

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2802

Appeal MA11-489

Town of Kapuskasing

October 17, 2012

Summary: The appellant sought access to records concerning the sewer line to her 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 does not uphold the town's decision.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, *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) 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 copy of the public works log book, indicating the type of work that was completed at the mentioned address and the names of the involved workers. Time frame 2008-2011

- A copy of the video taken of the sewer drain pipes in 2009 or other possible dates
- A copy of results or recommendations that were provided to the previous owner of the home

2. The town conducted a search and located two records responsive to the request. It subsequently issued a decision denying access to the records in their entirety, pursuant to section 12 (litigation privilege) of the *Act*. In addition, the town stated that "disclosure of records may affect the interests of a third party."

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

4. During mediation the town clarified that section 10(1) (third party information) of the *Act* applies to one of the two records, the video.

5. The appellant asked if there were any additional records in the town's holding that are responsive to her request. The town subsequently conducted another search and confirmed there are no further records. The appellant does not take issue with the town's response and, therefore, reasonableness of search is not at issue in this appeal.

6. The appellant further confirmed that she is only seeking access to the information in the records that has been identified as responsive to her request by the town. Accordingly, the information identified as not responsive is not at issue in this appeal.

7. 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 appellant. Representations were received only from the town and the appellant. These representations were shared in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*.

8. In this order I find that the records are not exempt and order them disclosed.

RECORDS:

9. The records consist of one excel spreadsheet consisting of two entries and one video. 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. 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

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.

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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)].

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

13. The town submits that:

...there is potential for litigation privilege. The video was undertaken by and for the municipality for use in the event of litigation or contemplation of litigation. It 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. As stated above, the affected party which prepared the video for the town did not provide representations in this appeal.

14. The appellant did not provide direct representations on the application of section 12 to the records.

Analysis/Findings

15. Before I determine the application of section 12, I will set out the chronology of events involving the appellant and the town.

16. On October 11, 2011, the appellant wrote the town stating that she was seeking access to the following records concerning her home, which she had taken possession of a few months earlier in 2011:

- A copy of the public works log book, indicating the type of work that was completed at the mentioned address and the names of the involved workers. Time frame 2008-2011
- A copy of the video taken of the sewer drain pipes in 2009 or other possible dates
- A copy of results or recommendations that were provided to the previous owner of the home

17. On October 19, 2011, the town denied access to two responsive records pursuant to section 12 of the *Act*. The responsive records consist of a video of the

sewer line to the appellant's home, which appears to have been taken in 2005, and two entries on a daily time sheet for two town employees dated 2008.

18. Although the town refers in its representations to adjuster reports and a named insurance company, there is no indication in the records that an insurance company or an insurance adjuster was involved in a claim against the town with respect to the appellant's property. The town provided identical representations in another appeal file concerning a homeowner whose property sustained damages. This other homeowner is seeking recovery through her insurer. This property is located on a different street in the town. Unlike the situation in this appeal, the responsive records in that appeal include insurance company letters and adjuster reports.

19. 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.

20. In *SNC-Lavalin Engineers & Constructors Inc. v. Citadel General Assurance Co.*,² the Court stated that the party claiming the privilege must satisfy that each document thereafter was created for the dominant purpose of litigation.

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

22. Consistent with the reasoning in Order MO-1571 and the orders referred to therein, I find that the records were not prepared on behalf of the town for the dominant purpose of using them in reasonably contemplated litigation against it. The records do not contain information concerning the reports of the adjuster on the town's liability for damages nor were the records created to aid in the conduct of litigation which at the time of their production was a reasonable prospect.

23. In conclusion, I find that the records are not subject to litigation privilege as claimed by the town in both its decision letter and in its representations. As no other exemptions apply to the information at issue in the excel spreadsheet, I will order that information disclosed.

24. I will now consider whether section 10(1) applies to the video.

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

25. 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;

² *SNC-Lavalin Engineers & Constructors Inc. v. Citadel General Assurance Co.*, [2003] O.J. No. 310 at para. 31 (Sup.Ct.)

- (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.

26. Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions,³ 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.⁴

27. 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.

28. 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 appellant. 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.

29. The affected party which prepared the video did not provide representations.

30. The appellant did not provide direct representations on the application of section 10(1) to the video.

³ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)

⁴ Orders PO-1805, PO-2018, PO-2184, and MO-1706

Part 1: type of information

31. 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].

32. 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 find that part 1 of the test does not apply.

33. 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,⁵ nor have I been provided with "detailed and convincing" evidence to establish a "reasonable expectation of harm" should the video be disclosed.⁶

ORDER:

1. I order the town to disclose the records to the appellant by **November 22, 2012** but not before **November 16, 2012**.
2. 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 disclosed to the appellant.

Original signed by: _____
Diane Smith
Adjudicator

_____ October 17, 2012

⁵ See Order PO-2020.

⁶ 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.