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

ORDER MO-1562

Appeal MA-010253-1

City of Waterloo

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NATURE OF THE APPEAL:

The City of Waterloo (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from an individual for all information relating to an identified property, subsequent to January 1, 1999. The request further specified the following:

1. all information relating to three identified individuals, including the requester, that relate to the same specified property;
2. all information pertaining to the process of obtaining Lodging House Licenses between specified dates;
3. all information pertaining to the process of obtaining approval of accessory apartment status between specified dates;
4. all legal opinions received from identified lawyers in relation to the City's current application against two identified individuals;
5. all information pertaining to an identified City Councillor's dealing with the specified property, including particulars of meetings with neighbours who are opposed to the current use of the property at issue;
6. all information pertaining to the City staff dealing with the specified property, including particulars of meetings with neighbours who are opposed to the current use of the property at issue;
7. copies of all building permits issued between specified dates;
8. copies of all correspondences and memos, both internal and external, dealing with the property at issue.

The City issued a decision letter in which it responded separately to each of the eight parts of the request.

For part one of the request, the City referred the appellant to an affidavit of the City's by-law enforcement manager that had been previously disclosed as part of a court proceeding involving the City and the appellant. The City claimed that it had no further records relating to the three individuals.

In response to parts two and three of the request, the City released various records to the appellant.

In response to part four, the City refused access relying on section 12 of the *Act* and claiming the records were exempt from disclosure as they were subject to solicitor-client privilege.

In response to part five, the City claimed that no such records exist.

In response to parts six and eight, the City again referred the appellant to the same affidavit of the City's by-law enforcement manager that had previously been disclosed.

In response to part seven, the City released a copy of a building permit issued to the appellant.

The appellant appealed the City's decision. The letter of appeal indicated that the appellant was satisfied with the records released in response to part two of the request. With respect to every

other part of the request, the appellant was dissatisfied with the City's decision in that the decision was not responsive to the request.

In this regard, the appellant provided information supporting his belief that additional records responsive to the request exist. The appellant also disputed the City's claim of solicitor-client privilege alleging that it had waived privilege by disclosing the substance of the lawyers' opinions in an affidavit provided by the City in a separate legal proceeding. The appellant clarified that part seven of the request was intended to include all building permits issued, and not just those relating to the property in issue.

During mediation, the City conducted a further search to locate other responsive records that may have been originally overlooked by it during its initial search. The City also issued a supplemental decision letter, in which it responded to each part of the appellant's request in the following manner:

> Part 1 - Further clarification of the request was required prior to the City being able to issue a fee estimate;
>
> Part 2 - No further response required;
>
> Part 3 - The City confirmed that the record released with the original decision was in fact a newly created record created specifically to respond to the request. As a result of its further search, the City located two other records responsive to the request and released both;
>
> Part 4 - The City maintained its reliance on section 12 of the *Act*, claiming that it had not waived solicitor-client privilege by making reference to the opinions in an affidavit;
>
> Part 5 - The City confirmed that the identified City Councillor did not have any responsive records;
>
> Part 6 - Further clarification of the request was required prior to the City being able to issue a fee estimate;
>
> Part 7 - The City issued a fee estimate of $373.40 in relation to the appellant's request for copies of all building permits issued by the City between specified dates; and
>
> Part 8 - The City issued a fee estimate of $480.00 in relation to the appellant's request for copies of all correspondence and memos relating to the property in question.

The total fee estimate amounted to $853.40. The appellant submitted to the City a cheque for $426.70 as a 50% deposit to continue their search and preparation of the records in response to

parts 7 and 8 of the request. The City indicated that it would require 90 days to notify third parties, allow sufficient time for objections to be lodged, receive/review objections, make substantive decisions and review, copy and collate documentation for release.

The appellant objected to the length of time required to respond to parts 7 and 8 of the request. However, in correspondence to the mediator, he indicated that he would not be pursuing this matter. Rather, the appellant indicated that the sole remaining issue to be adjudicated was the application of section 12 to the records at issue in this appeal.

Further mediation could not be effected and this appeal proceeded to adjudication. I decided to seek representations from the City, initially. In reviewing the records, it appears that they contain information about the appellant. Accordingly, I added the possible application of section 38(a) (discretion to refuse requester's own information) as an issue in this appeal.

The City's representations were submitted on its behalf by legal counsel retained by it. I subsequently sought representations from the appellant and attached the non-confidential portions of the City's representations to the copy of the Notice of Inquiry that I sent him. The appellant's representations were also submitted by his legal counsel.

RECORDS:

The records at issue consist of 14 letters written by a law firm to the City in relation to the specified property. Except for the records disclosed, no other responsive records were identified.

DISCUSSION:

PERSONAL INFORMATION

As I indicated above, because the records made reference to the appellant, I included the possible application of section 38(a) as an issue in this appeal. In order to determine whether section 38(a) applies in the circumstances of a particular appeal, it is first necessary to determine whether the records contain the personal information of the requester. Personal information is defined generally in the preamble to section 2(1) of the *Act* as "recorded information about an identifiable individual". This section then sets out a non-exhaustive list of the types of information that qualify as "personal" which provides some guidance in determining whether the information at issue is "personal information":

> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if 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;

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" [Orders P-257, P-427, P-1412, P-1621].

The Commissioner's orders dealing with non-government employees, professional or corporate officers treat the issue of "personal information" in much the same way as those dealing with government employees. The seminal order in this respect is Order 80. In that case, the institution had invoked section 21 to exempt from disclosure the names of officers of the Council on Mind Abuse (COMA) appearing on correspondence with the Ministry concerning COMA funding procedures. Former Commissioner Linden rejected the institution's submission:

> The institution submits that "...the name of the individual, where it is linked with another identifier, in this case the title of the individual and the organization of which that individual is either executive director, or president, is personal information defined in section of the *FIO/PPA*...." All pieces of correspondence concern corporate, as opposed to personal, matters (i.e. funding procedures for COMA), as evidenced by the following: the letters from COMA to the institution are on official corporate letterhead and are signed by an individual in his capacity as corporate representative of COMA; and the letter of response from the institution is sent to an individual in his corporate capacity. In my view, the names of these officers should properly be categorized as "corporate information" rather than "personal information" under the circumstances.

In Reconsideration Order R-980015, Adjudicator Donald Hale reviewed the history of the Commissioner's approach to this issue and the rationale for taking such an approach. He also extensively examined the approaches taken by other jurisdictions and considered the effect of the decision of the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385 on the approach which this office has taken to the definition of personal information. In applying the principles which he described in that order, Adjudicator Hale came to the following conclusions:

> I find that the information associated with the names of the affected persons which is contained in the records at issue relates to them only in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not about these individuals and, therefore, does not qualify as their "personal information" within the meaning of the opening words of the definition.
>
> In order for an organization, public or private, to give voice to its views on a subject of interest to it, individuals must be given responsibility for speaking on its behalf. I find that the views which these individuals express take place in the context of their employment responsibilities and are not, accordingly, their personal opinions within the definition of personal information contained in section 2(1)(e) of the *Act*. Nor is the information "about" the individual, for the reasons described above. In my view, the individuals expressing the position of an organization, in the context of a public or private organization, act simply as a conduit between the intended recipient of the communication and the organization which they represent. The voice is that of the organization, expressed through its spokesperson, rather than that of the individual delivering the message [emphasis in original].
>
> In the present situation, I find that the records do not contain the personal opinions of the affected persons. Rather, as evidenced by the contents of the records themselves, each of these individuals is giving voice to the views of the organization which he/she represents. In my view, it cannot be said that the affected persons are communicating their personal opinions on the subjects addressed in the records. Accordingly, I find that this information cannot properly be characterized as falling within the ambit of the term "personal opinions or views" within the meaning of section 2(1)(e).

Previous orders have also recognized that even though information may pertain to an individual in that person's professional capacity, where that information relates to an investigation into or assessment of the performance or improper conduct of an individual, the characterization of the

information changes and becomes personal information (Orders 165, P-447, M-122, P-1124, P-1344 and MO-1285). In these cases, the records must be viewed contextually (see, for example: Orders MO-1524-I and PO-1983).

It would appear that counsel for both parties are in agreement that the records do not contain the appellant's personal information. In this regard, the lawyer for the City writes:

> The information at issue does not qualify as "personal information" as defined in section 2(1) of the *Act*.
>
> The types of information articulated in subsections 2(1)(a) – (f) and (h) are in no way referred to in the records.
>
> The records make no personal reference to the Applicant. In the event that the Applicant's name is mentioned it is for the sole purpose of identifying the matter which is being discussed.
>
> Based on subsection 2(1)(g), an individual is entitled to records indicating "the views of opinions of another individual about the individual". The records in issue do not contain any views or opinions about the Applicant. The records contain opinions regarding the legal action involving the Applicant. The City submits that this information does not qualify as "personal information" as defined in section 2(1) of the *Act*.
>
> …
>
> The information at issue does not qualify as "personal information" in light of the Commission's previous decisions regarding the distinction between an individual's personal and professional or official government capacity.
>
> The information at issue makes no reference to the Applicant in either his personal capacity or any professional or governmental capacity. The City has no information regarding any possible professional or governmental capacity of the Applicant.
>
> As noted in (i) above, the information relates only to an action involving the Applicant, and does not qualify as "personal information". [emphasis in the original]

On this issue, the appellant's lawyer states:

> In this matter the application was in relation to access to records. Every person, as provided in Section 4 of the *Act*, has a right to access to a record, including personal information of third parties, unless the record falls within the exemptions provided for in Sections 6 – 15 of the *Act*.

> The [City] admits that this is not personal information and therefore a *prima facie* right to the record exists unless an exemption is claimed. In this case, the questions of whether the information is "personal information" is irrelevant to any consideration of the appeal and is a red herring, a non-issue.
>
> The only relevant issue is whether the records requested fall into the exemption claimed by the [City]. The exemption claimed is Solicitor and Client Privilege as provided by Section 12.

Despite the apparent positions of the parties, I have decided to independently consider this issue, for a finding that the records contain the appellant's personal information has the effect of enhancing his right to access since the City would be required to take this fact into consideration in its exercise of discretion (See: Order MO-1277-I for a discussion of a head's exercise of discretion under part II of the *Act*).

Looking at this issue independently and as an outsider, it is not immediately apparent to me whether or not the appellant is acting in a personal or professional capacity in his litigation with the City. The records relate to the appellant's actions in obtaining a lodging house license at the specified property and renovations made to the premises. In relation to these activities, the City brought an application against the appellant in the Superior Court of Justice and the appellant brought an action against the City in the same court.

All of these matters pertain to the property in question, and information about a property generally does not qualify as personal information, particularly where the information pertains directly to the land and its use (See, for example, Order PO-1847). In the current appeal, however, the records reflect actions taken, rights and liabilities, which are attributable to the appellant – either as an individual or corporate/business entity. Accordingly, although pertaining to the property and its use, the circumstances of this appeal are distinguishable from this other line of orders.

It may be that the appellant is operating a business of purchasing properties and turning them into rental accommodations. On the other hand, it is equally possible that this might have been a one-time investment project of an individual. The majority of the records do not provide any insight on this issue. On one of the records at issue, however, the appellant, along with another family member is referred to as a "businessman". This record, which was drafted by the appellant's solicitor, would appear to indicate that the property in question may be one of several owned by one or both of these family members. Despite these references, given the nature of this record and the purpose for which it was written, I am not prepared to conclude that it provides solid evidence in support of a finding that the records relate to the appellant in his professional or business capacity.

The records refer to the appellant and other family members by name only with no other reference to title or capacity and there is insufficient independent evidence to support a conclusion that they are acting in a capacity other than a personal one in their dealings with the

City. Accordingly, I find that the records contain the appellant's personal information and my analysis will, therefore, be conducted under Part II of the *Act*.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/SOLICITOR - CLIENT PRIVILEGE

Under section 38(a) of the *Act*, the City has the discretion to deny an individual access to his own personal information where the exemptions in sections 6, 7, 8, 9, 10, 11, **12**, 13 or 15 would apply to the disclosure of that information.

The City claims that the 14 letters identified above are exempt under section 12 of the *Act*. This section 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. The Board submits that the records are exempt under both heads of privilege.

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].

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].

The City states that the records were all written by its solicitors and sent to City staff for the purpose of obtaining legal advice. In its representations, the City describes the nature of the advice given in each record. In support of its argument that the letters were "confidential communications", the City states:

> In each situation involving faxed correspondence, the following warning was printed on the fax cover sheet:
>
> > This message is solicitor-client privileged and contains confidential information intended only for the person(s) named above. Any other distribution, copying or disclosure is strictly prohibited. If you have received this message in error, please notify us immediately by telephone and return the original transmission to us by mail without making a copy.

This is essentially a standard warning that, apart from the reference to solicitor-client privilege, is found on most facsimile cover sheets in recognition of the risk of misdirection due to the manner in which faxed documents are transmitted. I do not accept this alone as evidence that the communications were made confidentially.

With respect to the application of section 12 to the records, the appellant, referring to the City's decision states:

> Section 12 of the *Act* provides that "**A head may refuse …"** to disclose a record that is subject to solicitor and client privilege. The basic premise in Section 4 is not abrogated by Section 12 but is made subject to a discretion. Clearly, the

> request for disclosure was for legal opinions given by a solicitor engaged by the City of Waterloo.
>
> The mere answer, as given by [the Head], that the information is the subject of Solicitor and Client Privilege is a tautology, a circular argument. Discretion cannot be exercised capriciously based on the application of circular arguments.
>
> It is our submission that in exercising discretion some reason must be forthcoming for the exercise of the discretion not to disclose. A municipality may not rely on a bald claim of solicitor and client privilege to defeat the right granted in Section 4. The statute does not require a municipality to claim solicitor and client privilege, it only states that the municipality may refuse to disclose despite any applicable privilege. Being a public body it cannot rely on the circular argument that the refusal is being made because privilege is being claimed. The Municipality (Head) must disclose some reason for withholding the information. The impetus of the legislation is that municipalities are to disclose. Section 14(3) lists the disclosures that are deemed to constitute an unjustified invasion of personal privacy as relates to personal information. There are no such strictures applicable to a record nor to solicitor and client privilege no matter how it may arise. Since no reason has been disclosed for the refusal, the exercise of the discretion is *prima facie* capricious.
>
> In any event, even if a reason had been given, the Municipality, through its solicitor advised of advice it gave with regard to the matter in issue. On the basis of transparency of the process, the Applicant should be entitled to know if any contrary advice had been given. This deals with advice prior to any contemplated Court action. It would be duplicitous of the Municipality to have received contrary advice and subsequently, having obtained advice in line with the policy they wished to impose, only disclose the opinion favourable to their objective of denying the license application. [emphasis in the original]

All of the records at issue comprise communications between the City as client (as represented by the Team Leader – By-law enforcement and/or the City Clerk/Solicitor) and solicitors retained by the City. I am satisfied that all of them either contain advice from the solicitors with respect to matters involving the appellant or are intended to keep the client informed, thus forming part of the continuum of communications aimed at keeping both informed so that advice may be sought and given as required within the meaning of *Balabel* (referred to above).

Although the records do not contain any notations that they are being communicated in confidence, I am satisfied, based on the nature of the matter and the possibility of litigation arising from it (which ultimately occurred), that the City's communications with its solicitors would have been conducted with a reasonably held expectation of confidentiality. Therefore, I find that the records all qualify for exemption pursuant to the communication privilege aspect of the solicitor-client privilege exemption.

Waiver

Actions of an institution, in this case, the City, may constitute waiver of solicitor-client communication privilege. As stated in Order P-1342:

> ... [C]ommon law solicitor-client privilege can also be lost through a waiver of the privilege by the client. Waiver of 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] 4 W.W.R. 762, 45 B.C.L.R. 218, 35 C.P.C. 146 (S.C.) at 148-149 (C.P.C)]. Generally, disclosure to outsiders of privileged information would constitute waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669. See also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].
>
> Strictly speaking, since the client is the "holder" of the privilege, only the client can waive it. However, the client's waiver of the privilege can be implied from the actions of the client's solicitor. Legal advisors have the ostensible authority to bind the client to any matter which arises in or is incidental to the litigation, and that ostensible authority extends to waiver of the client's privilege. [J. Sopinka et. al., *The Law of Evidence in Canada* at p. 663. See also: *Geffen v. Goodman Estate* (1991), 81 D.L.R. (4th) 211 (S.C.C.); *Derby & Co. Ltd. v. Weldon (No. 8)*, [1991] 1 W.L.R. 73 at 87 (C.A.)].

Waiver has been found to apply, for example, where a record was disclosed to the requester [Order P-341; upheld on judicial review in *General Accident Assurance Co. v. Ontario (Information and Privacy Commissioner)* (March 8, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.)], where a record was disclosed to another outside party [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)] and where the communication was made to an opposing party in litigation or the document records a communication made in open court [Order P-1551].

As I noted above, the appellant indicated on appealing the City's decision that it had waived privilege by disclosing the substance of the lawyers' opinions in an affidavit provided by the City in a separate legal proceeding.

In response to this allegation, the City states that it is "not aware of any circumstance that could lead to the conclusion that confidentiality has been waived". The City states further that the records have been maintained in the City Clerk's office and the solicitor's office and that access to them has been limited to only "relevant employees". The City indicates that "each of the individuals with access to the records were apprised of the confidential nature of the records".

Other than asserting that the City had waived solicitor-client privilege, the appellant did not provide any further evidence to support his allegations, such as a copy of the affidavit. The

appellant was provided with the City's representations on this issue and did not address it further in the representations he made in response. Based on the evidence before me, I find that the appellant has provided insufficient evidence to support a conclusion that the City has waived the privilege it holds with respect to the records at issue. On this basis, I find that the records at issue qualify for exemption under section 12 of the *Act*.

Exercise of Discretion under sections 12 and 38(a)

Although the City is of the view that the records do not contain personal information, in the alternative, it has considered and exercised its discretion under section 38(a) as well as under section 12. In this regard, the City states:

> … The records in issue are communications between a solicitor and his client, and are privileged.
>
> …
>
> The factors that were considered by the City in exercising its discretion include the following:
>
> - the integrity of the adversary system of Justice;
> - the rights of the City to bring legal action against the appellant, and to communicate freely with its solicitor for that purpose; and
> - the right of the City to defend against legal action, and to communicate freely with its solicitor for that purpose.

It is apparent, from the representations of the parties and the records themselves, that the City and appellant are involved in legal disputes relating to the use of land by the appellant. The records at issue are all directly connected to these matters, which are currently before the courts. In the circumstances, I find the basis for the City's exercise of discretion in favour of non-disclosure to be reasonable even though the records contain the appellant's personal information. As a result, I find that the records are properly exempt under section 12 of the *Act*.

ORDER:

I uphold the City's decision to withhold the records at issue from disclosure.

Original Signed By: August 9, 2002
Laurel Cropley
Adjudicator