

Information and Privacy Commissioner,  
Ontario, Canada



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

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## FINAL ORDER MO-2846-F

Appeal MA11-374

City of Hamilton

February 14, 2013

**Summary:** The appellant requested copies of two reports relating to its commercial relationship with the city. The city denied access to the responsive records pursuant to sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege). In Interim Order MO-2818-I, the adjudicator determined that the records qualify for exemption pursuant to solicitor-client communication privilege under both branches of the discretionary section 12 exemption, and ordered the city to provide submissions on its exercise of discretion in withholding the records at issue. After considering the representations submitted by the city and the appellant, the adjudicator upheld the city's exercise of discretion and found that the records are exempt under section 12 of the *Act*.

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

### OVERVIEW:

[1] The appellant is a company that has had a contractual relationship with the City of Hamilton (the city). The appellant submitted two requests to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to two specified reports relating to the commercial relationship between it and the city.

[2] Following receipt of the two requests, the city advised the appellant that it would process the requests as one, as they appear to deal with related records. The city denied access to the responsive records pursuant to sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege) of the *Act*.

[3] The appellant appealed the city's decision.

[4] During the course of mediation, the city agreed to disclose one of the withheld records, consisting of correspondence addressed to the appellant dated April 26, 2011. However, the appellant indicated that it already has this record and accordingly, it is not at issue in this appeal.

[5] Mediation was not successful and the appeal was forwarded to the adjudication stage of the appeal process. In conducting an inquiry, I sought and received representations from the city and the appellant, respectively. The representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[6] I subsequently sought reply representations from the city, and provided it with a copy of the appellant's submissions. The city's attention was drawn to the appellant's submission that it had failed to explain its exercise of discretion in its representations. I specifically asked the city to provide submissions on its exercise of discretion under sections 6(1)(b) and 12.

[7] The city did not submit representations in response. Although numerous attempts were made by this office to contact the city, the calls were not returned and additional representations were not received.

[8] I subsequently issued Interim Order MO-2818-I, in which I found that the records qualify for exemption under the discretionary exemption at section 12 of the *Act*. Noting that the city did not provide representations on its exercise of discretion, I ordered the city to exercise its discretion under section 12, and to provide submissions on this exercise.

[9] In addition, I indicated that, because of the decisions I made in the Interim Order, it was not necessary to determine the other exemption claims made by the city, including the possible application of section 6(1)(b) and the litigation privilege aspect of section 12.

[10] In accordance with provision 2 of Interim Order MO-2818-I, the city provided representations on its exercise of discretion to withhold the records at issue. I sent a copy of the city's representations to the appellant and sought its representations in response. The appellant also submitted representations, and I have considered them in arriving at my decision.

[11] In this order, I find that the city has properly exercised its discretion to withhold the records under section 12 of the *Act*.

## **DISCUSSION:**

### **Preliminary Matters:**

[12] In its representations, the appellant raises several issues relating to my decision in Interim Order MO-2818-I:

- The appellant believes that I should have made a decision on the application of section 6 of the *Act* "and the effect of section 6 both on the City's claim of privilege and on whether the Reports should be ordered disclosed...." The appellant believes that, "based on the totality of the circumstances giving rise to the Appeal, [I should] order the City to disclose the Reports..." In this regard, the appellant argues that "notwithstanding the Commissioner's decision in the Order that the Reports are privileged, the Commissioner should consider whether any such privilege was waived as a result of the application of section 6 of the *Act*."
- The appellant's representations also suggest that the city may have waived privilege in the records at issue in its letter to the appellant, dated April 26, 2011. The appellant states, "if the Reports do not contain information beyond that found in the Letter, it stands to reason that the Reports should be disclosed, as they will not disclose any new information."
- After noting the city's actions in failing to address the exercise of discretion until ordered to do so, the appellant argues that I should consider the city's conduct as "an unlisted consideration under section 12."

[13] While it is not clear to me why the appellant believes that the city should be found to waive solicitor-client privilege "as a result of the application of section 6 of the *Act*," I will address this argument in the context of the appellant's position that I should have also considered the application of section 6 in Interim Order MO-2818-I.

[14] It appears that the appellant is of the view that a finding that one exemption does not apply renders the remaining exemptions claimed by the city of no force or effect. The appellant is mistaken in this belief. In the circumstances of this appeal, the city raised the possible application of two exemptions under the *Act* for the same records. Each exemption stands on its own and it is possible that more than one

exemption may apply to a single record according to the circumstances of a particular appeal.

[15] It is equally possible that out of several exemptions claimed by an institution, some may be found not to apply, while a decision is rendered upholding one exemption. It is only necessary to find that one exemption applies to uphold an institution's decision to withhold a record from disclosure. Generally speaking, it would serve no useful purpose to address other exemptions claimed for a record once a determination has been made that, as in this case, one exemption, that being section 12, applies.

[16] In Interim Order MO-2818-I, after considering all of the arguments put forth by the city and the appellant, I determined that the records met the test for inclusion under section 12, and thus qualified for exemption pending any decision I might make on the city's exercise of discretion. At the time, the appellant did not put any evidence before me that the city had waived its privilege in the records. Even if I were to consider the possible application of section 6(1)(b) and find that it was not applicable because the city failed to meet the requirements for that exemption, I have already determined in Interim Order MO-2818-I that the exemption at section 12 applies to the records.

[17] Accordingly, I will not consider the possible application of section 6(1)(b) in the circumstances of this appeal. Moreover, I am not persuaded by the appellant's arguments that the city has waived its privilege in the records at issue "as a result of the application of section 6 of the *Act*."

[18] Regarding the possible impact of the contents of the letter dated April 26, 2011 on my finding that the records are exempt under section 12, I have reviewed the content of this letter. Although there is a reference to a report going forward to city Council, it is not clear that the report is one of the two records at issue. Nor does the letter address this report further. Rather, the letter appears to be a response to a letter written to the city by the appellant seeking answers to questions and issues raised by the appellant. Consequently, I am not persuaded that I should revisit the issue of waiver of solicitor-client privilege claimed by the city.

[19] With respect to the appellant's arguments concerning the city's behaviour throughout the processing of this appeal, I agree that the city was not forthcoming, nor was it co-operative during this process. However, there is nothing in section 12; nor do any other orders of this office or decisions of the courts recognize that "unlisted factors," such as a lack of co-operation on the part of an institution, play a part in determining whether the exemption applies. Accordingly, I will not consider the appellant's arguments in this regard further.

## **Exercise of Discretion**

[20] 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.

[21] 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.

[22] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>1</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>2</sup>

## ***Relevant considerations***

[23] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>3</sup>

- 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

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<sup>1</sup> Order MO-1573.

<sup>2</sup> Section 43(2).

<sup>3</sup> Orders P-344 and MO-1573.

- 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.

[24] In Interim Order MO-2818-I, I outlined the appellant's representations on this issue as follows:

In addressing this issue in its representations, the appellant states that the city did not consider the principles that "information should generally be available to the public and that exemptions from the right of access should be limited and specific."

The appellant also submits that the city did not consider its unique circumstances present in this situation. In particular, the appellant states:

Simply put, the Reports contain essential information, without which [the appellant] cannot defend itself against the allegations made by the City. The current ban on [the appellant's] bidding on City contracts has had a significant and presumably lasting impact on [the appellant's] business. [The appellant] has suffered economic and reputational damage without ever being shown the Reports that have led to said damage.

[25] In Interim Order MO-2818-I, I noted that in providing its submissions on the exercise of discretion, the city should take into consideration and address the appellant's position in this regard.

## ***Representations***

[26] The city states that upon receiving the appellant's request, it contacted the staff who had knowledge about the circumstances surrounding the creation of the responsive records. The city states further that through discussions with these staff and a review of city documentation (presumably regarding the city's relationship with the appellant), the city engaged in a consideration of "the matter of disclosure versus non-disclosure."

[27] The city notes that it further exercised its discretion when it disclosed one of the records it initially withheld, which comprised a letter from the city to the appellant. The city points out that this letter "references previous City correspondence/documentation to the appellant and, City meetings with the appellant about vendor performance issues and the City's concerns."

[28] Addressing one of the concerns raised by the appellant and outlined in Interim Order MO-2818-I, the city submits that the contents of the April 26, 2011 letter provide the appellant with sufficient information to "defend itself against the allegations made by the City." The city states that it does not believe that the contents of the records at issue will aid in the appellant's defence.

[29] The city notes that the records at issue were prepared by legal counsel in confidence for the purpose of providing legal advice to the Chair and Members of the city's Audit, Finance and Administration Committee. The city notes further that the records do not contain personal information, but pertain to the business relationship between the city and the appellant.

[30] Also addressing an argument made by the appellant in its initial representations, the city claims that it is mindful of its fiduciary responsibilities to the citizens of the city and in that regard did publicly address the commercial relationship between it and the appellant.

[31] In response, the appellant submits that the city has failed to demonstrate that it properly exercised its discretion under the *Act*. Apart from the representations it made on the issues I addressed above under "Preliminary Matters," the appellant submits the following:

- the city did not relate its exercise of discretion specifically to the exemption at section 12;
- the city's representations "do not contain any discussion of the particular factors that the City considered..." let alone to the factors that are relevant to section 12;

- the crux of the city's exercise of discretion is that it "contacted certain people and determined, on the basis of unknown factors, that the Reports should not be disclosed;"
- the city did not address the purpose of the *Act*, whether the appellant had a compelling need, the relationship between the appellant and any affected persons or the extent to which the reports are significant and sensitive to the appellant.
- The city's failure to consider factors that are favourable to the appellant constitutes a failure to properly exercise its discretion or is evidence of bad faith.
- Regarding the April 26, 2011 letter, the appellant argues that "there is no reason to believe that the Letter contains the same information as the Reports, particularly considering that the Reports were prepared for a different purpose than the Letter and pre-date and post-date the Letter."
- Disclosing the records at issue will increase public confidence as it will enable the citizens of the city to "assess the reasonableness [of the] City's conduct." The appellant submits that if the records at issue are not disclosed, "the conclusion that will be reached is that the City had no reasonable basis on which to ban [the appellant] from bidding on City contracts, and that the City is concerned about the information contained in the Reports."
- Disclosure of the records at issue may allow the appellant to "better interact with the City, and may prevent future problems from occurring" and may assist the appellant in other aspects of its business.

### ***Analysis and findings***

[32] After considering all of the circumstances of this appeal, including the representations made by the city and the appellant on the exercise of discretion, I am satisfied that the city has properly exercised its discretion in deciding to withhold the records at issue on the basis of the application of section 12 of the *Act*. Contrary to the appellant's assertions, the city has taken into account relevant factors, including the background of its relationship with the appellant, the purpose for which the records were created and the need to protect the confidentiality of the records in the circumstances.



[33] Although the city did not directly refer to the purposes of the *Act*, I am satisfied that it turned its mind to this issue in its decision-making process and throughout the mediation stage of the appeal. I am also satisfied that the city was cognizant of the impact of the business-related decisions it has made in the past on the appellant and agree with the city that the information that has been disclosed to the appellant provides sufficient information for it to understand the city's position with respect to their relationship, and to take whatever action it deems necessary in the circumstances.

[34] I do not accept the appellant's assertion that withholding the records at issue will lead the public to conclude that "the City had no reasonable basis on which to ban [the appellant] from bidding on City contracts." There is no evidence before me that there is any public concern that the city has acted inappropriately in a way that requires a public accounting for its actions.

[35] The appellant has a grave concern about the way the city has treated it and is understandably vexed by the impact the city's actions have had on its business interests. However, I am not convinced that these concerns entitle the appellant to receive confidential information contained in the communications between the city and its solicitor. Nor does this concern persuade me that a decision not to disclose the records is evidence of bad faith on the part of the city.

[36] Section 12 of the *Act* exists to protect a well-established relationship between a solicitor and his client. In invoking this exemption, the city has entertained only relevant considerations. I find further that in withholding the records at issue, the city has acted in good faith and in a manner that is consistent with the purposes of the *Act*. Accordingly, I find that the records at issue are exempt under section 12 of the *Act*.

**ORDER:**

I uphold the city's decision.

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Laurel Cropley  
Adjudicator

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February 14, 2013