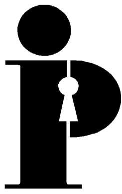

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2231

Appeal MA-050394-1

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 an identified City file relating to a zoning matter.

The City identified records responsive to the request and granted partial access to them. The City relied on the discretionary exemptions in sections 7(1) (advice or recommendations), 8(1)(i) (disclosure could endanger the security of a building) and 12 (solicitor-client privilege) to deny access to the records it withheld. Among the withheld records was a letter relating to the zoning matter that was sent to the City by a law firm (the law firm) on behalf of a client.

The requester (now the appellant) appealed the decision.

During mediation the City issued a revised decision letter granting access to some additional records. As a result, those records and the application of the discretionary exemption at section 8(1)(i) are no longer at issue in this appeal.

No further issues were resolved at mediation and the matter moved to the adjudication stage of the process.

I sent a Notice of Inquiry setting out the facts and issues in the appeal to the City and the law firm, initially. I enclosed with the Notice a copy of Order MO-1923-R, a recent reconsideration order dealing with solicitor-client privilege under section 12 of the *Act*. The City filed representations in response to the Notice. In its representations the City advised that after a further review, it was granting access to the records that it had withheld under section 7(1) of the *Act*. As a result, those records, and the application of the section 7(1) discretionary exemption are no longer at issue in this appeal. The Ministry also asked that a portion of its representations be withheld due to confidentiality concerns. The law firm advised that it had no objection to disclosure of its letter and would not be filing any representations on the appeal.

I then sent a Notice of Inquiry, along with a copy of the City's non-confidential representations and a copy of Order MO-1923-R to the appellant. The appellant filed representations in response to the Notice.

RECORDS

As a result of mediation and the City's subsequent access decisions, only the application of the section 12 discretionary exemption to a legal memorandum (pages 17 to 23 of the responsive records), and a letter from a law firm to the City's Director of Planning and Development Law on behalf of the lawyer's client (pages 60 to 63 and 88 to 91 of the responsive records), remains at issue in the appeal.

DISCUSSION:

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

Branch 1 – Common Law Privilege

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) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

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].

As well, in *Lavallee, Rackel & Heinz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, the Supreme Court of Canada stated (at para. 36 of the judgment) that solicitor-client privilege "must remain as close to absolute as possible if it is to retain relevance". I will bear this in mind in assessing the application of section 12 in this appeal.

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.)].

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.) (*General Accident v. Chrusz)*].

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].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident v. Chrusz* (cited above); see also *Blank* (cited above)].

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

There is a line of authority which holds that where the records at issue have not been prepared for the dominant purpose of litigation, copies of those records may become privileged if, through the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief: See *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129 at page 142 (B.C.C.A); *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd*. (1985), 3 N.S.W.L.R. 44 (*Nickmar*) at pages 61-62 (S.C.)

Branch 2: Statutory Privileges

Branch 2 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.

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."

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation."

The Submissions of the City and the Appellant

The City submits that the records were prepared by or for counsel employed or retained by an institution for use in giving legal advice and, therefore, are subject to solicitor-client privilege under section 12.

In particular the City submits that:

> … the memorandum at issue was prepared by the Director of Planning and Development law for the purpose of or during the course of providing legal advice to building staff about the proposed visitation centre, specifically whether it could be considered as an "associated use" within the meaning of section *12(1) 313* of City By-law *438-86* and therefore it constitutes confidential communications between a City legal advisor and building staff. Further, the Director was asked to specifically comment upon the letter from the law firm. The letter was considered and used in the provision of his legal advice. Therefore, this correspondence forms part of the documents that constitute the legal advisor's working papers that are "directly related to the seeking or giving of advice" concerning the proposed visitation centre.

The appellant submits that the letter from the law firm is correspondence from a third party to a public institution. The appellant's position is that it does not qualify as being subject to "solicitor-client privilege"; nor can it be considered to have been prepared "by or for counsel employed by an institution for use in giving advice or in contemplation of or for use in litigation".

The letter was addressed to the City's Director of Planning and Development Law and sets out a position with respect to the zoning matter. The law firm that sent the letter has no objection to it

being disclosed to the appellant. There are two copies of this letter. One of the copies has handwritten notations on it. The other does not.

Analysis and Findings

The Memorandum

I am satisfied that the memorandum represents a confidential communication between a solicitor and client, made for the purpose of giving professional legal advice. As a result, I find that the memorandum is properly exempt under the solicitor-client communication aspect of Branch 1 of section 12.

The letter from the Law Firm to the City

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 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].

The law firm that sent the letter has no objection to it being disclosed to the appellant. It is clear that no solicitor-client relationship existed in any way between the City and the law firm. Therefore, the non-annotated copy of the letter from the lawyer on behalf of his client, that is found in the zoning file, is not the type of communication that falls within the first part of Branch 1 of section 12 either as a direct communication between a solicitor and his/her client for the purpose of obtaining legal advice or as part of any continuum of communications between them in that connection.

Nor can it be said that the unannotated version of this letter comprises part of the lawyer's working papers. The fact that the contents of this letter comprise the subject matter of the advice that was sought or given does not transform it into the lawyer's working papers. It is only where a record contains or would reveal the contents of a communication between the solicitor and client that it would so qualify. For example, where a record reveals the thought processes of the lawyer in formulating legal advice, such as the lawyer's notes of his or her research or comments on or legal impressions concerning the subject matter of the advice, it would qualify under the working papers component of solicitor-client communication privilege. The unannotated version of the letter at issue in this appeal does not do so and, therefore, does not qualify under this component of the communication privilege.

I now turn to the second part of Branch 1 of section 12.

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation. This form of privilege encompasses communications between a solicitor

or litigant and third parties even where the third parties have no need for or expectation of confidentiality: See *Blank v. Canada (Minister of Justice)*, cited above at paragraphs 27-34.

As set out above, the dominant purpose test was articulated in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 at 1183 (H.L.) as follows:

> A document which was produced or brought into existence **either with the dominant purpose of its author, or of the person or authority under whose direction**, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection [emphasis added].

The dominant purpose that must be examined in this context is the dominant purpose of the lawyer who sent the letter and/or his client. In the case before me, the lawyer's letter sent to the City's Director of Planning and Development Law appears not to have been solicited by the City. On its face, this letter was created for the dominant purpose of the lawyer advancing a position to the City on behalf of his client with a view to persuading the City regarding a specific course of action. It was not created for the dominant purpose of litigation. Further, the dominant purpose must be the purpose of the party claiming the privilege. Whether or not litigation is or was contemplated by the City at any point with respect to the subject matter of this letter is not relevant. The City did not author the letter and I have not been provided with any evidence that the City directed that it be produced on its behalf.

In the *Blank* case, the Supreme Court of Canada did not find it necessary to resolve the issue "whether the litigation privilege attaches to documents gathered or copied - but not created - for the purpose of litigation". The Court observed that there were conflicting decisions of the Courts of Appeal of two provinces on this issue. It cited the conclusion of the British Columbia Court of Appeal in *Hodgkinson v. Simms* that copies of public documents gathered by a solicitor were privileged, where McEachern C.J.B.C. stated:

> It is my conclusion that the law has always been, and in my view, should continue to be, that in circumstances such as these, where a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection and to refuse production.

The majority of the Court observed that this approach was rejected by the Ontario Court of Appeal in *General Accident v. Chrusz*: See *Blank v. Canada (Minister of Justice)*, cited above at paragraphs 62-63; *Hodgkinson v. Simms* cited above at page 142; *General Accident v. Chrusz*, cited above at pages 334-336. And also see: *Nickmar*, cited above at pages 61-62.

The Court in *Blank* went on to state (at paragraph 64) that even such an extended form of litigation privilege would not automatically exempt from disclosure otherwise discoverable documents which have simply been remitted to counsel or placed in the litigation file:

> Extending the privilege to the gathering of documents resulting from research or the exercise of skill and knowledge does appear to be more consistent with the rationale and purpose of the litigation privilege. That being said, I take care to mention that assigning such a broad scope to the litigation privilege is **not intended to automatically exempt from disclosure anything that would have been subject to discovery if it had not been remitted to counsel or placed in one's own litigation files. Nor should it have that effect**. [emphasis added]

Accepting for the purposes of my analysis that this "extended" form of common law litigation privilege is protected under Branch 1 of section 12, I find that the letter from the law firm does not qualify under this aspect of the privilege. Specifically, it was not selectively copied or gathered for the City lawyer's litigation file using his skill and knowledge as a lawyer. It was sent to him unsolicited by the law firm for the purpose of advancing the client's position.

In making my findings that the common law privileges at Branch 1 do not apply to this record, I am mindful of the principle that privilege cannot attach to communications between counsel for opposing parties or parties who do not share a common interest in prosecuting or defending specific proceedings. At page 148 of Ronald D. Manes and Michael P. Silver, *Solicitor-Client Privilege in Canadian Law* (*supra*), the authors write that:

> The key to holding that privilege cannot possibly attach to communications between opposing parties is that in the making of such a communication, there cannot have been an intention of confidentiality, and that the production of the party's statement (in the hands of the other party) cannot violate a confidential relationship between the defendants and their solicitors. Thus, there is no room for privilege to attach. The denial of privilege operates on principles similar to those in waiver of privilege, in that by communicating to the other side, the communicating party could be said to have waived privilege with respect to that communication.

Moreover, this reasoning is consistent with the reasoning of Justice Lane in the *Big Canoe* case, cited immediately below in my discussion of the Branch 2 statutory form of litigation privilege. Although these authorities deal with parties who are clearly opposite in interest, I find their reasoning applicable in the appeal before me. As a result, I find that the non-annotated letter is not subject to common law litigation privilege under Branch 1 of section 12.

With respect to Branch 2 of section 12, in the circumstances before me and in keeping with my conclusions above, I find that the non-annotated letter was not "prepared by or for counsel employed or retained by an institution for use in giving legal advice". I also find that the non-

annotated letter was not prepared by or for counsel employed by an institution in contemplation of or for use in litigation.

In *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (*Big Canoe*) at paragraph 45, the Divisional Court had occasion to consider whether correspondence exchanged between Crown counsel and counsel for an accused was protected under the provincial equivalent of Branch 2 of section 12. In that case the Court held that the words "prepared ... for Crown counsel ... for use in litigation" are not intended to capture communications originating with opposing counsel in the course of the litigation. Justice Lane explained as follows:

> The issue is not common law privilege, but whether the records meet the description in the second branch of section 19... [T]he letters from defence counsel to Crown counsel ... were prepared and sent to Crown counsel in the course of the prosecution, but it would stretch the language "prepared ... for Crown counsel ... for use in the litigation" to include them. I would hold that they are producible as outside the reach of section 19. The letters from Crown counsel to defence counsel fall within the definition, but are outside of any reasonable "zone of privacy" and the adjudicator's decision to require their release is a reasonable order in the circumstances.

Again, although the *Big Canoe* case dealt with parties who are opposite in interest in the context of a criminal prosecution, I find this reasoning applicable to the appeal before me. In my view, the fact that an opinion was sought regarding the letter in connection with the zoning matter or that the City may have contemplated litigation in relation to the zoning matter does not change the nature of the communication. Accordingly, the non-annotated copy of the letter does not qualify for exemption under either part of Branch 2 of section 12.

As a result, I find that the non-annotated copy of the letter from the lawyer on behalf of his client that is found in the zoning file, does not qualify for exemption under either Branch 1 or 2 of section 12.

I take a different approach with respect to the annotated copy of the letter.

In my view, disclosing the annotations on the letter, which because of their nature I am assuming were made by the Director of Planning and Development Law, would reveal the thought processes of this lawyer in formulating his legal advice to the City on the original letter. As a result, it would qualify under the working papers component of solicitor-client communication privilege. Accordingly, this copy of the letter is exempt from disclosure under Branch 1 of section 12 of the *Act*.

In conclusion, the memorandum and the annotated copy of the letter are exempt under section 12, but the non-annotated copy of the letter from the law firm is not.

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. Because section 12 is a discretionary exemption, I must also review the City's exercise of discretion in deciding to deny access to the withheld information. On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.

I may find that the City erred in exercising their discretion where, for example:

- it did so in bad faith or for an improper purpose
- it took into account irrelevant considerations
- it failed to take into account relevant considerations

In these cases, I may send the matter back to the City for an exercise of discretion based on proper considerations [Order MO-1573].

In the circumstances of this appeal, I conclude that the exercise of discretion by the City to withhold the information that I have found to be exempt was appropriate, given the circumstances and nature of the information.

ORDER:

1. I uphold the City's decision to deny access to the legal memorandum (pages 17 to 23 of the responsive records) and the annotated copy of a letter from a law firm sent to the City on behalf of a client (pages 88 to 91 of the responsive records).

2. I order the City to disclose the non-annotated copy of a letter from a law firm sent to the City on behalf of a client (pages 60 to 63 of the responsive records) to the appellant by sending him a copy by November 2, 2007 but not before October 26, 2007.

3. In order to verify compliance with provision 2 of this order, I reserve the right to require the City to provide me with a copy of the information disclosed to the appellant.

Original signed by: September 28, 2007
Steven Faughnan
Adjudicator