

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2681

Appeal MA11-2

City of Toronto

December 22, 2011

Summary: The appellants are parents whose son was involved in an incident while attending a City of Toronto day camp. The incident resulted in their son receiving emergency care which resulted in city staff completing Emergency Incident Reports. The appellants sought access to these reports and the city denied access claiming that they contain solicitor-client privileged information under section 12. The city also claims that disclosure of some of the withheld information contained in the reports would constitute an unjustified invasion of personal privacy under section 14(1). The city's decision to withhold the reports is not upheld and the city is ordered to disclose the information at issue to the appellants.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1) definition of "personal information", 12 and 38(a).

Orders and Investigation Reports Considered: M-285, M-502, MO-1571, MO-2124-I, MO-2647 and PO-2818.

OVERVIEW:

[1] The appellant filed a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to an incident involving her child while attending a recreation camp.

[2] The City of Toronto (the city) located responsive records and granted partial access to them. The city claims that the withheld portions contain solicitor-client

privileged information and are, therefore, exempt from disclosure under section 12. The city also claims that disclosure of some of the withheld information would constitute an unjustified invasion of personal privacy and that this information is exempt under section 14(1). In addition, the city states that it removed portions of the records it identified as not responsive.

[3] A law office filed an appeal on behalf of the appellant and her spouse to this office and a mediator was assigned to the file. The appellant and her spouse will be referred to as the appellants for the remainder of this order.

[4] At the end of mediation, the appellants confirmed that they do not wish to pursue access to information the city identified as not responsive to the request; nor are they seeking access to any information found to constitute the personal information of other individuals.

[5] The appeal was then transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. During the inquiry of this appeal, a notice of inquiry setting out the facts and issues was sent to the parties, including the possible application of section 38(a) as it appeared that the records may contain the personal information of the appellants and their son. The parties' provided representations to this office, which were shared in accordance with section 7 of the IPC's Code of Procedure and Practice Direction 7.

[6] In this order, I make the following findings:

- The records contain the personal information of the appellants and their son;
- The references in the records to the home address and telephone information for some staff members are these individual's personal information; and
- The records do not contain solicitor-client privileged information and thus are not exempt under section 38(a) of the *Act*, in conjunction with section 12.

RECORDS:

[7] The records at issue consist of three Major Emergency Reports (reports) completed by staff members, described in the chart below:

| Record | Page Numbers | Released? |
|---|---------------------|------------------|
| Report no. 1 which includes the report maker's handwritten statement in addition to the statements of two lifeguards and a camp counselor | Pages 19-30 | No |

| | | |
|---|-------------|----|
| Report no. 2 | Pages 31-36 | No |
| Report no. 3 | Pages 37-48 | No |
| Duplicate of pages 20, 21, 22, 23, 25, 26, 27 and 28 of report no.1 | Pages 49-57 | No |
| Duplicate of pages 33, 35 and 36 of report no.2 | Page 58-61 | No |

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Are the records exempt under section 38(a) in conjunction with section 12?
- C. If the discretionary exemption at section 38(a) applies, did the city properly exercise its discretion?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1)?

[8] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

[9] The city submits that most of the withheld information relates to the incident, not the child involved in the incident. In support of this argument, the city's representations state:

... the Major Emergency Reports contains the individual's witness' opinions, views and observations in relation to the incident in question. While the Major Emergency Reports relate to the [named child] due to the individual's involvement in the incident which is the subject of the reports, they pertain directly to an incident as the subject of the reports rather than the [named child] as the subject. As a result, some of the information could be considered to be the personal of the [name child], for example the opinion of [named staff member] that EMS conducted "tests" (blood, etc) with respect to the [named child], while other opinions of [named staff member] would not be the personal information of the [named child] such as the opinion of [named staff member] that she waited for EMS at the Emergency Entrance located in the "deep end".

[10] The city also acknowledges that the records contain the personal information of the appellants and their child. The city also claims that the reports contain home

address and telephone information for some staff members and that this constitutes their personal information.

[11] The appellants do not dispute that the records may contain the personal information of other identifiable individuals and have advised that are not seeking access to any information found to constitute the personal information of other individuals.

[12] The city takes the position that "the records at issue do not contain a substantial amount of, or have as a primary subject, the personal information of the [appellants and their son]". I disagree. In my view, the records primarily relate to an incident which resulted in the appellants' son receiving emergency medical care. Consequently, the records contain information about what city staff observed and did in response to the appellants' son's medical emergency. In addition, the records contain information about the city's efforts to contact the appellants and follow up with them and staff about the incident. As noted above, the records also contain the home address and telephone numbers for some city staff members.

[13] 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, R-980015, MO-1550-F 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 MO-2344].

[14] I have carefully reviewed the records and find that they contain the personal information of the appellants and their son. In particular, I note that the records contain information about the appellants' son medical history [paragraph (b) of the definition of "personal information" in section 2(1)]. In addition, the appellants and their son's names appear with other personal information relating to them [paragraph (h)], including their home telephone number [paragraph (d)]. Finally, I find that the personal opinions or views of city staff members about the appellants' son's medical condition and circumstances surrounding the incident involving him constitute his personal information [paragraph (e)].

[15] I also find that the portions of the records which contain staff members' home addresses and telephone numbers constitute the personal information of these individuals [paragraph (d)].

[16] As I have found that most of the records contain the personal information of the appellants and their son, I will go on to determine whether this information contains solicitor-client privileged information under section 38(a) in conjunction with section 12.

[17] As noted above, the appellants have advised that they are not interested in seeking access to any information found to constitute the personal information of any other identifiable individual, such as the home address and telephone information contained in the records. Given the appellants position, this information is no longer at issue and will not be disclosed to the appellants.

B. Are the records exempt under section 38(a) in conjunction with section 12?

[18] 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.

[19] 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.

[20] In the circumstances of this appeal, the city claims that the solicitor-client communication privilege and litigation privilege in both branches 1 and 2 apply.

Branch 1: common law privilege

[21] 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

[22] The city claims that the solicitor-client communication privilege applies to the records. In support of this position, the city's representations states that the report "was prepared by or for counsel employed or retained by an institution for use in giving legal advice".

[23] 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.)].

[24] I have carefully reviewed the records and find that they do not constitute direct communications of a confidential nature between a solicitor and client. In fact, there is no evidence before me suggesting that the records were forwarded to counsel employed or retained by the city. Accordingly, I find that there is no evidence to support a finding that the records constitute "a continuum of communications" between solicitor-client as contemplated in *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

[25] Finally, confidentiality is an essential component of the privilege and other than the city's assertion that the records are "private and confidential", I was not provided with evidence demonstrating that the information contained in the records was made in confidence, either expressly or by implication [See *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Litigation privilege

[26] 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)].

[27] The city submits that the records in this appeal should be treated like adjuster's reports, which this office has found meets the dominant purpose test and thus falls within the scope of litigation privilege [See orders M-285, M-502, MO-1571 and MO-2124-I].

The Major Emergency Reports were prepared to record the relevant facts, issues and similar matters in relation to an unfortunate incident which occurred while an individual was participating in a [recreational program]. At the time of the incident, it was important that the City gather the information relevant to the incident to permit the City to engage in a review of the matter. There is no basis to suggest at the time the Major Emergency Reports were prepared that litigation (either on behalf of the City against third parties, or the defence of litigation commenced against the City) was not a reasonable matter to contemplate. The Major Emergency Reports [allow] City Management to review an incident and convey the necessary information to the City's solicitors, as well as other potential users as required.

The Major Emergency Reports are similar to an adjuster's report, in so much as the documents are prepared to collect the relevant facts in relation to an incident. This record is clearly a private and confidential

document which would be provided to the City's solicitor to be utilized in response to any litigation arising from this incident.

[28] The city's representations also state:

It is clear that the City prepared these records to record all information relating to the incident. The purposes of these records are to allow the full range of management options to determine what, if anything, should be done. Such "management options" could include, as a primary or dominate purpose in this case, a meaningful assessment of the City's potential liability, in possible future litigation relating to the incident, and preparation with respect to litigation commenced against the City. The City suggests that there was, and remains, a reasonable prospect of litigation at the time the Major Emergency Reports were prepared and that litigation continues to be reasonably contemplated as the matter is not yet resolved.

[29] As indicated, the city refers to previous decisions from this office which found that adjuster's reports fell within the scope of litigation privilege. In Order MO-1571, Adjudicator Bernard Morrow summarized Orders M-285 and M-503, as follows:

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.

[30] Adjudicator Morrow went on to state:

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 *Act*.

[31] In response, the appellants' representations state:

There must be more than a vague or general apprehension of litigation and reasonable contemplation of litigation does not meet this test. Until the investigation of the incident (which the City admits was the purpose of the creation of the Reports) had reached the stage of review of the Reports there could not have been more than a vague or general apprehension of litigation, as it would only be at that time that the facts would be known and could be considered to determine whether litigation should be expected. The exception to this would be if the [appellants] had already threatened litigation against the City on the day of the incident before the Reports were completed. There is no basis on which to find that this occurred.

Decision and Analysis

[32] 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.

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[For this privilege to apply], there must be more than a vague or general apprehension of litigation.

[33] I have carefully considered the evidence of the parties and find that the circumstances surrounding the creation of the records at issue in this appeal differ vastly from those in Orders M-285, M-502, MO-1571 and MO-2124-I. Though the city is correct in stating that these orders have consistently held that reports prepared by insurance adjuster’s have been found to fall within the scope of litigation privilege, I do not share the city’s view that the records at issue in this appeal ought to be treated as if they were adjuster’s reports. In any event, even if I accepted the city’s submission that the Emergency Incident Reports are like adjuster’s reports, I find that the specific circumstances surrounding the creation of the records at issue in this appeal do not support a finding that they meet the dominant purpose test.

[34] I note that in Order PO-2818, Adjudicator Laurel Cropley applied the reasoning in Orders M-285, M-502, MO-1571 and MO-2124-I and found that the adjuster’s report and notes at issue in that appeal fall within the scope of litigation privilege. In making her decision, she took into account the structure of the Province’s Risk Management and Insurance Services (RMIS) program and found that the institution had been put on notice that litigation was reasonably contemplated. In that order, she states:

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.

Although the appellant appears to be somewhat confused about the claims process, it is clear from the evidence that he has been pressing a claim for reimbursement of the damages to his property. The wording of his access request reflects his understanding that he had made a claim. Although I accept that he may have wished to have it amicably resolved, the description of the Province’s liability insurance program makes it clear that once certain actions are taken by an individual, in this case, a letter

from the appellant stating that he was seeking compensation, RMIS "treats this notice as an explicit notice that a statement of claim will be issued if the matter is not resolved..."

[35] Order MO-2647 is another example where the specific circumstances surrounding the creation of the engineering report at issue, along with the previous decisions from this office, were considered in determining whether the record fell within the scope of litigation privilege. In that order, Adjudicator Frank DeVries states "[i]t is clear to me, based in the evidence provided by the City, that litigation was reasonably contemplated at the time that the record was prepared". In making his decision, Adjudicator DeVries accepted the city's evidence that it contacted its insurer and retained an engineering firm to prepare a report after receiving information that residents who experienced flooding, raised concerns about who was responsible for the storm water infrastructure.

[36] Turning now to the circumstances surrounding the records at issue, I have carefully reviewed the Emergency Incident Reports and note they were created on the very day the incident involving the appellants' child occurred. The reports, unlike the adjuster's or consultant's reports at issue in Orders M-285, M-503, M-1571, M-2124-I, MO-2647 and PO-2818, were not prepared by a third party or in-house investigator retained to assess the city's liability after the incident occurred. In addition, there is no evidence suggesting that when staff completed the reports, they were prepared to aid the city in the conduct of litigation. Instead, it appears that the reports were prepared by staff members in the normal course of their professional duties. The city's evidence establishes that these type of reports are prepared by staff and are reviewed by their managers who "determine what, if anything, should be done".

[37] Having regard to the specific circumstances surrounding the creation of the Emergency Incident Reports, I find that the city's submission that the reports were prepared in contemplation of litigation is too vague and general. In addition, I find that the city's submission that the records "would be provided to the City's solicitor to be utilized in response to any litigation arising from this incident" lacks sufficient detail to support a conclusion that litigation was reasonably contemplated at the time the reports were created. In making my decision, I also note that the city did not present evidence demonstrating that it has been placed on notice that litigation is likely to occur at the time the records were prepared.

[38] For the reasons stated above, I find that the common law litigation privilege under branch 1 does not apply to the records.

Branch 2: statutory privileges

[39] 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

[40] The city's submits that the reports were "prepared by or for counsel employed or retained by an institution for use in giving legal advice". 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." However, based on the city's evidence it is clear that the reports were not prepared by or for counsel. For reasons already stated, I find that the reports were prepared by staff in the normal course of their professional duties for their managers. In addition, I have not been presented with any evidence which suggests that the city provided the records to its counsel.

[41] Accordingly, I find that the statutory solicitor-client communication privilege under branch 2 does not apply to the records.

Statutory litigation privilege

[42] For the same reasons I found that the common law litigation privilege under branch 1 does not apply to the records, I find that the statutory litigation privilege under branch 2 also does not apply. 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."

[43] In addition, I note that the city's evidence does not suggest that its counsel selected the reports for inclusion in his or her lawyer's brief. Documents not originally created in contemplation of or for use in litigation, which are copied for the Crown brief as the result of counsel's skill and knowledge, are exempt under branch 2 statutory litigation privilege [*Ontario (Ministry of Correctional Services) v. Goodis* (2008), 290 D.L.R. (4th) 102, [2008] O.J. No. 289; and Order PO-2733].

Summary

[44] As I have found that common law and statutory solicitor-client privileges under branch 1 and 2 do not apply, and the city has not claimed that any other exemption applies to the records, I will order the city to disclose the records at issue to the appellant, with the exception of the personal information of staff members found on pages 19, 21, 22, 25, 26, 27, 30, 31, 33, 37, 39, 49, 51, 52, 54, 55, 56, 58 and 59.

ORDER:

1. I order the city to disclose the records at issue to the appellant by **January 30, 2012** but not before **January 25, 2012**. For the sake of clarity, in the copy of the

records enclosed with the city's order, I have highlighted the portions of the records that contain the home address and telephone information of city staff members which are not at issue in this appeal and **should not** be disclosed to the appellant.

2. In order to verify compliance with Order Provision 1, I reserve the right to require a copy of the information disclosed by the city to be provided to me.

Original signed by: _____
Jennifer James
Adjudicator

December 22, 2011 _____