



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2206

Appeal MA06-386-2

City of Ottawa



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NATURE OF THE APPEAL:

The City of Ottawa (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

All “evaluation notes” on the north-south light-rail project compiled by the supply-management division (under [a named individual]).

During the request stage, the requester narrowed/clarified the request to:

Evaluations of three final consortia as well as presentations made to the selection panel during [the previous year].

The requester (now the appellant) initially appealed to this office on a number of issues relating to the City’s processing of the request. As a result, this office opened Appeal MA06-386. That appeal was subsequently closed by the issuance of Order MO-2116 on November 7, 2006, which disposed of the issues raised in that appeal relating to third party notification.

Following the resolution of that issue and in response to the access request, the City issued a decision in which it granted partial access to certain records, and denied access to the remaining records or portions of records on the basis of the exemptions found in sections 10(1)(a), (b) and (c) (third party information), 11(c), (d), (e) and (g) (economic and other interests), 12 (solicitor-client privilege) and 14(1)(a) (law enforcement) of the *Act*. The City subsequently included section 7(1) (advice or recommendations) of the *Act* as an exemption that applied to certain records.

The appellant appealed the City’s access decision, and this office opened Appeal MA06-386-2, the present appeal.

In the course of this appeal, records to which section 10(1) of the *Act* had been applied were either disclosed to the appellant, or became the subject of a separate third party appeal brought by the third party. As a result, those records are not at issue in this appeal.

Furthermore, during mediation, a number of events occurred, including the following:

- The City withdrew its reliance on section 11, and disclosed additional records.
- The appellant narrowed the records so that section 14 is no longer an issue.
- The appellant raised the possible application of section 16 of the *Act* (public interest override) as an issue.
- The City disclosed additional records. As a result, the application of section 7(1) is no longer an issue.

As a result of the mediation efforts of the parties, only five pages of records remain at issue, and the application of section 12 remains as the only exemption claimed for those pages.

Mediation did not resolve the remaining issue, and I sent a Notice of Inquiry to the City, initially, inviting the City to address the application of section 12 to the five pages of records at issue. The City provided representations in response. I then sent the Notice of Inquiry, along with a complete copy of the City's representations, to the appellant. I invited the appellant to provide representations to me by May 24, 2007, but did not receive submissions in response.

In the Notice of Inquiry I sent to the parties, I stated as follows concerning the possible application of section 16 (public interest override) in this appeal:

The appellant raised section 16 (the public interest override) as a possible issue in this appeal. That section reads as follows:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

As a result of mediation, however, the sole exemption remaining at issue in this appeal is the solicitor-client exemption found in section 12 of the *Act*. Section 16 does not apply to records which are exempt under section 12 of the *Act*. Accordingly, the "public interest override" in section 16 of the *Act* is not an issue in this appeal.

However, on May 25, 2007 the Ontario Court of Appeal issued a decision which may have some bearing on the issues in this appeal. That decision is *Criminal Lawyer's Assn. v. Ontario (Ministry of Public Safety and Security)* [2007] O.J. No. 2038, and the reason why it may be relevant is that it mandates that certain exemptions be "read in" to the "public interest override" section of the provincial *Freedom of Information and Protection of Privacy Act*, which is similar to section 16 of the *Act*. One of the exemptions that the Court read in to the public interest override is the solicitor-client privilege exemption. Accordingly, the statement I made in the Notice of Inquiry sent to the parties that section 16 does not apply to records which are exempt under section 12 of the *Act* is no longer accurate.

As a result, I sent a Supplementary Notice of Inquiry to the appellant, along with a copy of the Court of Appeal decision, and invited the appellant to provide representations on the supplementary issue of whether there exists a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 12 exemption. I did not receive representations from the appellant.

RECORDS:

The records remaining at issue are the email communications on the pages numbered 94, 95, 102, 103 and 107.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The City submits that section 12 of the *Act* applies to the five pages of records remaining at issue in this appeal. Section 12 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 as described below. To rely on this exemption, the City must establish that one or the other (or both) branches apply.

Branch 1 derives from the first part of section 12, which permits the City to refuse to disclose “a record that is subject to solicitor-client privilege”.

Branch 2 derives from the second part of section 12 and it is a statutory exemption that is available in the context of institution counsel giving legal advice or conducting litigation. The statutory exemption and common law privilege, although not necessarily identical, exist for similar reasons.

Branch 1: common law solicitor-client privilege

Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from 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.)].

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].

The privilege has been described by the Supreme Court of Canada as follows:

...all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. The confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [*Descôteaux v. Mierzwinski*, supra].

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.)].

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*, supra].

Branch 2: statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of institution counsel giving legal advice or conducting litigation. Similar to branch 1, this branch encompasses two types of privilege, as derived from common law: (i) solicitor-client communication privilege; and (ii) litigation 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 either of the statutory privileges apply.

Representations

The City submits that the five pages of records contain information that is subject to the solicitor-client communication privilege and that these records are, therefore, exempt. The City states:

All of the pages at issue consist of communications by email between City staff, City external consultants, and City external Legal Counsel and reflect either the requesting of legal advice or the communication of legal advice.

The City then identifies the project to which the legal advice relates, and that the City was the Contract Authority for the project. The City then states:

The City confirms that none of these communications have been publicly disclosed by City staff, City consultants or by the City's Legal Counsel and therefore, the City submits that it has not waived privilege with respect to any of

these records. It is the desire of the City to continue to claim privilege over these records. No waiver has occurred either intentionally or unintentionally.

The City then provides detailed information about each of the pages of records at issue, stating:

Page 107 consists of an e-mail from [a named lawyer with a named firm] in Ottawa. [The named lawyer] and his firm were retained by the City to provide legal counsel for the project. Some of the advice that the City required from [the firm] pertained to the City's role as Contract Authority. In this communication, [the named lawyer] corresponds to [a named engineering consultant] hired by the City for the purposes of the project, and [another lawyer with the firm]. This e-mail contains legal advice from [the named lawyer] to [the consultant] concerning a draft letter to be sent from a [named] City employee (as representative of the Contract Authority) to one of the proponents of the [Request for Proposal (the RFP)] as part of the review process that was being undertaken by the City [The named lawyer] is confirming his legal advice for the wording of that letter, and as such, such advice is confidential and is subject to solicitor and client communications privilege. Again, this communication has not been disclosed by anyone at the City, nor by the City's consultants and privilege continues to be maintained.

Pages 102 and 103 consist of an e-mail chain containing communications from [the consultant] to [Legal Counsel for the City]. In this e-mail chain, [the consultant] is requesting legal advice from [counsel] [Counsel] provides a brief reply, then [the consultant] forwards the result to [a named City staff member]. These communications reflect the requesting of and receiving of legal advice by the City, and are properly protected from disclosure under section 12 of [the Act]. No waiver of privilege has occurred since this record has not been disclosed by any City staff, City Consultants or Legal Counsel.

Pages 94 and 95 consist of a communication by City staff to Legal Counsel for the City, requesting Legal Counsel's opinion The City had retained [the named legal firm] to, among other things, provide a legal opinion [The City staff member] is therefore requesting from [the named lawyer] a summary of his opinion in this regard. [The named lawyer] responds with a report of his review ... [which] consists of his legal advice as to the action that the City should take ..., as well as his legal opinion [The named lawyer] also refers to previous communications with [the other lawyer] and [the consultant] that was contained in the above-noted records. The information contained in these pages is therefore protected by solicitor and client communications privilege and is properly exempted from disclosure under section 12 of [the Act]. The City has not waived privilege in this case, as the records kept confidential and were not disclosed by anyone.

As noted above, the appellant did not provide representations on the issues in this appeal.

Analysis and findings

I have carefully reviewed the five pages of records remaining at issue in this appeal. These records consist of emails, as described in the City's representations. On my review of the records and the representations of the City, I am satisfied that these emails meet the solicitor-client communication privilege test as set out above. The records consist of email communications between the City (through its agents or employees) and its legal counsel, made for the purpose of seeking, formulating and/or giving legal advice with respect to the identified project. The email exchange which comprises pages 94 and 95, as well as the email on page 107, clearly contain legal advice prepared by City counsel and communicated to the City. The email exchange contained on pages 102 and 103 contains a specific request by the City to City counsel for the provision of legal advice. The City has also provided evidence that these communications were made in confidence. Accordingly, I am satisfied that these five pages of records constitute 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

Finally, although not all of the portions of the email exchanges contain the specific legal advice or request, I find that these communications fall within the ambit of the solicitor-client communication privilege on the basis that they form part of the "continuum of communications" passing between the City and its legal counsel, as contemplated in *Balabel*.

Accordingly, I find that the five records are subject to solicitor-client communication privilege under Branch 1 of section 12 of the *Act*.

EXERCISE OF DISCRETION

Section 12 is a discretionary exemption. When a discretionary exemption has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the records. On appeal, the Commissioner may determine whether the institution failed to do so.

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 such a 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)].

With respect to the records which qualify for exemption under section 12, the City provided me with submissions outlining the factors it considered in deciding to exercise its discretion to withhold access. Upon review of all of the circumstances surrounding this appeal, including the

City's representations on the manner in which it exercised its discretion, I am satisfied that the City has not erred in the exercise of its discretion not to disclose the five pages of records.

COMPELLING PUBLIC INTEREST

In the course of this appeal, the appellant took the position that there is a compelling public interest in the disclosure of the records, and that section 16 of the *Act* applies. That section states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

As identified above, in the *Criminal Lawyer's Assn.* case cited above, the Ontario Court of Appeal stated that certain exemptions, including the solicitor-client privilege exemption, can be "read in" to the "public interest override" section of the *Act*.

In order for section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

A compelling public interest has been found *not* to exist where, for example:

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

Although the appellant did not provide representations in response to the invitation to do so, in the course of this appeal the appellant has stated that the light-rail project, which is the subject matter of the request, “continues to be an issue of significant interest to the residents of Ottawa.”

Findings

In the circumstances of this appeal, I find that section 16 does not apply to override the application of section 12 to the five records remaining at issue. Even if I were to accept the appellant’s statement that the subject matter of the request (namely, the light-rail project generally) is of significant interest to the residents of the City, in the circumstances of this appeal and in the absence of representations on the specific information in the five records at issue, I do not find that the public has a compelling interest in the disclosure of these five records. The five pages of records remaining at issue were described in some detail in the City’s representations. They consist of email communications between the City (through its agents or employees) and its legal counsel, and address narrow and discreet legal issues relating to the project. In this appeal, I have not been provided with sufficient evidence to indicate that the public has a compelling interest in the disclosure of the records remaining at issue.

Accordingly, I find that section 16 does not apply in the circumstances of this appeal.

ORDER:

I uphold the City’s decision that the five pages of records are exempt from disclosure under section 12 of the *Act*, and I dismiss this appeal.

Original signed by: _____
Frank DeVries
Adjudicator

June 27, 2007