



**Information and Privacy  
Commissioner/Ontario**

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

# **FINAL ORDER MO-2195**

**Appeal MA-060142-2**

**City of Vaughan**



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## **NATURE OF THE APPEAL:**

The City of Vaughan (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for a copy of a report by a named forensic accounting firm (the Forensic firm) relating to the estate of a former mayor. The requester attached a copy of the City's news release dated November 19, 2002, which refers to this report, to its request.

The City denied access to the responsive record on the basis that it does not have custody and/or control of the record within the meaning of section 10(1) of the Act. The City also advised the requester that, in the event that the record is found to be under the control of the City, it would be exempt under section 12 (solicitor/client privilege) of the Act.

The requester (now the appellant) appealed the City's decision that it does not have "control" of the responsive record. The requester also appealed the reliance by the City on the exemption provided for under section 12 of the Act, in the event that I determined that the City has control of the record.

Throughout the processing of this appeal, the City maintained its position that it does not have custody or control of the responsive record.

Mediation was not possible and the appeal was moved into adjudication. I decided to seek representations from the City, initially. I also decided to ask the law firm that currently has apparent custody of the record to submit representations on the issue of custody and/or control. In the Notice originally sent to the City and law firm, I indicated that I would first address the issue whether the City has custody or control of the record at issue. If I found that it does, I would go on to address the possible application of the exemption claimed in section 12 of the Act. In order to fully canvass all issues expeditiously, I set out both issues in the Notice and asked the City to respond to both. The law firm was specifically asked to respond to the issue of custody and/or control, although it was also invited to comment on the application of section 12 to the record.

Both parties submitted representations relating to both issues. These submissions raised additional questions, which needed to be addressed before representations could be sought from the appellant. I subsequently sent a supplementary Notice to the City and the law firm seeking clarification with respect to certain discrepancies in their combined evidence and additional information regarding their relationship. Again, both parties submitted representations.

After considering the representations, I decided to issue Interim Order MO-2150-I, in which I found that the City exercised the requisite degree of control over the record at issue. I ordered the City to obtain the record, if it had not already done so, and to provide a copy to this office. The City complied with that order, and I proceeded to address the remaining issue in this appeal. Accordingly, this final order will only address the application of section 12 to the Record.

The City and the law firm consented to sharing their submissions with the appellant and I provided copies of them to the appellant, along with a copy of the Notice of Inquiry. I did not amend the original Notice, although I indicated to the appellant that custody/control was no longer at issue. I also included all information that was sent to and received from the City and

the law firm relating to the two issues originally identified, for the appellant's reference, and to put the submissions in perspective. The appellant did not submit representations in response.

## **RECORD:**

The record at issue in this appeal is a forensic accounting report prepared by the Forensic firm.

## **DISCUSSION:**

### **SOLICITOR-CLIENT PRIVILEGE**

The City has claimed that solicitor-client privilege, the discretionary exemption found at section 12 of the *Act*, applies to exempt the record.

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 and statutory. The City relies on both branches. The burden of proof rests on the City to establish that one or the other (or both) branches apply.

#### **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.)).

### **Statutory solicitor-client communication 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 applies to a record that was “prepared by or for counsel employed or retained by an institution for use in giving legal advice.”

#### *Representations and Analysis*

In reading the City’s representations regarding the application of section 12 to the record as a whole, the following emerges:

- After the former mayor passed away, the subject matter of her entitlement to severance pursuant to the severance by-law came under review. There was a difference of opinion regarding entitlement and it was anticipated that if Council refused payment, litigation would ensue. Council refused payment and litigation was commenced and is continuing.
- The City entered into a retainer with outside legal counsel (the law firm) for a legal opinion relating to the severance by-law. The law firm retained the Forensic firm to conduct a forensic audit related to the severance by-law. Upon receipt of the report from the Forensic firm, the law firm prepared a legal opinion and subsequently provided a verbal report with recommendations to a closed session of the City Council.
- The City submits that this communication related directly to the seeking of legal advice to protect the City’s interest related to the severance by-law. It submits further that the record has not been disclosed to any other parties, including the parties to the litigation related to the severance by-law. The City notes that the Court refused to direct the disclosure of this report on two occasions.

The representations submitted by the law firm confirm the City’s position with respect to this record. In particular, the law firm confirms that:

- It was retained by the City to provide legal advice concerning certain payments to the Estate of the former mayor.
- It confirmed that, in the course of that retainer, it retained the Forensic firm to prepare a report, in confidence, for the exclusive use of the law firm for the purpose of providing its legal advice to the City.

- The law firm confirmed that the findings of the record formed part of the factual basis for its legal opinion and the findings were discussed in the opinion.

In the absence of representations from the appellant, and based on the representations made by the City and the law firm, I am satisfied that the record was prepared for counsel retained by the City for use in giving legal advice. Moreover, I have no evidence before me that privilege in the record has been waived. Accordingly, subject to my discussion below of the Exercise of Discretion, I find that the record qualifies for exemption under the statutory solicitor-client communication privilege.

### **Exercise of Discretion**

Section 12 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 54(2)].

The City did not provide specific representations regarding its exercise of discretion in this case. However, it has provided me with considerable background information relating to the reasons for its initial request for a legal opinion, the manner in which it has held the information in confidence and the appellant's efforts to obtain the record throughout the litigation in which they are embroiled. It is apparent, from the law firm and City's representations, that this record has been the subject of dispute between the parties to the litigation and that the City has made concerted efforts to protect its privilege in it. In these circumstances, I do not find the City to be acting in bad faith or for an improper purpose in protecting its legitimate legal interests in a matter that has the potential to impact on its financial obligations and/or subsequent policy decisions. I find that in the circumstances, the City relied upon relevant considerations in exercising its discretion not to disclose the record.

Accordingly, I find that the record is exempt pursuant to section 12 of the *Act*.

**ORDER:**

I uphold the City's decision to withhold the record.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Adjudicator

\_\_\_\_\_ May 17, 2007