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

ORDER MO-2454

Appeal MA08-56

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 access to the following:

> All correspondence - including but not limited to e-mail, letters and memos - between the Ottawa Mayor's Office and Provincial and/or Federal Government Officials regarding the OPP investigation of, and/or charges laid against [a named Mayor].

The City responded with a decision letter, in which it denied access to the responsive records on the basis that it "does not have custody and control of these records." The City added that this matter "relates to an independent investigation between the Ontario Provincial Police [OPP] and the Mayor. It is not related to any business activity of the City of Ottawa."

The requester (now the appellant) appealed the decision.

During the mediation stage of the appeal process, the City confirmed that it had one responsive record, but that it is relying on section 4 (custody or control) of the *Act* to deny access to it.

Mediation was not successful in resolving the appeal. Accordingly, the file was transferred to the adjudication stage of the appeal process for an inquiry into whether the City has custody or control of the one record found to be responsive to the appellant's request.

I commenced my inquiry by issuing a Notice of Inquiry, seeking representations from the City. Prior to providing representations, the City issued a new decision letter in which it agreed to disclose a portion of the record at issue to the appellant, denying access to the severed portions pursuant to the discretionary exemption in section 12 (solicitor-client privilege) of the *Act*.

This office then contacted the appellant to confirm whether he had received the information that the City had agreed to disclose and whether the appellant wished to continue to pursue access to the remaining withheld information. The appellant confirmed receipt of the severed record and advised that he wished to pursue access to the remaining information in it.

The City, subsequently, responded with representations that addressed the application of the section 12 exemption to the withheld information in the record.

I elected to not seek representations from the appellant, because of my findings in this order.

RECORDS:

There is one record at issue, consisting of the severed portions of a one-page email document sent via blackberry to three email addresses.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 12

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. In this case, the City has claimed the application of the branch 1 privileges to the information at issue in the record. The City has not made representations on the application of the branch 2 statutory privileges.

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

Solicitor-client communication privilege

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].

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.)].

Loss of privilege

Waiver

Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege

> [*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

Waiver has been found to apply where, for example the record is disclosed to another outside party [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)]

City's representations

The City submits that the severed information in the record at issue constitutes communications that are solicitor-client privileged and further submits that the privilege has not been waived by the City.

The City submits that the email communication was "directed by an elected representative to their personal solicitors and as such is a clear example of correspondence to an individual's legal representatives." The City goes on to state that

> disclosure of the communications would affect the 'frank and full' discussions as between a lawyer and client essential to that relationship and that disclosure of

> these communications would be inhibited if they were made public [Order MO-2198 and others].

The City submits that it has acted "judiciously to sever the record without disclosing material which it considers exempt due to solicitor-client privilege."

Analysis and findings

The section 12 solicitor-client privilege exemption is designed to protect the interests of institutions, not private individuals. The genesis of this long standing view is articulated in the following passage from Order MO-1338, issued by former Senior Adjudicator David Goodis:

> In my view, the solicitor-client privilege exemption is designed to protect the interests of a *government* institution in obtaining legal advice and having legal representation in the context of litigation, not the interests of other parties outside *government*. Had the Legislature intended for the privilege to apply to non-government parties, it could have done so through express language such as that used in the third party information and personal privacy exemptions at sections 10 and 14 of the *Act*. This interpretation is consistent with statements made by the Honourable Ian Scott, then Attorney General of Ontario, in hearings on Bill 34, the precursor to the *Act*'s provincial counterpart:
>
> > Section 19 is a traditional, permissive exemption in favour of the solicitor-client privilege. The theory here is that in the event the government either commences litigation or is obliged to defend litigation, it should be able to count on the fullest accuracy and disclosure from its employees.
> >
> > . . . . .
> >
> > If you do things to discourage the client from telling the lawyer the true story, then the *government* does not get good legal advice. Again, the judgement is, "Yes, we exclude the information, but because we are protecting this value that is important." It is important that the *government*, which is spending taxpayers' money, should be able to be certain that public servants tell our lawyers the truth. We do not want to discourage public servants from telling our lawyers the truth by saying to them, "Everything you say is going to be open in a couple of days in the newspapers." [emphasis added by the Senior Adjudicator]
> >
> > [Ontario, Standing Committee on the Legislative Assembly, "Freedom of Information and Protection of Privacy Act" in *Hansard: Official Report of Debates*, Monday, March 23, 1987,

> Morning Sitting, p. M-9, Monday March 30, 1987, Morning Sitting, p. M-4]
>
> Thus, where the client in respect of a particular communication relating to legal advice is not an institution under the *Act*, the exemption cannot apply. The only exception to this rule would be where a non-institution client and an institution have a "joint interest" in the particular matter . . .

I concur with and will apply the analysis set out in the above passage. Although the record reflects a communication between the Mayor and his personal lawyers, the contents of this record would not be subject to solicitor-client privilege since the interests at issue concern the Mayor personally, subject to the existence of a "joint interest" in this particular matter, as between the Mayor and the City.

I have received no submissions from the City that it shares a joint interest in the matter addressed in this record. In fact, the evidence before me points clearly to the opposite conclusion. As noted above, in the City's initial decision in which it denies having custody or control of records responsive to the appellant's request, the City states that the matter that is the subject of the appellant's request involves an "independent investigation" between the OPP and the Mayor, and that it is "not related to any business activity of the City." In my view, the City's statements are not consistent with the existence of a "joint interest".

In addition, while the City subsequently located the record at issue, it continued to rely on the custody and control provisions in section 4. Later, despite disclosing a portion of the record and making representations regarding the application of section 12 to the withheld information, the City never raised "joint interest" as a relevant factor in this case. Accordingly, I conclude that there does not exist a joint interest in the record at issue as between the Mayor and the City.

Moreover, even if solicitor-client communication privilege could apply to the record, I would find that privilege was lost through waiver. I note that the record at issue, in addition to being sent to the Mayor's personal solicitors, was also copied to a senior City official. This gives rise to the question of waiver. I invited the City to make representations on the issue of waiver, and while it stated that it had not waived privilege, it did not offer any further input on this issue.

In Order M-260, former Adjudicator Anita Fineberg considered the issue of waiver of solicitor-client privilege, stating:

> Only the client may waive the solicitor-client privilege. Waiver of the solicitor-client privilege may be express or implied. As the appellant has not specifically stated whether she claims the waiver was express or implied, I shall examine both issues.

In the recent text *Solicitor-Client Privilege in Canadian Law*, R.D. Manes and M.P. Silver, (Butterworth's, 1993) at pp. 189 and 191, the authors distinguish between the two types of waiver:

> Express waiver occurs where the client voluntarily discloses confidential communications with his or her solicitor.
>
> Generally waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. Fairness is the touchstone of such an inquiry.
>
> . . . . .

In *S. & K. Processors Ltd.* ... McLachlin J. noted:

> However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require ...
>
> In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. (pp. 148-149)

The following passage from *Wigmore on Evidence*, vol. 8 (McNaughton rev. 1961), as set out in *The Law of Evidence in Canada* (Markham: Butterworth's, 1992), by Sopinka, Lederman and Bryant at p. 666, was quoted with approval by the Ontario Court (General Division) in the recent case of *Piché v. Lecours Lumber Co.* (1993), 13 O.R. (3d) 193 at 196:

> A privileged person would seldom be held to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not.

In my view, by intentionally providing the record to the senior City official, the sender of the record waived any privilege which may have attached to it.

This conclusion is consistent with the analysis of former Senior Adjudicator David Goodis in Order MO-1338. In that case, the Adjudicator found that a communication between a consultant, acting as an agent on behalf of the World Wildlife Fund, and its legal advisor, did not qualify for exemption under the solicitor-client communication privilege exemption, for the same reasons set out above in this case. However, he also concluded that any privilege that would have

existed was lost through waiver when disclosure of the communication was subsequently disclosed to the City of Toronto.

Furthermore, I find the City's actions in disclosing the substantive portion of the record to the appellant pursuant to its second decision letter, withholding only the email addresses of the sender and recipients along with the subject line of the email message, to be additional evidence of waiver.

I acknowledge that the City has also raised the application of the branch 1 litigation privilege. However, having already concluded that any privilege that may have existed was lost due to waiver, any finding regarding the application of litigation privilege would also be negated by waiver. Accordingly, it is not necessary for me to review the application of the litigation privilege exemption in this case.

ORDER:

I order the City to disclose the record at issue to the appellant in its entirety by **October 6, 2009** but not before **September 29, 2009**.

Original Signed by: August 28, 2009
Bernard Morrow
Adjudicator