at Ivor Wynne Stadium. I find that each of the communications was made for the purpose of providing confidential legal advice. It is also clear that a solicitor-client relationship existed between the City and its employees on the one hand and counsel employed by the City on the other. Accordingly, I find that the requirements of solicitor-client communications privilege have been established for Records 2, 10, 11, 12, 13, 35, 41, 48, 50, 61, 63, 65 and 70, and they qualify for exemption under section 12 of the *Act*.

Records 4, 40, 47, 52 and 64 are e-mail correspondence sent to counsel by various staff members specifically asking for legal advice or referring to issues and the advice received. For the same reasons as the other records discussed above, I find that each of these e-mail messages represents a confidential communications between solicitor and client made for the purpose of obtaining legal advice, and Records 4, 40, 47, 52 and 64 also qualify for exemption under section 12.

As far as Record 37 is concerned, the City describes it as a "draft harmonized by-law report", which includes a specific request for legal advice. This record was prepared by City counsel and staff, and subsequently amended, as is evidenced by some of the other records at issue in this appeal. The amendments include changes made to the draft based on legal advice provided by City counsel, and I am satisfied that the disclosure of this draft report would disclose confidential legal advice provided by City counsel to their client. Accordingly, I find Record 37 also qualifies for exemption under the solicitor-client communications component of section 12.

In summary, I find that all remaining responsive records qualify for exemption under section 12 of the *Act*.

ORDER:

I uphold the City's decision.

Original Signed By: November 14, 2001
Tom Mitchinson
Assistant Commissioner