



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2198

Appeal MA-050350-1

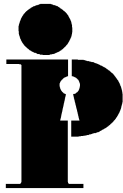
City of Hamilton



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NATURE OF THE APPEAL:

The City of Hamilton (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of a staff report that was approved by Hamilton City Council.

The City identified a five-page report, dated July 22, 2005, as the responsive record. It then issued a decision letter that denied the requester access to this report pursuant to the discretionary exemptions in sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege) of the *Act*.

By way of background, the requester is one of two plaintiffs that brought a lawsuit against the City. The City lost the lawsuit and was ordered by a trial court to pay substantial damages to the plaintiffs. The five-page report, which relates to this trial decision, was prepared by a lawyer in the City's legal department and submitted by the City Solicitor to a closed meeting of the Committee of the Whole.

In its decision letter, the City stated that the report was prepared by a staff lawyer for the purpose of providing legal advice. It further stated that the City Solicitor submitted the report to the City Council's Committee of the Whole at a closed meeting on August 10, 2005.

The requester (now the appellant) appealed the City's decision to deny access to this five-page report. This appeal was not settled in mediation and was moved to the adjudication stage of the appeal process.

I started my inquiry by issuing a Notice of Inquiry, setting out the facts and issues, to the City. The City submitted representations in response. I then issued the same Notice of Inquiry to the appellant, along with a copy of the City's representations. The appellant submitted brief representations in response.

RECORD:

The record at issue is a five-page report, dated July 22, 2005, which was prepared by a lawyer in the City's legal department and submitted by the City Solicitor to a closed meeting of the Committee of the Whole.

DISCUSSION:

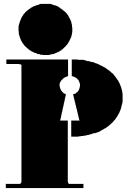
SOLICITOR-CLIENT PRIVILEGE



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General principles

Section 12 states as follows:

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). The institution must establish that one or the other (or both) branches apply.

Branch 1 arises from the opening words of section 12, which give an institution the discretion to refuse disclosure of a record "... that is subject to solicitor-client privilege." This branch encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the record at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 457 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Branch 2 arises from the latter part of section 12, and in particular, gives an institution the discretion to refuse disclosure of a record "... 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." It is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

I will begin by considering whether the record at issue qualifies for exemption under branch 1 of the section 12 exemption. As noted above, the first head of privilege encompassed by branch 1 is 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.)].

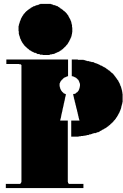
The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].



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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.)].

The parties' representations

The City submits that the record at issue qualifies for exemption on the grounds of solicitor-client communication privilege. It asserts that "frank and full" discussions between a lawyer and client are essential to their relationship, and that disclosure of these discussions would be inhibited if they were made public.

The City further states that the report was communicated by legal counsel to the Committee of the Whole in a closed meeting for the purpose of soliciting, formulating or giving legal advice and dealing with potential or actual litigation. It submits, therefore, that the five-page report constitutes communications of a confidential nature between the City Solicitor and his client.

The appellant states that it wishes to scrutinize the report to determine why the City is continuing to litigate:

The position taken by the City of Hamilton makes no commercial sense and [we] feel that the only reason City Council has approved continuance of this litigation is the contents of the report from Staff.

We want to know what the report is saying about [us] and the history of this litigation. We feel this is our right under the *Act*.

The appellant further submits that it would accept a severed version of the five-page report:

We have no interest in the legal recommendations of the report ... We have no objection to the severing of the portion of the report which presents legal recommendations.

Analysis and findings

I have carefully reviewed the record at issue and considered the representations of both the City and the appellant. In my view, this record qualifies for exemption under branch 1 of the section 12 exemption, for the following reasons.

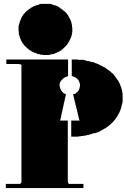
The five-page report was prepared by a staff lawyer in the City's legal department and submitted to the City Council's Committee of the Whole at a closed meeting on August



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10, 2005. The report, which is stamped “confidential,” provides legal advice and seeks the approval of City Council with respect to a recommended course of action.

In my view, the substance of this report constitutes direct communications of a confidential nature between the City Solicitor and his client that was made for the purpose of giving professional legal advice. The fact that the report is stamped “confidential” and was considered by Council members at a closed meeting of the Committee of the Whole, demonstrates that it was communicated by the City Solicitor in confidence. Consequently, the information in this report falls squarely within the ambit of solicitor-client communication privilege.

Under section 4(2) of the *Act*, an institution must disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. However, I am not persuaded by the appellant’s argument that the legal recommendations in the report could be severed, and the remainder of the report disclosed to the appellant.

In *Blank v. Canada (Minister of Justice)*, [2007] F.C.J. No. 306, the Federal Court of Appeal found that the severance provision in section 25 of the federal *Access to Information Act* does not require a government institution to sever information which forms part of a privileged solicitor-client communication:

... section 25 must be applied to solicitor-client communications in a manner that recognizes the full extent of the privilege. It is not Parliament’s intention to require the severance of material that forms a part of the privileged communication by, for example, requiring the disclosure of material that would reveal the precise subject of the communication or the factual assumptions of the legal advice given or sought.

Similarly, the Ontario Divisional Court has found that solicitor-client privilege is a "class-based" privilege that protects the entire communication and not merely those specific items which involve actual advice. Once it is established that a record constitutes a communication to legal counsel for advice, the communication in its entirety is subject to privilege. [*Ontario Freedom of Information and Protection of Privacy Co-ordinator, Ministry of Finance v. Ontario (Assistant Information and Privacy Commissioner)* (1997), 102 O.A.C. 71, 46 Admin. L.R. (2d) 115 (Div. Ct.)].

However, the Divisional Court noted that the maximum disclosure principle in section 10(2) of the *Freedom of Information and Protection of Privacy Act*, which is the provincial equivalent to section 4(2) of the *Act*, could apply in limited circumstances:

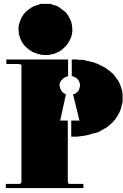
I would hasten to add that this interpretation does not exclude the application of s. 10(2), the severance provision, for there may be records



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which combine communications to counsel for the purpose of obtaining legal advice with communications for other purposes which are clearly unrelated to legal advice.

I have reviewed the record at issue in detail and find that it communicates legal advice and related information. It does not contain communications for other purposes which are clearly unrelated to legal advice. Given that solicitor-client privilege is a "class-based" privilege that protects the entire communication and not merely those specific items which involve actual advice, I find that the *entire* five-page report is subject to solicitor-client communication privilege. Consequently, the City is not required to apply the severance provision in section 4(2) of the *Act* to the report.

Given that I have found that the record at issue qualifies for exemption under branch 1 of the section 12 exemption, it is unnecessary to consider whether the record also qualifies for exemption under branch 2 or under section 6(1)(b) (closed meeting) of the *Act*.

EXERCISE OF DISCRETION

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)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

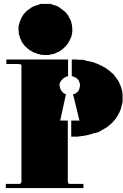
- the purposes of the *Act*, including the principles that:
 - information should be available to the public



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- individuals should have a right of access to their own personal information
- exemptions from the right of access should be limited and specific
- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The City submits that in exercising its discretion to refuse disclosure of the five-page report under section 12 of the *Act*, it acted in good faith and for an appropriate purpose.

The appellant did not provide representations as to whether the City exercised its discretion properly in refusing to disclose the report.

In my view, the City exercised its discretion based on proper considerations. There is no evidence before me to suggest that the City failed to take relevant factors into account or that it considered irrelevant factors in applying the section 12 exemption. I find, therefore, that its exercise of discretion was proper.

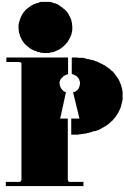
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I uphold the City's decision to deny access to the five-page report.

Original signed by: _____
Colin Bhattacharjee
Adjudicator

_____ May 31, 2007



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