



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER MO-1801**

**Appeal MA-030199-2**

**City of Kitchener**



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## **NATURE OF THE APPEAL:**

The City of Kitchener (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

all reports, studies, assessments, minutes, memoranda, correspondence or other materials in the City's possession pertaining to the value prior to the City of Kitchener's acquisition (by any means) of properties and/or any businesses situated thereon separately or in any combination for ten specified addresses.

The City located responsive records and granted access to some of them. Access to the remaining records, consisting of minutes of *in camera* Council meetings and appraisal reports, was denied under the discretionary exemptions in sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege) respectively.

The requester, now the appellant, appealed the City's decision.

During the mediation stage of the appeal, the appellant agreed not to pursue access to the Council minutes. As further mediation was not possible, the appeal was moved into the adjudication stage of the process. I sought and received the representations of the City, which were then shared, in their entirety, with the appellant. I also received representations from the appellant and shared them, in turn, with the City, who then made additional submissions by way of reply.

## **RECORDS:**

The records at issue consist of appraisal reports and notes prepared by an appraiser and certain notes made by the City Solicitor relating to ten specified properties.

## **DISCUSSION:**

### **SOLICITOR-CLIENT PRIVILEGE**

#### **General principles**

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 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

The City takes the position that the records are subject to both the solicitor-client communication privilege at common law, as described in Branch 1, and statutory solicitor-client privilege from Branch 2.

### **Branch 1: common law privileges**

This branch applies to a record that is subject to “solicitor-client privilege” at common law. The term “solicitor-client privilege” encompasses two types of privilege:

- solicitor-client communication privilege
- litigation 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 or giving professional legal advice [*Descôteaux v. Mierzewski* (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.)].

### **Branch 2: statutory privileges**

Branch 2 is a statutory solicitor-client privilege that is available in the context of institution counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege

- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

***Statutory solicitor-client communication privilege***

Branch 2 applies to a record that was “prepared by or for counsel employed or retained by an institution for use in giving legal advice.”

**Representations of the parties**

In its initial submissions, the City argues that the records:

. . . were utilized by the then City Solicitor, as in house Legal Advisor for [the City] for the purposes of giving and formulating legal advice with respect to the acquisition of the 10 properties, the communication of which was to his client, City Council, in confidence in Caucus (in camera). The acquisition endeavour took place over a protracted period of time and pertained to over half of a city block located immediately adjacent to City Hall in the heart of Kitchener’s downtown. The City Solicitor was a key player participating in the negotiations of the acquisition of the said properties and participated in countless numbers of Caucus discussions where he provided legal advice to Council and sought their direction.

All of the discussions between the City Solicitor and Council were in confidence, in caucus, for the purposes of affected the acquisition of the various parcels.

...

The appraisals and the additional evaluation information as reflected in some of the notes were prepared and secured from accredited appraisers at the request of the City Solicitor for the purpose of formulating and providing legal advice to Council.

Throughout this endeavour the City Solicitor made notes pertaining to the evaluation in the process of formulating his legal advice and these are his working notes for the purposes of providing Council with said legal advice and carrying out the instructions rendered by Council. The land appraisals and the business valuation appraisal, as well as additional evaluation information secured for the purposes and under the circumstances here referenced would in my opinion be protected by solicitor-client privilege.

...

. . . any release of such reports would be in violation of the privilege, which attached to the reports as a result of the appraisal reports being secured for and used by the City Solicitor in formulating his legal advice. City Council in turn relied on the legal advice being given and hence the appraisal reports, used in formulating the legal advice were a fundamental component of City Council's decision and the manner in which the City conducted their negotiations.

The City goes on to state that the privilege in the records at issue has not been lost through waiver as "[D]iscussions involving these documents were under very controlled circumstances with the security of these documents being maintained by the City Solicitor."

The appellant takes the position that:

The City offers no evidence that there were legal issues at discussion relative to the question of market value. Rather, by inference, the City seems to maintain that it was in fact legal advice that was given, received and discussed simply because the appraisal reports/notes were commissioned by, prepared for, received by and (the appraisal reports/notes or the information contained therein) passed along to Council by the City Solicitor.

The appellant submits that the City Solicitor was simply acting as "conduit" for certain information requested by Council in its conduct of a business transaction, the purchasing of certain property. He suggests that consultation of a legal nature would have occurred between the City Solicitor and the City Council "on the contents of the agreement of purchase and sale, not on the contents of the appraisal report." He further argues that the opinion provided by the appraisers cannot be considered to be a legal opinion and reiterates that "the act of deciding an acceptable price relative to market value is a business, not a legal, calculation."

The appellant expands on these arguments to submit that the notes prepared by the City Solicitor pertain only to an "analysis of business advice and are not privileged simply because he was analysing the business advice for business purposes".

The appellant argues that because he is the principal of one of the vendors of property ultimately sold to the City, if any of the solicitor's notes refer to conversations with him, any privilege in those notes would have been waived. Similarly, the appellant argues that references to meetings or discussions with other individuals representing the owners of the other nine properties are also not subject to solicitor-client communication privilege, as the privilege in them has been waived. The appellant also suggests that, if the purchase prices for the properties "is inextricably linked" with the appraised value in the records, then that information also falls outside the ambit of solicitor-client privilege as the purchase prices have now been made public.

In its reply representations, the City submits that the City Solicitor:

. . . required a variety of information in order to formulate and provide the legal advice to Council as the matters progressed. Accordingly, the City Solicitor secured that information for which he relied upon for the purposes of formulating his advice and continued to provide the advice throughout the protracted period of time for which these acquisitions took place. Legal advice is never given in a vacuum or in isolation of other information as legal advice is formulated on the facts and information available.

With respect to the question of loss of privilege through waiver, the City submits that:

Nothing precludes the Solicitor from seeking advice from others with expertise in areas needed for the purposes of properly formulating legal advice. A prudent solicitor secures the necessary information needed to formulate their advice, usually through confidential arrangements and does not constitute waiver by the solicitor.

### **Findings**

In my view, the notes taken or prepared by the City Solicitor which comprise a portion of the records clearly fall within the ambit of his “working papers”, thereby qualifying for exemption under the solicitor-client communications component of section 12. In my view, these notes are directly related to the formulating and giving of legal advice by the solicitor to his client. [Order PO-1985]

The appraisal reports, valuation reports and notes prepared by the appraiser are less easily disposed of. In Order PO-2277, Assistant Commissioner Tom Mitchinson addressed the application of the equivalent provision to section 12 from the provincial *Act* to certain appraisal records prepared by an outside appraiser for the Ontario Native Affairs Secretariat (ONAS). He found that:

I accept ONAS’s submission, supported by affidavit evidence, that all three records were prepared for Crown counsel for his use in giving legal advice to the Crown for the purpose of the land claim negotiations and the litigation that was anticipated to arise should the negotiations not be fully successful in resolving the dispute. As in *Hale*, I accept that Crown counsel required the detailed land appraisal information, from both outside consultants acting as agents (Records 1 and 2) and government officials (Record 3) in order to be in a position to provide informed legal advice to the Crown on the nature and extent of the Crown’s liability, and how this would impact the Crown’s position in the negotiations and anticipated litigation. On this basis, the records fit within the *Descôteaux* framework of solicitor-client communication privilege. As well, in my view, these records clearly are in the nature of the “continuum of communications” described in *Balabel*.

In Order MO-1316, former Adjudicator Laurel Cropley considered the application of section 12 to certain notes taken by municipal staff and used to assist a solicitor in the formulation of legal advice, as well as engineering reports prepared by engineers from outside the institution for the solicitor. In finding that these records qualified for exemption on the basis that they represented part of a “continuum of communications” or formed part of the solicitor’s “working papers”, she held that:

Although Records 10 and 14 are not in themselves communications to or from a lawyer and a client, these records fall within the “continuum of communications” as described in *Balabel*, and could be described as part of the solicitor’s “working papers” [*Susan Hosiery Ltd.*] [Orders MO-1205 and MO-1258]. Further, I am satisfied that these records were prepared with an intention to keep them confidential. Therefore, I find that these records qualify for exemption under the section 12 solicitor-client communication privilege.

Records 5 and 8 are communications from an engineering firm to the Township’s solicitor. The engineering firm is not “employed” by the Township. In Order M-1112, Adjudicator Donald Hale had occasion to consider a similar situation. In that case, the Township in question engaged the services of a Planner employed by another jurisdiction. In finding that solicitor-client privilege attached to communications between the Planner and legal counsel, Adjudicator Hale commented as follows:

The Township engaged the services of the Planner employed by the County (the Planner) to provide it with advice respecting the zoning issue. The Planner, in the course of his duties as the Township’s expert, communicated on behalf of the Township with the solicitors for both the Township and the Township’s insurers. The Planner is not an employee of the Township. However, this does not necessarily mean that documents flowing to and from the Planner are not privileged.

In *Canadian Pacific v. Canada (Competition Act, Director of Investigations)*, [1995] O.J. No. 67 (June 2, 1995) (Ontario Court General Division), Mr. Justice Farley held that:

If a third party is truly an agent of the client seeking professional advice from the lawyer, not merely in the sense of being an agent of the client, but also being the agent who actually seeks the advice then there has been no waiver of disclosure to that third party.

I find that the Planner's involvement was an essential conduit on behalf of the Township for legal advice and instructions to counsel, and that he was "playing an indispensable role which cannot be performed reasonably by the client in the client's affairs, and for this role to be carried out, the party must be part of the process in seeking and obtaining legal advice." (*Canadian Pacific*, supra). Since the Planner was an essential part of the client Township's team, I find that any privileged document communicated to or by the Planner on behalf of the Township maintains its privileged status.

In the circumstances of the current appeal, I am satisfied that the engineering firm was engaged by the Township to fulfil a technical role in assessing the viability of specific development issues and that it was in the best position to communicate with the Township's solicitor on the Township's behalf on matters falling within its technical expertise. Similar to the findings in Order M-1112, I am satisfied that the engineering firm was an essential part of the Township's team and that the communications between it and the Township's solicitor were made on behalf of the Township for the purpose of seeking or giving legal advice relating to development matters. Therefore, I find that Records 5 and 8 also qualify for exemption under section 12.

I adopt the reasoning relied upon in these decisions for the purposes of the present appeal. In my view, the appraisal reports, valuation reports and notes and correspondence from the appraiser to the solicitor were provided for the purpose of formulating and giving legal advice to the City on the legal issues surrounding the purchase of the subject properties. I further find that these records were confidential in nature and were treated as such by the solicitor.

The appellant suggests that there were no "legal issues" which required the advice of the solicitor to Council. As with any transaction involving the purchase of land, legal advice is not only required but is essential to ensure that title defects or other encumbrances are discovered and addressed prior to the closing of the transaction. In my view, the solicitor's involvement in the purchase process is to be expected and I find no merit in the appellant's arguments to the contrary.

Similarly, I find that there was no waiver of the privilege existing in the records. Their contents have not been disclosed beyond the City's Administration. The fact that the ultimate purchase price of the properties has been made public does not constitute waiver of the privilege which exists in the appraisal documents.

Accordingly, I find that the records prepared by the appraiser for the solicitor fall within the ambit of the solicitor's "working papers", thereby qualifying for exemption under the solicitor-client communication privilege component of section 12.



**ORDER:**

I uphold the City's decision to deny access to the records.

Original signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_ June 17, 2004