



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

ORDER MO-2647

Appeal MA11-13

City of Greater Sudbury



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NATURE OF THE APPEAL:

The City of Greater Sudbury (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a complete copy of an engineer's report that was referred to in an identified email.

The City identified one responsive record, described as a "Review of Stormwater Management for [an identified development] prepared by [an identified company] dated May, 2010." The City then indicated that access to the record was denied on the basis of the exemption in section 12 (solicitor-client privilege) of the *Act*.

The appellant appealed the City's decision.

Mediation did not resolve this matter and the file was transferred to the inquiry stage of the process. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the City, initially, and the City provided representations in response. I then sent the Notice of Inquiry, along with a severed copy of the City's representations, to the appellant. The appellant did not provide representations in response to my invitation to do so.

The record at issue is described in an affidavit provided by the City as a "Review of Stormwater Management for [an identified development]" dated May, 2010.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The City claims that the record qualifies for exemption under the solicitor-client exemption in section 12, which 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. Branch 1 arises from the common law and branch 2 is a statutory privilege. 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)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of litigation, actual or contemplated [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (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.

Representations

The City provides detailed representations relating to the record at issue and why it was created. It begins by providing some background information, and identifies that in 2004 it granted approval of a plan of subdivision in an identified area. The City states that, as part of the approval process, the appropriate storm water infrastructure was approved, in accordance with the standards set by the Province of Ontario.

The City then identifies that in July of 2009, part of the City experienced an intense and short storm during which over 90 millimetres of rain fell in the course of a few hours. The City then states:

The City’s storm water infrastructure, designed with the capacity required of provincial standards at the time of construction, could not accommodate the massive amounts of rain that fell during the short storm.

The City then states that, as a result of the storm, it expected to be involved in both potential and actual litigation relating to damage caused by the storm. It states:

On Wednesday, August 5, 2009, City staff reported to City Council that the City's insurance adjuster ... had received 544 claims for property damage arising from flooding resulting from the storm.

The City also states that on August 11, 2009, it received a letter from an insurance company explaining that the company was serving formal notice that it would be looking to the City to recover their subrogated interest in any monies paid to their insured clients, which put the City on notice to expect a lawsuit by the insurance company. The City then states:

In total, the City received 709 claims in connection with the Property Damage, including a claim by the Appellant.

The City's liability was denied for all claims, including the Appellant's claim for his property

In this context, the City identifies the specific circumstances surrounding the preparation of the record at issue. The City indicates that it purchases municipal general liability insurance from an insurance company [the Insurer], and that the City's Adjuster investigates claims in order to assess the City's liability and ensure that the claim is defended by the City itself or by the City's insurer on behalf of the City. The City then states that the record was commissioned in preparation for anticipated litigation. It states:

On Monday, August 10, 2009, the City's Adjuster advised the Insurer by email that a number of residents were blaming [the named development] and its storm water infrastructure ... for the flooding of [certain identified homes] that occurred on July 26, 2009.

In order for the City and the Insurer to assess its liability with respect to the residents' claims, the City's Adjuster suggested to the Insurer that an engineer's report be commissioned to study [the named development's] storm water infrastructure and the Insurer agreed.

The City's Adjuster requested information from the City to determine which engineering firm to retain to prepare the Record.

The City's Insurance Adjuster retained [a named engineering firm] to review and provide a report to the Insurer reviewing the storm water infrastructure in the [named development] ...

This report is the subject of this appeal.

The Record was to be prepared for the mutual benefit of the City and the Insurer in assessing the City's liability.

The City also confirms that it obtained a copy of the record from the Insurer. It also states:

The Insurer provided the Record to the City on the condition that the Record remain confidential stating that it was not provided to the City for public consumption.

The City provides both documentary and affidavit evidence in support of its representations set out above.

The City then refers to a number of court cases, as well as previous orders of this office, in support of its position that the record is subject to litigation privilege. It then states:

Litigation privilege creates a “zone of privacy” to allow parties in an adversarial process to take part in an investigative process to facilitate the process. ... The City and the claimants were (and still are) parties to an adversarial process where residents claimed compensation from the City and insurers have given notice of their subrogated interest with respect to property damages paid by those insurers. The City denied all of these claims. The City and the Insurer as the City’s defender of claims is engaged in an adversarial process and required the Record to assess the City’s liability. The document deserves to be afforded the “zone of privacy” allowed by litigation privilege in this situation.

Finally, the City confirms that a reasonable prospect of litigation existed at the time the record was created. It reviews previous orders of this office, including Orders M-285 and M-502, and also refers to Order MO-1571 in which Adjudicator Morrow held that for litigation privilege to apply “there must be more than a vague or general apprehension of litigation.” The City then states that, with respect to the record at issue in this appeal:

The evidence to demonstrate that a threat of litigation exists against the City can be found in the hundreds of claims received by the City and the formal notice of claims given to the City by residents’ insurers. Further evidence can be found in the press coverage related to the floods.... The residents and their insurers have made it clear that there is a reasonable prospect of litigation against the City arising out of the property damage suffered from the flood.

Whether the Appellant is a party to litigation against the City or any other residents or residents’ insurers are parties to litigation, the numerous claims and the continuing press coverage of the litigation threats provide plenty of evidence to indicate that a reasonable prospect of litigation has arisen out of the storm from a number of possible litigants.

As identified above, I did not receive representations from the appellant.

Analysis and findings

As identified by the City, a number of previous orders have considered the application of section 12 to records prepared by consultants relating to stormwater flooding and potential litigation. In Order MO-1571, the requester sought access to records relating to flooding that had occurred as a result of a storm. One of the records at issue was a consultant's report, entitled "Flooding Investigations..." The Municipality in that case took the position that the record was subject to litigation privilege because "[t]he 'dominant purpose' for the creation of this record was a contemplated or real apprehension of litigation." In upholding the Municipality's decision to withhold this record, Adjudicator Bernard Morrow stated:

Previous orders of this office have addressed the application of litigation privilege to reports prepared in similar circumstances. In Order M-285, Adjudicator Holly Big Canoe found that reports prepared by an insurance adjuster for the City of Kitchener in response to damage claims for flooded homes by homeowners met the dominant purpose test and fit within the scope of litigation privilege. Adjudicator Big Canoe found that the dominant purpose for the preparation of the reports in that case was to prepare for anticipated litigation between the City and the homeowners. In Order M-502, Adjudicator Donald Hale found that a report prepared by the City of Timmins' Public Works Department following two incidents in which the appellant's home was damaged by a sewer back-up, met the dominant purpose test. In that case, Adjudicator Hale found that the report was intended to inform the adjuster retained by the City's insurer of the occurrence and the possible cause of the problems with the sewer on the appellant's street. As the City had been put on notice by the appellant that a claim was being made, Adjudicator Hale found that there was a reasonable prospect of litigation at the time the report was prepared. Accordingly, Adjudicator Hale concluded that litigation privilege applied.

Consistent with Orders M-285 and M-502, I am satisfied that the consultant's report was prepared on behalf of the Municipality for the dominant purpose of using it in reasonably contemplated litigation against the City. It is clear that the Municipality's insurer sought the report to assess the Municipality's liability, in possible future litigation, for damages caused by the storm. In fact, some of the contemplated litigation has already come to fruition, and the Municipality has established that there is a reasonable prospect of further claims.

Accordingly, I find that the record falls within the litigation privilege aspect of section 12 of the [Municipal] Act.

Adjudicator Laurel Cropley applied this analysis in Order PO-2818. In that appeal, the requester sought access to a report prepared by Risk Management Insurance Services (RMIS) assessing the Ministry of Transportation's liability in possible future litigation relating to damages caused by flooding. Adjudicator Cropley reviewed the application of section 19(a) of the Provincial *Freedom of Information and Protection of Privacy Act* (similar to section 12 at issue in this appeal), and stated:

Having reviewed the representations submitted by the parties and the records at issue, I am satisfied that common law litigation privilege in section 19(a) attaches to the Adjuster's report and notes. I find that the records at issue were prepared on behalf of RMIS for the dominant purpose of using the records in reasonably contemplated litigation against the Ministry of Transportation. It is clear that RMIS sought the report to assess the Ministry of Transportation's liability, in possible future litigation, for damages caused by the flooding on the appellant's property, which he claims was a result of prior road construction and the construction of a culvert. Moreover, I find that there was a reasonable prospect of litigation at the time the report was prepared and that litigation continues to be reasonably contemplated as the matter is not yet resolved.

Adjudicator Copley accordingly found that the records fell within the common law litigation privilege aspect of the solicitor-client privilege exemption.

Applying the same analysis to the record at issue in this appeal, I find that the record was prepared for the City and its insurer for the dominant purpose of using it in the litigation which was reasonably contemplated against the City. It is clear that the City's insurer sought the report to assess the City's liability for damages caused by the storm. It is also clear to me, based on the evidence provided by the City, that litigation was reasonably contemplated at the time that the record was prepared. As a result, I find that the record at issue falls within the common law litigation privilege aspect of section 12 of the *Act*. Because of this finding, it is not necessary to consider whether the other aspects of the solicitor-client privilege exemption apply to the record.

EXERCISE OF DISCRETION

General Principles

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, this office may determine whether the institution failed to do so. In addition, this office 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

If any of these circumstances are present, the matter may be sent 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)].

Relevant considerations

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

With regard to its exercise of discretion, the City submits that it took into consideration the principles of the *Act*, including that information should be available to the public, as well as the interests that the exemption seeks to protect. The City states:

These [section 12] privileges protect the right of the City, as a party to what could be multiple lawsuits ..., to inform itself of its liability in advance of the commencement of the threatened lawsuits. This is not a situation where the information is out of date or has lost its significance. The Record contains highly sensitive and current information relating to the City's alleged liability during a time where there is still a reasonable prospect of litigation occurring.

The City also identifies that the record does not contain the appellant's personal information, and that there is no compelling or sympathetic need for access to the record. The City also refers to a number of other factors it took into account in deciding to exercise its discretion to deny access to the record under section 12.

Having considered the representations of the City, and in the absence of any representations from the appellant, I am satisfied that the City has not erred in the exercise of its discretion to apply section 12 to the record at issue. Accordingly, I uphold the City's exercise of discretion.

ORDER:

I uphold the City's decision and dismiss this appeal.

Original Signed By: _____ August 24, 2011
Frank DeVries
Adjudicator