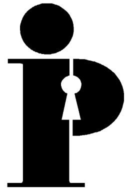

ORDER MO-1867

Appeal MA-040013-1

City of Ottawa

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NATURE OF THE APPEAL:

The requester made a request to the City of Ottawa (the City) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to certain correspondence between the City's Legal Department and a City employee regarding an application for a permit and contract with the City to operate a vendor's stand in an open-air market owned and operated by the City.

In an e-mail dated November 21, 2003, the City described the requested records as:

> correspondence referenced in an e-mail produced by [a named City employee] which indicates that [another named City employee] addressed the Legal Department and the Legal Department's response regarding the court decision for an individual claiming accusations of forgery and misrepresentation with regard to an application for a market stand contract [to carry on a specified business].

The City issued a decision to the requester, identifying two records. They are e-mails dated July 25, 2003 and July 31, 2003. The City granted partial access to the requested information. It agreed to release all but one sentence of the email dated July 25, 2003. It withheld all the contents of the July 31, 2003 email except the names of the sender and recipient, the date and time, and the subject of the email. In denying access, the City relied on the discretionary exemption at section 12 (solicitor-client privilege).

The requester (now the appellant) appealed the City's decision to deny access. During mediation, the appellant took the position that the City has waived solicitor-client privilege. Mediation did not resolve this appeal, and the appeal advanced to the adjudication stage.

A Notice of Inquiry setting out the issues in this appeal was sent to the City initially, and the City provided this office with written representations. The Notice was then sent to the appellant, together with a copy of the non-confidential portion of the City's representations. The appellant responded to the City's representations. I requested the City to reply to the appellant's submissions. The City did respond, raising two new issues in its response. However, in light of my decision, it is not necessary to address those issues.

The issue to be decided is whether the remaining information in these emails is exempt from disclosure under section 12.

BRIEF CONCLUSION

The information at issue in this appeal is exempt from the disclosure requirements of the *Act* under section 12 (solicitor-client privilege). The information is subject to common law solicitor-client privilege. The City did not waive privilege in the information at issue.

DISCUSSION:

The appellant is involved in an ongoing attempt to persuade the City to issue him a permit to carry on a business at a City-owned market. He submitted an application, but the City refused it on the grounds that the business in question was not a permitted activity under a City bylaw.

The appellant then asked the City to reconsider this refusal. He provided a City employee with a court decision, suggesting that it supported his application. The employee said he would "forward it to our legal Services Staff (sic) for their review".

Subsequently, the City employee responded to the appellant by e-mail, "I have received comments from legal and which are included in a letter to you. We will send the original letter by mail but here are the contents for your information". The email set out the contents of the letter to be sent, and, in fact, later that day the City did send a letter to the appellant with contents identical to those set out in the email.

The appellant claims that the City promised to obtain a legal opinion on whether the court decision that he sent affects his application and to provide him with this legal opinion. He alleges that the email and corresponding letter that the City sent him set out the legal opinion of the City's Legal Department. His position is that the City's promise to give him its legal opinion together with its action in including that legal opinion in a letter to him constitute a waiver of privilege and therefore the exemption in section 12 of the *Act* for records subject to solicitor-client privilege does not apply to the two records.

Issue A: Does the discretionary exemption at section 12 apply to the records?

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, common law privileges (branch 1) and statutory privileges (branch 2). To establish an exemption, the institution must establish that one or the other (or both) branches apply. Branch 1 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 and litigation privilege.

In this appeal, the City relies upon common law solicitor-client communication privilege. In light of my finding that the records in question are subject to this form of privilege, it is unnecessary to discuss the other forms of privilege encompassed by section 12.

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.)].

Waiver

The actions by or on behalf of a party may constitute waiver of privilege under either branch [Order P-1342]. Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and

- voluntarily evinces an intention to waive the privilege

[*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

Generally, disclosure to outsiders of privileged information constitutes 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.)].

Waiver has been found to apply where, for example

- the 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.)]

- the communication was made to an opposing party in litigation [Order P-1551]

- the document records a communication made in open court [Order P-1551]

The courts have held that where there is voluntary waiver of part of a record, waiver of the rest of the record may be implied where fairness requires this. Adjudicator Anita Fineberg discussed this in Order M-260:

> Only the client may waive the solicitor-client privilege. Waiver of the solicitor-client privilege may be express or implied.
>
> In the recent text *Solicitor-Client Privilege in Canadian Law*, R.D. Manes and M.P. Silver, (Butterworth's, 1993) at pp. 189 and 191, the authors distinguish between the two types of waiver:
>
>> Express waiver occurs where the client voluntarily discloses confidential communications with his or her solicitor.
>>
>> Generally waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. Fairness is the touchstone of such an inquiry.
>
> In S & K Processors (1983), 35 C.P.C. 146 (B.C.S.C.) McLachlin J. noted:
>
>> However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require ...
>>
>> In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. (pp. 148-149)
>
> The following passage from Wigmore on Evidence, vol. 8 (McNaughton rev. 1961), as set out in The Law of Evidence in Canada (Markham: Butterworth's, 1992), by Sopinka, Lederman and Bryant at p. 666, was quoted with approval by the Ontario Court (General Division) in the recent case of Piche et al. v. Lecours Lumber Co. Ltd. et al. (1993) 13 O.R. (3d) 193 at 196:

> A privileged person would seldom be held to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not.

Previous orders issued by this office have found that disclosing a small portion of the "bottom line" of a legal opinion does not constitute an intention to waive privilege in a record and that fairness or consistency do not require a determination that this constitutes an implicit waiver of privilege. [Orders MO-1172, MO-1233, MO-1316, MO-1537].

The parties' positions

A. The appellant

In his letter appealing the City's decision, the appellant explained why he believed the records in question were not subject to privilege:

> I submitted a legal decision to a City employee on the understanding that it would be sent [to] the City of Ottawa's Legal department for interpretation. The employee sent me a letter describing (in full) the City's interpretation. … . I submitted a MFIPPA request for the correspondence the Solicitor's office sent to the City employee which was returned with "unrequested" correspondence that the employee sent to the Solicitor's office: the information that I did request was exempted with Section 12.
>
> Section 12 cannot apply as confidentiality has been broken because the employee wrote to me what Legal wrote to him. In fact, the agreement between myself and the City employee was that I would be made aware of Legal's decision.

In a fax to this office dated March 30, 2004, the appellant further explained his position:

> It is my lay opinion that if the Aug. 1 letter only stated that the City's legal department reviewed the matter then solicitor-client privilege would remain intact; however, the letter went much further than that.

In his reply to the City's representations, the appellant stated:

> [T]he appellant submitted a court decision to the City of Ottawa with the "explicit" understanding that it was to be sent to the City of Ottawa's legal department for interpretation. It was also "explicitly" understood on the part of the City…that the City of Ottawa's legal department's opinion was to be disclosed, as the evidence indicates, to the appellant. …[T]he City **unambiguously** states in the opening paragraph of the Aug. 1, 2003 e-mail, "…I have received comments from legal and which are included in a letter to you. We

> will send the original letter by mail but here are the contents for your information". [Emphasis in original].

Thus, the appellant's position can be summarized as follows. The appellant believes that privilege does not apply to the Legal Department's opinion both because the City intentionally waived this privilege by promising or agreeing to provide him with this opinion and, moreover, that the City implicitly waived its privilege by providing him with the Legal Department's opinion in the body of an email and letter.

B. The City

The City made the following representations in response to the allegation that it promised or agreed to disclose the Legal Department's legal opinion:

> The City denies that there was any "explicit" understanding between [the named City employee] and the appellant that [the named employee] would disclose a legal opinion to the appellant, as argued by the appellant. …The City submits that no such understanding or agreement was ever created and that [the named employee's] communications to the appellant do not reasonably support such an interpretation.

The City supported this assertion by providing the content of several communications between the appellant and the City employee.

The City explained that its employee's statement, "I have received comments from legal and which are included in a letter to you" was not a waiver of privilege:

> [The named employee's] intention was simply to confirm that the City's refusal of the appellant's application had been reviewed and had been confirmed, in part based on legal advice that had been received, and the City's position that the court case submitted by the appellant had no bearing on this issue.

The City also argued that including a portion of the Legal Department's advice in its email and letter to the appellant did not constitute a waiver of privilege:

> That disclosure was made in the context of confirming the City's position and confirming that the position is based in part on legal advice. There was no intention to waive the privilege over the opinion itself.

Did the City explicitly waive privilege by promising to provide its legal opinion to the appellant?

Whether the City promised to provide its legal opinion to the appellant is important in determining both whether the communications between City legal staff and other staff were initially intended to be confidential and whether, if there was an initial privilege, it was subsequently intentionally waived.

As indicated earlier, in his representations, the appellant stated:

> [T]he appellant submitted a court decision to the City of Ottawa with the "explicit" understanding that it was to be sent to the City of Ottawa's legal department for interpretation. It was also "explicitly" understood on the part of the City…that the City of Ottawa's legal department's opinion was to be disclosed, as the evidence indicates, to the appellant. …[T]he City **unambiguously** states in the opening paragraph of the Aug. 1, 2003 e-mail, "…I have received comments from legal and which are included in a letter to you. We will send the original letter by mail but here are the contents for your information". [Emphasis in original].

The two records at issue relate to a request for legal advice and a response containing legal advice. Normally, such communications are subject to common-law solicitor-client privilege. The City states that the advice was requested and received with an expectation of confidentiality. This assertion is consistent with the City's actions and statements both before and after the legal opinion was given. There is nothing in the communications among City employees or between City employees and the appellant that rebuts this assertion.

Having reviewed the exchanges of emails between the appellant and City officials, I find no promise to provide the records in question or their contents to the appellant. As indicated above, a City employee offered to forward the court decision to the City's Legal Department for review. Neither he nor any other City employee undertook to provide the appellant with the Legal Department's answer. Subsequently, the same employee made a second promise. He undertook in the August 1, 2003 e-mail referred to above to provide the appellant with a letter which would "include" comments from the City's Legal Department. This promise was fulfilled. The letter to the appellant includes the following passage which sets out the advice of the Legal Department and identifies the Department as the source of that advice:

> Our Legal Department has reviewed the court decision … in which you were the plaintiff and the City of Ottawa was the defendant. Legal advises that the Small Claims Court decision has no direct relevance to your application for a stand contract … .

The employee's undertaking to include some of the Legal Department's comments in a letter cannot be construed as a promise to disclose other advice from legal counsel, to produce the legal opinion itself, or to acknowledge whether other information in the letter came from the Legal Department or from other sources.

In summary, the City made no promise to provide any more information than it provided in its August 1, 2003 email and letter.

Did the City implicitly waive privilege in its legal opinion by disclosing part of that opinion to the appellant?

As indicated earlier, courts have held that were there is a voluntary waiver of part of a record, waiver of the rest may be implied where fairness and consistency require this.

In this case, the second sentence of the letter (and the corresponding passage of the email) sent to the appellant contains an opinion as to whether the appellant's proposed activity complies with the provisions of the City's by-law. However, the City states in that paragraph, "It remains *our position* that the [activity] does not fall under this definition [of permissible activities under the by-law]." [Emphasis added].

In my opinion, "our position" refers to the position of the City, not the position of its counsel. The City has chosen not to disclose whether the opinion expressed in this paragraph came from counsel or was arrived at in some other fashion. Therefore, there is no waiver of privilege, express or implied, in including this information in a letter to the appellant as it does not purport to be a disclosure of the advice of counsel.

The passage quoted earlier, however, is a different matter. It contains legal advice and acknowledges the source to be the City's Legal Department. Therefore, the City has deliberately revealed a portion of the legal advice it received. Nevertheless, I do not find that this disclosure constitutes a waiver of privilege in the record containing the detailed legal opinion. Fairness and consistency do not require implication of waiver in these circumstances.

As Adjudicator Laurel Cropley stated in Order MO-1172:

> In my view, it is often necessary or desirable for a public body to refer to the crux of the advice its solicitors provide to it in order to carry out its mandate and responsibilities. In many cases, the public body will intend to retain the privilege, while at the same time provide a minimal degree of public disclosure to ensure the proper discharge of its functions. In the usual case, this should not of itself constitute express waiver of the privilege attaching to the underlying solicitor-client communication (Order P-1559).

> This issue was recently addressed by the Federal Court of Appeal in Stevens v. Canada (Prime Minister) (1998), 161 D.L.R. (4th) 85 at pp.108 -109. In this case, pursuant to an access request under the federal Access to Information Act, a federal institution provided partial access to legal accounts, severing out the narrative portion of the accounts while providing access to the dollar amount of the accounts. In dealing with the issue of waiver in the freedom of information context, Linden J.A. stated on behalf of the Court:
>
>> In Lowry v. Can. Mountain Holidays Ltd. [(1984, 59 B.C.L.R. 137 (S.C.), at p. 143] Finch J. emphasized that all the circumstances must be taken into consideration and that the conduct of the party and the presence of an intent to mislead the court or another litigant are of primary importance.
>> ...
>> I would add, with respect to the release of portions of the records, that, in light of these reasons, the Government has released more information than was legally necessary. The itemized disbursements and general statements of account detailing the amount of time spent by Commission counsel and the amounts charged for that time are all privileged. But it is the Government qua client which enjoys the privilege; the Government may choose to waive it, if it wishes, or it may refuse to do so. By disclosing portions of the accounts the Government was merely exercising its discretion in that regard. **As I mentioned earlier, a government body may have more reason to waive its privilege than private parties, for it may wish to follow a policy of transparency with respect to its activity. This is highly commendable; but the adoption of such a policy or such a decision in no way detracts from the protection afforded by the privilege to all clients**. [emphasis added]
>
> Although the matter in Stevens arose in the context of disclosure under the federal Act, in my view, the Court's rationale may be similarly applied to the disclosure, generally, made by government institutions of information in their custody or control. This is not to say that an institution can never be found to have waived solicitor-client privilege by partial disclosure of a privileged document. Rather, in determining this issue, a decision-maker must be cognizant of the environment in which institutions operate and their responsibilities with respect to the public interest, which may include maintaining a "policy of transparency" regarding information which is used in the decision-making process.

The disclosure made by the City in the passage quoted above, constitutes a disclosure of the "bottom line" of the Legal Department's opinion that does not amount to a waiver of privilege in the opinion itself, particularly in light of the consistent assertion of confidentiality, expressed in an e-mail to the appellant from the City dated September 24, 2003.

The facts of this case are similar to those in Order P-1559, referred to in Order MO-1172 above. Like that Order, this is a case where the public body intends to retain the privilege, while at the same time provide a minimal degree of public disclosure to ensure the proper discharge of its functions by responding to a query.

In summary, I find that the records are exempt from disclosure under section 12 because they are subject to common law solicitor-client privilege.

Did the City exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

General principles

The section 12 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Although the City states at page 5 of its representations that it "took into consideration all relevant factors", it does not indicate in that paragraph what those factors were, other than stating that, "[T]he City …intends to maintain privilege. It is the City's right to do so".

However, in a confidential portion of the representations in the following paragraph, the City sets out some reasons "in addition" to the fact that it has a right to maintain privilege, that were taken into account. The concerns raised in these confidential representations are relevant to the exercise of discretion and there is no evidence that the City considered any irrelevant considerations. Therefore, I uphold the City's exercise of its discretion.

ORDER:

I uphold the City's decision not to disclose the portions of the two records in question which it has withheld from the appellant.

Original Signed by: November 17, 2004
John Swaigen
Adjudicator