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

ORDER MO-1798

Appeal MA-030162-1

City of Hamilton

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NATURE OF THE APPEAL:

A private individual made a request to the City of Hamilton (the City) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information about the relocation of and other matters pertaining to a pipeline, which was related to the proposed construction of the Red Hill Creek Expressway. In particular, she wanted access to all of the correspondence exchanged between the City, the company that owns the pipeline (the affected party), and/or the National Energy Board (the Board) from September 1, 2002 to the present.

The City identified eighteen responsive records and gave the individual three of them. It denied her access to the remainder of the records on the basis of solicitor-client privilege (section 12 of the *Act*).

The individual appealed the decision.

During mediation, the individual (now the appellant) removed two records from the scope of the appeal. No further mediation was possible, so the matter moved to adjudication.

I initially sought representations from the City. The City agreed to share its representations in their entirety with the appellant. I then sought and received representations from the appellant. I decided to seek reply representations from the City so I sent the appellant's representations in their entirety to the City. The City elected not to file reply representations. I then sought representations from the affected party. I confirmed that the affected party had received the Notice of Inquiry and the solicitation for representations. The affected party declined to provide representations.

RECORDS:

The records at issue here number thirteen. They consist of email and letter correspondence.

- Records 1, 5, 5B, 7, 9, 10 and 12 are exchanges between a lawyer and the affected party
- Record 3 is an exchange between the lawyer and the Board
- Records 2 and 6 are exchanges between the affected party and the lawyer
- Record 11 is an exchange between the affected party and the City

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

General principles

The section 12 solicitor-client privilege exemption contains two branches. Branch 1 includes two common law privileges whereas Branch 2 contains two analogous statutory privileges that apply in the context of institution counsel giving legal advice or conducting litigation. The City must establish that one or the other (or both) branches apply.

In this case, the City relies on Branch 1 only. The City relies on the common law solicitor-client communication privilege under Branch 1 to withhold all of the records but one. For record 3, the City submits that the common law litigation privilege under Branch 1 applies. In general, the City's argument appears to be that because the City and the affected party have a common interest, the lawyer retained by the City, to provide advice to the City, is also providing advice to the affected party on the best way to proceed on the matter that has given rise to an application before the Board.

I reproduce more fully the representations of the City, and those of the appellant, below.

Representations of the City

The City says that, with the exception of record 3, all of the records comprise a continuum of communication between the City, the lawyer, who is outside counsel retained by the City, and the affected party. These records contain legal advice and are therefore exempt from release under Branch 1 – solicitor client communication privilege.

> The legal advice in these records include direction on the best way for [the affected party] to proceed with a Deviation Application for the relocation of an oil pipeline on City property, advice regarding the City's position and submissions to the NEB, as well as overall legal strategy should the NEB decide on a type of approval which may result in the *Canadian Environmental Assessment Act* being triggered.
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> However, it is important to note that [the affected party] is not a City owned or operated company, but a third party who has a common interest as the City. [The affected party] owns an oil pipeline which runs down the Red Hill Creek Valley in Hamilton, land which is owned by the City and has been designated as the location of the proposed and highly controversial Red Hill Creek Expressway. This pipeline was installed under a licence agreement signed by the City and [the affected party] in 1977. At that time, the Red Hill Creek Expressway had been planned, but not implemented. Accordingly, the licence agreement included a clause that said the pipeline installed by [the affected party] must be moved, at the expense of [the affected party], if requested by the City when it came time for the expressway to be built. As the City is close to beginning construction of the Expressway, it has requested that [the affected party] relocate its pipeline to an alternate location in the Valley. The City and [the affected party] have a joint interest in having the application to the NEB run smoothly – a delay in the deviation approval would result in added costs to both [the affected party] and the City, whether through legal costs, environmental assessment costs or, in the extreme, the cost involved to relocate the expressway to an alternate location.
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> . . . . .

> In this case, it is the city's outside counsel who is providing advice to both the City and [the affected party]. If [the affected party] has its own counsel, they are not involved in these discussions. In this case, it is reasonably possible that the City's outside counsel represents both the City and [the affected party].
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> . . . . .
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> In this case, while there is not litigation at this point, clearly [the affected party] and the City have selfsame interests in the relocation of the pipeline, and the common interest that they be allowed to pursue same in the most timely and cost effective manner, the crux of the legal advice contained in the records at issue.

Representations of the appellant

The appellant makes these representations in response:

> All disputed records, except numbers 3, 8 and 11, are correspondence (either emails or letters) from the City's outside counsel to [the affected party]. With regards to these records, the City argues that "the records comprise a continuum of communication" between the City, its outside legal counsel, and [the affected party]. This curious phrasing appears intended to suggest that the records constitute communications between the City and its outside counsel, and are thus subject to client-solicitor privilege.
>
> However, it should be noted that the records were not sent by the City to its solicitor, nor were they sent by the solicitor to the City (except as copies for information). On the contrary, these records were sent on behalf of the City by the City's solicitor to a third party. Client-solicitor privilege does not extend to such communications. It is intended to protect communications BETWEEN the client (in this case the City of Hamilton) and the solicitor . . . The records in question do not fall into this category….
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> We understand that client-solicitor privilege has been found to apply to a continuum of communications but only when these are between the client and the solicitor.
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> . . . . .
>
> The City also suggests that these records constitute legal advice to the private company. The private company would be highly unlikely to be obtaining its legal advice from City of Hamilton bureaucrats. There is also no evidence that the private company has engaged the services of the City's outside legal counsel. On the contrary, it is likely that the private company has its own legal counsel and would turn solely to that legal counsel for legal advice.

> The City further suggests that it is in some type of partnership or common interest with [the affected party] in [the affected party]'s dealings with the National Energy Board. This is neither likely nor appropriate. [The affected party] operates under the regulatory oversight of the NEB. The City does not. The City has an agreement with [the affected party] that the City says requires [the affected party] to relocate its pipeline at the City's request, and indeed the City has taken steps to pressure [the affected party] into doing just that. It has gone so far as to threaten [the affected party] that it will be forced by the City to remove all its pipelines from Hamilton if it does not accede to the City's demands. It is clear that the relationship between the City and [the affected party] cannot be considered as a partnership or a common interest.
>
> Records 8 and 11 are communications from [the affected party] to the City. The provision of copies of these communications to the City's outside counsel does not confer on them the protection of client-solicitor privilege. Like the other records referred to above, these two communications do not constitute communications between a client and a solicitor for the purposes of providing legal advice to the client, or for the purposes of obtaining legal advice from the solicitor.

Analysis

Common law 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 or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

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 privilege applies to "a continuum of communications" between a 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 [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also 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].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)]. This office has found that, generally speaking, communications between a lawyer and another party who is not the client are not privileged [Orders P-1561, MO-1180]. However, such communications may attract privilege if it can be shown that the parties have a common interest.
This office has explored the concept of common interest most recently in Order MO-1678. In that order one can find a summary of the jurisprudence in this area. A common interest has been found to exist between parties where, for example

- a sender of correspondence and the recipient anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties to the litigation [*General Accident Assurance Co. v. Chrusz* (above); Order MO-1678]

- a law firm gives legal opinions to a group of companies in connection with shared tax advice [*Archean Energy Ltd. v. Canada (Minister of National Revenue)* (1997), 202 A.R. 198 (Q.B.)]

- multiple parties share legal opinions in an effort to put them on an equal footing during negotiations, but maintain an expectation of confidentiality vis-à-vis others [*Pitney Bowes of Canada Ltd. v. Canada* (2003), 225 D.L.R. (4th) 747 (Fed. T.D.)]

There is insufficient evidence in this case to support a finding that there is a solicitor-client relationship between the City's outside counsel and the affected party. Further, there is insufficient evidence before me to prove that the City and the affected party have a common interest such that the communications between the City's counsel and the affected party are protected by privilege.

There is no evidence before me that the affected party actually retained the City's outside counsel to act on its behalf or represent its interests in respect of the matter in dispute. Indeed, the very substance of the correspondence at issue suggests that the relationship between the affected party and the City's outside counsel is not one of client and solicitor. Moreover, there is no evidence in the correspondence of outside counsel providing *advice* to the City. Instead, the correspondence is more in the nature of exchange of information or opinions and attempts at negotiation. Therefore, I find that there is no direct relationship of solicitor and client between these parties.

In addition, the representations and the evidence before me do not persuade me that the affected party and the City have a common interest so that privilege attaches to their communications. First, the actual substance of some of the communications belies the assertion that the parties have a common interest. While it could be argued that both of these parties desire a swift and easy resolution of the dispute in which they are involved, in my view such desire does not create

a common interest, even where the parties might desire the same resolution. In this regard, I must agree with the appellant who states

> The City further suggests that it is in some type of partnership or common interest with [the affected party] in [the affected party]'s dealings with the National Energy Board. This is neither likely nor appropriate. [The affected party] operates under the regulatory oversight of the NEB. The City does not. The City has an agreement with [the affected party] that the City says requires [the affected party] to relocate its pipeline at the City's request, and indeed the City has taken steps to pressure [the affected party] into doing just that. It has gone so far as to threaten [the affected party] that it will be forced by the City to remove all its pipelines from Hamilton if it does not accede to the City's demands. It is clear that the relationship between the City and [the affected party] cannot be considered as a partnership or a common interest.

Given the types of parties involved, the essence of the dispute between them and the broader context, it is difficult to see how they can have a common interest. It is not inconceivable that adversaries may seek to resolve their differences by compromise. In fact, this happens often with legal disputes. This effort, however, does not by itself create a common interest that protects their communications.

Accordingly, having examined the circumstances described in the representations of the City and having reviewed the communications themselves, I find insufficient evidence to show that the common law solicitor-client communication privilege protects the communications between the City's outside counsel and the affected party.

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co.*].

The purpose of this privilege is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co.*].

Courts have described the "dominant purpose" test as follows:

> A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection [*Waugh v. British Railways Board*,

> [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co.*; see also Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.)].

To meet the "dominant purpose" test, there must be more than a vague or general apprehension of litigation [Order MO-1337-I].

Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief [Order MO-1337-I; *General Accident Assurance Co.*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

The City claims that record 3 is subject to common law litigation privilege. The City submits:

> Record #3 is an e-mail from the City's outside counsel to the National Energy Board (NEB), and is exempt under Branch 1 – litigation privilege – of the Section 12 exemption. This record is an e-mail from the outside counsel to the NEB seeking a resolution regarding a dispute as to which section of the National Energy Board Act the Deviation should be applied for under. The City views this record as a settlement record, and therefore exempt under Branch 2 of section 12 – litigation privilege . . .
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> . . . . .
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> While no formal litigation has resulted to date as a result of the Deviation Application, the potential for litigation remains a distinct and real possibility should the NEB rule that this application would trigger the *Canadian Environmental Assessment Act*, as this project has already been declared exempt from this *Act* by numerous courts. A brief history of the legal battles the City has been involved in as part of the Expressway project can be found in record# 5B.

In response, the appellant states:

> Record 3 is a public document as a result of being submitted to the National Energy Board as part of a public process. It is obtainable from the National Energy Board, and there is no reason why the City should refuse to release it. Once again it is clearly not a communication between client and solicitor

Record 3 is an email communication from counsel for the City, a party before the Board, to the Board. The email is copied to City staff and the pipeline company. A communication between a party and an administrative tribunal before which the party will be appearing cannot be considered subject to litigation privilege, particularly where it is copied to a third party. The rationale for the privilege is to protect the adversarial process by ensuring that counsel for a party

has a "zone of privacy" in which to investigate and prepare a case for trial. The "zone of privacy" cannot be considered to include the decision-making body.

The City's representations suggest that record 3 is subject to litigation privilege because it is a "settlement record". This office has stated that settlement privilege does not form a part of solicitor-client privilege and, therefore, record 3 cannot be exempt on this basis [Orders PO-1212, MO-1736]. In any event, based on the representations and the contents of the record, it does not appear that record 3 would be subject to settlement privilege.

Conclusion

None of the records qualify for either solicitor-client communication privilege or litigation privilege.

ORDER:

I order the City to disclose the records to the appellant by **July 21, 2004 but not before July 16, 2004**.

Original signed by: June 15, 2004
Rosemary Muzzi
Adjudicator