

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-2799-I

Appeal MA11-486

Town of Kapuskasing

October 16, 2012

Summary: The appellants sought access to records concerning a sewer backup on a specific property. The town denied access applying the discretionary exemption in section 12 to all of the records and the mandatory exemption in section 10(1) to one record. This order partly upholds the application of section 12 to the records and orders the town to re-exercise its discretion with respect to this information.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 10(1), 12.

Orders and Investigation Reports Considered: Order MO-1571.

OVERVIEW:

[1] The Town of Kapuskasing (the town or the municipality) received an access request, pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for the following records relating to sewer damage at a specific property:

- a) Any and all records, notes etc., in your possession with respect to [identified individuals'] complaints, including any investigatory material compiled in response to the sewer backup(s);

- b) Copies of relevant/respective by-laws, policies and procedures in place at the time the back-up(s) occurred, regarding the maintenance of sewer lines;
- c) Copies of any and [all] notes/records with respect to complaints received by the [the town] with respect to the sewer line blockage specific to this property;
- d) Copies of any and all TV lateral tapes/video recordings that recorded by [the town] in its investigation to determine the cause of the back-up;
- e) Statements taken from independent witnesses with respect to the incident(s).

[2] The town identified records responsive to the request and issued a decision denying access, citing section 12 (solicitor-client privilege) of the *Act*.

[3] The requesters, now the appellants, appealed the town's decision.

[4] During mediation, the town agreed to disclose the bylaws that are responsive to part b of the request to the appellants. The town also confirmed it had no additional responsive records. The appellants advised the mediator they are not taking issue with the town's search.

[5] The town issued a supplementary decision letter to the appellants advising that it is applying section 10(1) (third party information) in addition to section 12 of the *Act* to one of the records, the video, that was identified as responsive to the request.

[6] No further mediation could be conducted and therefore, the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I sought representations from the town, the affected party which prepared the video, and the appellants. Representations were received only from the town and the appellants. These representations were shared in accordance with the IPC's *Code of Procedure and Practice Direction 7*.

[7] In this order I partly uphold the application of section 12 to the records and I order the town to re-exercise its discretion with respect to this information.

RECORDS:

[8] The records at issue consist of:

- an Acknowledgement of Claim Assignment, Status Reports and a Time and Expense Summary addressed to the town from the adjuster representing its insurance company;
- correspondence between the town and this adjuster;
- a video of the inside of the sewer; and
- correspondence between the appellant insurance company and the town or the adjuster.

[9] The town has claimed the application of section 12 to all of the records. It has also claimed the application of section 10(1) to the video.

ISSUES:

- A. Does the discretionary exemption at section 12 apply to the records?
- B. Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?
- C. Does the mandatory exemption at section 10(1) apply to the video?

DISCUSSION:

A. Does the discretionary exemption at section 12 apply to the records?

[10] 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.

[11] The town submits that the records are subject to litigation privilege. Litigation privilege protects records created for the dominant purpose of litigation, actual or contemplated.¹

¹ 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).

[12] 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.

[13] The town submits that the video was to be used in the event of litigation or in contemplation of litigation. It states that:

[The video] relates directly to formulating for use in litigation and in support of the municipality for arguments pertaining to liability. The reports and video are intended to inform the town's adjuster of the circumstances pertaining to the claim and therefore litigation privilege can be applied. At the time of the request there is no litigation claim however the municipality desires to be reasonable in event a claim is filed. As per the paperwork filed pertaining to the claim by [named insurance company], it is proposed that the company will file paperwork with the municipality for compensation of the insurance claim.

[14] As stated above, the affected party which prepared the video for the town did not provide representations in this appeal.

[15] The appellants' representative submits that section 12 does not apply as the records were not created in contemplation of, or for use in, litigation, but were created during the investigation into the sewer back-up at the appellant homeowner's property. She states that the adjuster's reports and the video recording were created as part of the adjusting process in the town's usual course of business.

[16] The appellants' representative refers to the two-part test for determining whether litigation privilege exists with respect to a particular document: (1) the litigation must have been reasonably foreseeable at the time that the material in question was produced; and (2) the dominant purpose for the production of the material must have been to assist in litigation.²

[17] With respect to the first part of the test, the appellants' representative states that it has been held that recognition by an adjuster that litigation is a possibility, without anything more, is insufficient to properly maintain a claim for privilege, as there may be other reasons to investigate, such as to determine coverage.³

[18] The appellants' representative states that litigation must be "actual or contemplated."⁴ As such, in order for litigation privilege to apply, there must be more than a vague or general apprehension of litigation. She states that:

With respect to the second part of the test, the general rule is that the initial stages of an investigation will not be deemed to be "for the dominant purpose of litigation."⁵ The test regarding the 'dominant purpose' of a document is whether it was produced in order to obtain legal advice or to conduct or aid in the conduct of litigation which at the time of its production was in reasonable prospect.⁶

For example, in *Chrusz*, which is the leading case regarding litigation privilege, the plaintiff hired an adjuster to investigate a fire loss approximately a day after the fire occurred. The plaintiff's insurer later attempted to gain access to a sworn statement of a witness which was taken by the adjuster. The plaintiff claimed privilege over the statement and the adjuster's reports, arguing that litigation was in contemplation from the beginning of the investigation. However, the court disagreed, noting that while litigation was always a possibility, it was not actually in contemplation at the time that the adjuster's reports were created.

² The appellants rely on *Kavanagh v. Peel Mutual Insurance Co.*, [2009] O.J. No. 4349, 99 OR. (3d) 780 (Ont. S.C.J.) [hereinafter referred to as *Kavanagh*] and *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (Ont. CA.) at 32 [hereinafter *Chrusz*].

³ The appellants rely on *Shaughnessy Golf and Country Club v. Uniguard Services Ltd.* (1986), 1 B.C.L.R. (2d) 309 (C.A.).

⁴ The appellants rely on *Ferris v. Shell Canada Inc.*, 2000 CarswellOnt 2886 (Ont. Sup. Ct.).

⁵ The appellants rely on *Kavanagh and Chrusz*.

⁶ The appellants rely on *Kavanagh and Chrusz*.

Similarly, in *Young Men's Christian Assn., of Hamilton Wentworth v. 331783 Ontario Ltd.*,⁷ the court held that "merely because litigation may have been a possibility does not attract litigation privilege. Rather, it must be said that the dominant purpose of the documentation was the prospect of litigation."

[19] The appellants' representative submits that use of the word "potential" in the town's representations only establishes that the town was vaguely aware of the possibility of litigation, which is not relevant to the decision whether to disclose the records. As well, she points out that the town admits in its letter that at the time the appellant's request was made, there was no litigation pending.

[20] The appellants' representative states that the possibility that the appellants' insurer may seek compensation from the town for the damage incurred at her property as a result of the sewer back-up is insufficient to establish that litigation privilege applies. She states that:

The request for disclosure of the requested documents was made in October 2011, almost two years after the sewer back-up. The requested documents were created in or around December 2009, at the time of the sewer back-up. As such, the town cannot claim that the requested documents were made in contemplation of litigation.

While the town may assert that it was generally aware of the possibility of litigation at the time of the sewer back-up, this is only a vague apprehension of litigation.

[21] The affected party did not provide representations in this appeal nor did the town provide reply representations.

Analysis/Findings

[22] The appellants in this appeal are the homeowner and the insurer of her home. The subject matter of the records relates to a sewer backup which occurred at the appellant homeowner's house in December 2009.

[23] Before I determine the application of section 12, I will set out the chronology of events involving the appellants and the town.

- On January 6, 2010, the appellant insurance company wrote to the town stating that it will be seeking reimbursement from the town for damages it will be paying the homeowner.

⁷ (2001) 16 C.P.C. (5th) 192 (Ont. S.C.J.).

- On November 29, 2010, the appellant insurance company sought reimbursement from the adjuster for the amount of damages sustained by the appellant homeowner.
- On February 28, 2011, the appellant insurance company sought information from the town regarding settlement of the claim.
- On April 18, 2011, the appellant insurance company wrote to the town seeking access under the *Act* to copies of all documents in its possession relating to the sewer backup and the sewer main. On May 2, 2011 the town denied access to all responsive records, citing section 12 of the *Act*.
- On October 6, 2011 the appellants' representative wrote to the town indicating that it had been retained to assist in an investigation of the sewer backup and seeking access to the records in paragraphs (a) to (e) set out above.
- On October 20, 2011, the town denied access to all responsive records, again citing section 12 of the *Act*.

[24] In Order MO-1571, Adjudicator Bernard Morrow summarized orders which found that adjuster's reports fell within the scope of litigation privilege, 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. 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.

[25] In *SNC-Lavalin Engineers & Constructors Inc. v. Citadel General Assurance Co.*,⁸ the Court stated that the party claiming the privilege must satisfy that each document thereafter was created for the dominant purpose of litigation.

[26] In order for litigation privilege to apply, the requested documents must have been created in contemplation of litigation which was reasonably likely to occur.

[27] The town sought the services of the adjuster to assess the town's liability in possible future litigation for damages caused by the sewer backup on the appellant homeowner's property, which she claims was a result of the town's negligence. Based on the correspondence between the town and the appellant insurance company, and consistent with the reasoning in Order MO-1571 and the orders referred to therein, I find that the records that contain information concerning the reports of the adjuster on the town's liability for damages fit within the scope of litigation privilege. These records were created to aid in the conduct of litigation which at the time of their production, given the correspondence from the appellant insurance company about seeking damages, was a reasonable prospect. At the times these reports were made, the town had received notice from the appellant insurance company that it was seeking to recover the amount it had paid out for damages to the appellant's home as a result of the sewer backup.

[28] The video is a recording of the inside of a sewer. According to the town, the video was prepared for use by it in the event of litigation to address issues of the town's liability for the sewer backup. The video was provided by the town to the adjuster as part of the claims reporting process. I find that when this video was produced, litigation was reasonably foreseeable and the dominant purpose of the production of the video was to assist in litigation. Therefore, I find that section 12 applies to the video. For the sake of completeness, I will also consider whether section 10(1) applies to the video.

[29] I find that there was a reasonable prospect of litigation at the time the records that concern the town's liability for damages resulting from sewer backup at the appellant homeowner's property were prepared. Based on the parties' representations, litigation continues to be reasonably contemplated as the matter is not yet resolved.⁹

⁸ *SNC-Lavalin Engineers & Constructors Inc. v. Citadel General Assurance Co.*, [2003] O.J. No. 310 at para. 31 (Sup.Ct.)

⁹ See also Order PO-2818.

[30] However, I find that the other records or portions of records that do not contain information specifically addressing the town's liability in the sewer backup do not come within section 12 as these records were not created for the dominant purpose of litigation. These records or portions of records do not contain information related to the town's liability for damages, and include the correspondence between the appellant insurance company and the town or the adjuster.

[31] In conclusion, I find that the records that contain information specifically addressing the town's liability for the sewer backup are subject to section 12. I will consider below whether the town exercised its discretion in a proper manner. As no other exemptions apply to the remaining information, I will order that information disclosed.

B. Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

[32] 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, the Commissioner may determine whether the institution failed to do so.

[33] In addition, 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.

[34] In either 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)].

[35] 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.

[36] The town did not provide representations on the exercise of its discretion. It did state in its May 15, 2012 representations that at the time of the request there was no litigation claim made against it related to the subject matter of the records. The town stated that it wanted to be reasonable in the event a claim is filed. Considering this information, I find that the town did not consider several relevant factors, including the age of the records, whether disclosure will increase public confidence in the operation of the town, and the extent to which the information in the records is significant and/or sensitive to the institution and the requesters.

[37] Accordingly, I will order the town to re-exercise its discretion and to provide me with representations on this issue.

C. Does the mandatory exemption at section 10(1) apply to the video?

[38] Section 10(1) states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[39] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, and MO-1706].

[40] For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

[41] The town did not provide representations on the three-part test, nor did it even provide direct representations on the application of section 10(1) to the video. Concerning section 10(1), the town submits that the video is municipal property and it may or may not be of assistance to it in the event that the town faces legal action by the appellants. The town states that the information in the video is maintained as being confidential because it may be useful for litigation purposes, in the event that such should occur.

[42] The affected party which prepared the video did not provide representations.

[43] The appellants dispute that section 10(1) applies to the video and made specific representations on each part of the three-part test.

Part 1: type of information

[44] The types of information that could apply to the video are listed in section 10(1) and have been discussed in prior orders:

Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known,
and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

[45] The appellants submit that the town cannot establish the first part of the test. The appellants states that:

The video recording cannot be considered to disclose a trade secret, as it is not the subject of efforts that are reasonable under the circumstances to maintain its secrecy. It does not disclose scientific information, as it does not relate to the observation and testing of a specific hypothesis or conclusion and was not undertaken by an expert in the field.

The video recording does not disclose commercial information, which has been defined as relating solely to the buying, selling, or exchange of merchandise or services. Indeed, the fact that a record might have monetary value, which is strictly denied in this case, does not necessarily mean that the record itself contains commercial information.

Similarly, the video recording cannot be considered to disclose financial information or labour relations information.

The closest form of information which may be disclosed by the video recording is technical information. However, we submit that to categorize the video recording as disclosing technical information would be a stretch. Technical information includes information belonging to an organized field

of knowledge that would fall under the general category of applied sciences or mechanical arts and usually describes the construction, operation, or maintenance of a structure, process, equipment, or thing. In this case, the video recording would capture the investigation of the sewer back-up at our client's property. Its purpose was to document this investigation into the cause of the sewer back-up. We submit that this does not fall within the ambit of 'construction, operation, or maintenance of a structure, process, equipment, or thing.'

[46] The video is a recording of the inside of a sewer. The affected party appears to have inserted a type of camera into a sewer and taken a video of the inside of the sewer. In the absence of specific representations from either the town or the affected party, I agree with the appellants that part 1 of the test does not apply.

[47] As part 1 of the test has not been met, section 10(1) does not apply. In any event, if I had found that part 1 of the test had been satisfied, I would have found that neither part 2 nor part 3 of the test under section 10(1) had been met. There is no evidence that the video was supplied by the affected party in confidence to the town,¹⁰ nor have I been provided with "detailed and convincing" evidence to establish a "reasonable expectation of harm" should the video be disclosed.¹¹

ORDER:

1. I order the town to re-exercise its discretion concerning the paper records and the video that I have found subject to section 12 and to advise the appellants and this office of the result of this re-exercise of discretion, in writing. For ease of reference, I enclose with the copy of the order being sent to the town, a highlighted copy of the portions of the paper records that I have found subject to section 12.
2. If the town continues to withhold all or part of the information at issue in the video and the paper records that I have found subject to section 12, I also order it to provide the appellants with an explanation of the basis for exercising its discretion to do so and to provide a copy of that explanation to me. The town is required to send the results of its re-exercise, and their explanation to the appellants, with the copy to this office, by no later than **November 6, 2012**. If the appellants wish to respond to the town's re-exercise of discretion, and/or its explanation for exercising its discretion to withhold information, they must do so within 21 days of the date of the town's correspondence by providing me with written representations.

¹⁰ See Order PO-2020.

¹¹ See *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.), and Orders PO-2020 and PO-2435.

3. I order the town to disclose the remaining information in the records to the appellant by **November 21, 2012** but not before **November 15, 2012**.
4. In order to verify compliance with this order, I reserve the right to require the town to provide me with a copy of the records or the portions of the records disclosed to the appellants.
5. I remain seized of this matter pending the resolution of the issue outlined in provisions 1 and 2.

Original Signed By: _____ October 16, 2012
Diane Smith
Adjudicator