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

ORDER MO-2619

Appeal MA10-116

City of Toronto

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

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 "copies of all documents obtained, and the source of the documents and information that the City relied upon as part of its investigation that led to the denial of the renewal of [an identified Eating Establishment License]." Some of the records at issue in this appeal were generated during an early morning joint investigation of the subject establishment by the Municipal Licensing Standards and Toronto Public Health Staff and the Toronto Police Services (TPS). One of the records at issue in the appeal is an email regarding the establishment that was sent from a City Councillor's executive assistant to staff of certain programs areas involved in the matter. The appellant alleges that the Councillor "was going beyond his elected duties to try to close a business" and was acting on his own "personal initiative." The appellant alleges that in the circumstances the interests of the Councillor conflicted with the interests of the City.

The City identified responsive records and granted partial access to them, for a fee. The City relied on sections 12 (solicitor-client privilege) and 14(1) (invasion of privacy) of the *Act* to deny access to the portion of the records it withheld.

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

At mediation, the appellant indicated that he was only seeking access to the withheld responsive information on pages 14, 17 and 31 of the records at issue. That said, the appellant took the position that an additional record containing the City's solicitor's legal advice ought to exist. In response, the City explained that the initial search for responsive records was conducted in the City's Public Health and Municipal Licensing Standards Divisions, in addition to the Legal Services Department, and that no other responsive records exist. The City further suggested that the appellant may also submit an access to information request to the TPS involved in the investigation. The appellant was satisfied with the City's explanation and as a result, the adequacy of the City's search for responsive records containing the City's solicitor's legal advice is not at issue in the appeal.

Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

I commenced my inquiry by seeking representations from the City on the facts and issues set out in a Notice of Inquiry. The City provided representations in response to the Notice. I then sent the Notice of Inquiry to the appellant, along with the non-confidential representations of the City. The appellant provided representations in response to the Notice of Inquiry. As the appellant's representations raised issues to which I determined the City should be give an opportunity to reply, I sent the appellant's representations along with a covering letter to the City. The City provided representations in reply. Subsequently, the appellant requested, and was provided, a copy of the City's non-confidential reply representations.

RECORDS:

Remaining at issue in this appeal are the withheld responsive portions of pages 14 and 17 (an investigator's notes), which the City claims are exempt under section 14(1), and 31 (an email) which the City claims is exempt under section 12.

PERSONAL INFORMATION

Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

Accordingly, in order to determine if section 14(1) of the *Act* applies, it is first necessary to decide whether the records contain "personal information" in accordance with section 2(1) of the *Act* and, if so, to whom it relates.

Section 2(1) of the *Act* defines "personal information," as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and

> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) of section 2(1) may still qualify as personal information [Order 11].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Sections (2.1) and (2.2) of the *Act* also relate to the definition of personal information. These sections state:

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621 and PO-2225]. Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225 and PO-2435].

The City's Representations

The City submits that it withheld the names of two individuals who provided "evidence" to a municipal licensing inspector during an early morning joint investigation by the Municipal Licensing Standards (MLS) and Toronto Public Health Staff (TPH) and the TPS. The City explains that it withheld the names because:

> It is not entirely clear in such circumstances if the individuals identified in the inspector's notes were "employees" of the night club. The D.J. identified on page 14 could be a "guest D.J." (D.J.'s often move from club to club) or a "new" D.J. doing a try out. He may not necessarily have been a professional D.J.; he may have been a patron "volunteering" his services for that evening. Similarly, it is not clear if the woman identified on page 17 was an employee or a "regular" patron who was familiar with the premises.

> The City believes that in this situation, where it cannot be determined conclusively if names are identifying individuals in their "business" capacity, it is not unreasonable to consider this information to be about the individuals in their "personal" capacity. The City submits, therefore, that this information would meet the requirements of paragraph (h) of the definition of "personal information" in section 2(1) of the *Act*.

The Appellant's Representations

The appellant submits that the City's position regarding the name of the D.J. amounts to speculation. The appellant submits that the City's position:

> … is contrary to common sense. A city employee in their job as a Municipal Standards Officer collected the information. If the Municipal Standards Officer had any doubt about the position of the D.J. with the company being investigated, the officer would have obtained further information to clarify.
>
> …
>
> The woman identified on page 17 of the documents provided pursuant to the access to information [request] was identified as an employee. Her name is therefore not "personal information", as defined by the *Act*, section 2(2.2).

The City's Reply Representations

In the non-confidential portion of its reply representations, the City submits that:

> In conducting his investigation of the club, the MLS officer was performing his duties as a law enforcement officer. The City submits that his actions or non-actions with respect to his collection of evidence during his investigation have no relevance in respect of the issues in this appeal, including whether the severed information constitutes the personal information of individuals pursuant to [the *Act*].

The City further submits that the woman on page 17 has not been specifically identified as an employee, and adds:

> The premises were described as being jam packed with people dancing to very loud music; illegal drug activities were noted; people were being arrested, etc. Amidst all the noise and confusion, it would be difficult to determine with any certainty the individuals' specific "relationship" with the club.
>
> The City, therefore, remains of the view that given these conditions, it is unclear if the individuals were actually employees providing the information to the inspector in their "business" capacity.

Analysis and Finding

Under section 42 of the *Act*, where an institution refuses access to a record or part of a record the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution.

I have reviewed the records at issue and considered the representations of the parties on this issue, including the representations of the City that could not be shared due to confidentiality concerns. I find that, in all the circumstances, the withheld information relates to these two individuals only in their professional or business capacity and, therefore, falls within the scope of section 2.1 of the *Act*. With respect to the first individual, he is clearly identified as a D.J. who was performing at the location at the time. The second individual is described in such a way in the records that a logical inference can be drawn that she is an employee of the establishment. In my view, the position put forward by the City in an effort to refute this finding is simple speculation.

Accordingly, the withheld information does not qualify as personal information. I will, therefore, order that this information be disclosed to the appellant as only personal information can qualify for exemption under section 14(1) of the *Act*.

SOLICITOR-CLIENT PRIVILEGE

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. 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)].

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 [Orders PO-2441, MO-2166 and MO-1925].

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].

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 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)].

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.)]

- the communication is made to an opposing party in litigation [Orders MO-1514 and MO-2396-F]

- the document records a communication made in open court [Orders P-1551 and MO-2006-F]

Waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party. The common interest exception has been found to apply where, for example

- the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties [*General Accident Assurance Co. v. Chrusz* (above); Order MO-1678]

- a law firm gives legal opinions to a group of companies in connection with shared tax advice [*Archean Energy Ltd. v. Canada (Minister of National Revenue)* (1997), 202 A.R. 198 (Q.B.)]

- multiple parties share legal opinions in an effort to put them on an equal footing during negotiations, but maintain an expectation of confidentiality vis-à-vis others [*Pitney Bowes of Canada Ltd. v. Canada* (2003), 225 D.L.R. (4th) 747 (Fed. T.D.)]

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."

Loss of Privilege

The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the *head of an institution* (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)) and

- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)).

The City's Representations

The City submits that the solicitor-client communication privilege applies to the information at issue on page 31 because "disclosing the withheld portion would reveal confidential advice provided to City staff by the City solicitor." In the confidential portion of its representations, the City sets out what it views as the advice that was provided.

The Appellant's Representations

The appellant acknowledges the significance of solicitor-client privilege but takes the position that any privilege that existed was waived. The appellant submits that because there is no evidence that a City solicitor was present at the relevant time, a named Councillor must have "voluntarily waived the privilege by telling the privileged information" to the author of the email set out at page 31.

The appellant argues in the alternative that if the privilege survived this voluntary disclosure, it was waived when the author of the email at page 31 voluntarily disclosed the information in the email to "several City employees."

The appellant further submits that simply copying the City solicitor on the email does not create privilege:

> This was not a confidential e-mail to the solicitor. There was no expectation of privacy in the e-mail communication. The City employees whom [were] recipients of the e-mail were not asked to keep the information confidential.

The appellant submits that the common interest exception does not apply in the circumstances. The appellant takes the position that the City bears the onus of raising the common interest exception and it failed to do so. The appellant further submits in particular that the named

Councillor "was going beyond his elected duties to try to close a business" and that this does not represent a common interest with City Division managers "who should in fact have had the opposite interest to that of" the named Councillor. The appellant submits that the actions taken by the named councillor were in furtherance of the Councillor's personal initiative and therefore the advice was not given to him in his capacity as Councillor. The appellant relies on Order MO-2454 in support of his position.

The City's Reply Representations

In the non-confidential portion of its reply representations, the City submits that the privilege that exists was between the City solicitor and her staff and their clients. The City identifies these clients as being the named Councillor and his executive assistant, who authored the email, as well as the relevant staff of the program areas involved in the matters, who were the recipients of the email.

Analysis and Findings

I find that disclosing a portion of the email would reveal the substance of a solicitor-client communication that qualifies for exemption under section 12 of the *Act*. In that regard, unlike the information under consideration in Order MO-2454, I am not satisfied that the interests at issue as reflected in the email concern the Councillor "personally." Rather, I find that the subject of the email is squarely related to the activities and interests of the City. Furthermore, I am also satisfied that this information was shared amongst those sharing a "joint interest" in the subject matter of the email. Finally, I am also satisfied that there has been no waiver of privilege with respect to the portion that I have found to qualify for exemption under section 12 of the *Act*.

That said, only a portion of the withheld section of the email would reveal the actual advice. The balance is simply factual background information, the disclosure of which would not reveal any information that falls within the scope of section 12. I have highlighted the information that I have found to be exempt under section 12 of the *Act* on a copy of the record provided to the City along with this order.

Finally, in all the circumstances, I am satisfied that the City appropriately exercised its discretion to withhold the information that I have found to qualify for exemption under section 12 of the *Act*.

ORDER:

1. I order the City to disclose to the appellant the withheld portion of pages 14 and 17 along with the non-highlighted withheld portion of page 31 by sending it to the appellant by no later than **May 26, 2011**.

2. I uphold the City's decision to deny access to the remainder of the withheld portion of page 31 that I have highlighted on a copy of page 31 that I have provided to the City along with this order.

3. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of pages 14, 17 and 31 disclosed to the appellant pursuant to this order.

Original signed by: May 5, 2011
Steven Faughnan
Adjudicator