



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2187

Appeal MA06-356

City of Toronto



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NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for access to a specific memo prepared by the City's legal department concerning whether or not "Per Diem' Valuator/Negotiators are deemed to be City employees."

By way of background, the requester is currently engaged by the City as a valuator/negotiator and has brought a grievance against the City regarding his employment status.

In response to the request, the City issued a decision letter advising that it had located one responsive record. The City denied access to this record in full pursuant to section 12 (solicitor-client privilege) of the Act.

The requester (now the appellant) appealed the City's decision.

During the mediation stage of the appeal process, the mediator had discussions with both the City and the appellant. However, no issues were resolved during mediation.

Accordingly, the file was transferred to the adjudication stage for an inquiry.

I commenced my inquiry by issuing a Notice of Inquiry, setting out the facts and issues in dispute, and seeking representations from the City. The City submitted representations in response and agreed to share the non-confidential portions with the appellant. In addition to providing representations on the application of section 12, the City also raised the exclusionary provisions in sections 52(3)1 and 3 (labour relations and employment records) as a preliminary issue.

I then sought representations from the appellant on the application of section 12 and included with my Notice of Inquiry a copy of the City's non-confidential representations. The appellant provided representations in response on the application of section 12 and the City's raising of sections 52(3)1 and 3.

RECORDS:

There is one record at issue, a legal opinion from the City Solicitor to the City's Corporate and Human Resources Department (HR Department) concerning whether or not "per diem appraiser negotiators" are deemed to be City employees.

DISCUSSION:

PRELIMINARY ISSUE

Section 52(3)

As indicated above, the City has raised the application of sections 52(3)1 and 3, which state:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
- ...
3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

In this case, the City first raised the application of sections 52(3)1 and 3 at the representations stage of the inquiry process. In support of its position, the City simply states that in the circumstances of this request, sections 52(3)1 and 3 apply to the record so as to remove it from the scope of the *Act*. The City offers to make further representations on this issue, if invited to do so. The appellant comments on the application of section 52(3) in this case; however, his representations do not assist me in resolving this issue.

In my view, the City has not provided me with any evidence that would demonstrate that the record at issue is linked to the appellant's grievance. Based on what is before me, I am not prepared to find that section 52(3)1 or 3 applies. While I acknowledge the City's willingness to provide representations, to adjudicate this issue would require going back to both parties for representations, serving to significantly extend the inquiry process. In the interests of achieving an expeditious outcome of this inquiry and given my findings below regarding the application of section 12 to the record, I have decided not to seek further representations concerning the application of sections 52(3)1 and 3 in this case.

SOLICITOR-CLIENT PRIVILEGE

As indicated above, the City has claimed the application of the section 12 exemption to the record.

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 of the section 12 exemption 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 records 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 1 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].

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.)].

Representations

Both the City and the appellant have submitted representations on the application of the branch 1 communication privilege.

The City states that the record at issue is a letter from a solicitor to a staff member in its HR Department and constitutes a direct communication that was sent implicitly in confidence in response to a request for a legal opinion on a particular issue.

The appellant argues that the information in the record is “stale dated” and “reliance on 10 year old legal opinions is neither a standard corporate practice nor is it prudent corporate practice.” The appellant therefore submits that the section 12 exemption should not apply.

The City maintains that the legal opinion was prepared in confidence, remains confidential and continues to be subject to solicitor-client privilege. The City states that it continues to rely on the legal advice contained in the opinion.

Analysis and findings

On my review of the parties’ representations and the record itself, I am satisfied that it qualifies for exemption under the branch 1 solicitor-client communication privilege exemption. It is clear on its face that the record constitutes a confidential legal opinion prepared by the City Solicitor for a staff person in the City’s HR Department in response to a request for legal advice on the

issue of whether or not “per diem appraiser negotiators” are deemed to be City employees. The fact that the legal opinion is more than ten years old is irrelevant since the application of the branch 1 communication privilege exemption is not time sensitive. The common law is clear that once a document falls within the ambit of communication privilege it remains privileged forever [see Order P-667 and *Blank v. Canada (Minister of Justice)* [2006] S.C.J. No. 39].

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
 - 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

Representations

The City states that it has exercised its discretion to deny access to the record under section 12 “in accordance with the provisions and purposes of the *Act*, including the principles that information should be available to the public and that exemptions from the right of access should be limited and specific.” The City states that it considered the following factors in deciding to withhold the information under section 12:

- the wording of the exemption and the interests it seeks to protect, namely the confidentiality of legal advice
- the sensitive nature of the information in the record and the impact of disclosure on the City’s ability to prepare for legal proceedings relating to the issues in the record
- whether the appellant had a sympathetic or compelling need for the information
- the City’s historic practice of not disclosing legal opinions that are relevant to ongoing matters
- the ongoing importance and relevance of the legal advice contained in the record despite its age

In response, the appellant takes issue with the City’s exercise of discretion and, in so doing, addresses each of the factors considered and presented by the City in its representations. In particular, the appellant states:

- the City’s reliance on the solicitor-client exemption is inappropriate in this case

- the disclosure of the record would not negatively impact the City's ability to prepare for legal proceedings but rather would help to achieve the City's goals of accurately and fairly establishing terms to calculate seniority and service
- the fact that he has made a request for the record to assist with his grievance demonstrates that he has a sympathetic and compelling need for the information
- the City should be more concerned with doing what is fair and reasonable rather than following its historic practice of not disclosing legal opinions
- the record is ten years old and is stale-dated

Analysis and findings

Having carefully considered the parties' representations, I am satisfied that the City has properly exercised its discretion in applying the section 12 exemption to deny access to the record. I acknowledge the appellant's interest in the record and his views regarding the application of the exemption and the City's exercise of discretion. However, I am satisfied that the City exercised its discretion in good faith, considering only relevant factors in denying access to the record under section 12.

ORDER:

I uphold the City's decision to deny access to the record under section 12 of the *Act*.

Original Signed By: _____ April 27, 2007
Bernard Morrow
Adjudicator