

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3120

Appeal MA13-530

City of Burlington

November 4, 2014

Summary: The city received a request for all records provided to city council or its committees since 2008 providing updates of external legal costs incurred for the Brant Street Pier. The city disclosed to the public the total cost of external legal fees relating to the pier, but denied access to the requested records on the basis of the exemptions in sections 12 (solicitor-client privilege) and 6(1)(b) (closed meetings) of the *Act*. This order determines that the legal billing information at issue is presumptively privileged, and upholds the city's decision that the records qualify for exemption 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.

Orders and Investigation Reports Considered: PO-2484, PO-2624 and PO-2767.

Cases Considered: *Maranda v. Richer* [2003] 3 S.C.R. 193; *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)* [2007] O.J. No. 2769, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association.*) [2010] 1 S.C.R. 815.

OVERVIEW:

[1] The City of Burlington (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

All written confidential updates, reports and documents provided to city council, Community Services Committee and Budget and Corporate Services committee providing updates of external legal costs for the Brant Street Pier from June 2008 to present.

[2] In response, the city issued a decision in which it advised that 36 responsive records were located, and that access to the records was denied on the basis of the exemptions in section 6(1)(b) (closed meeting) and section 12 (solicitor-client privilege) of the *Act*. The city also provided an index of the responsive records.

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

[4] During mediation, the city publicly released the total cost of external legal fees relating to the Brant Street Pier. The appellant's representative confirmed that she was proceeding with the appeal of the city's decision to deny access to the more detailed information contained in the requested records.

[5] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the city, initially, and received representations in response. I then sent the Notice of Inquiry, along with a copy of the non-confidential portions of the city's representations, to the appellant, who also provided representations in response.

[6] In this order, I uphold the city's decision to deny access to the responsive portions of the records on the basis that they are exempt from disclosure under section 12 of the *Act*.

Preliminary Issue – responsiveness of records

[7] In its representations, the city indicates that only portions of the 36 records at issue are actually responsive to the request. It states:

... the City also asserts that a large portion of the information contained in the Records does not fall in the scope of information requested The Appellant seeks information relating to "updates of external legal costs for the Brant Street Pier." While small portions of Records 1-36 contain updates on external legal costs, of which the City claims privilege, the majority of the information contained in the Records is in reference to confidential legal advice and/or relate to funds in the City's contingency-reserves that may be allocated to pay for its legal fees.

[8] The appellant does not address this issue in its representations; however, the appellant refers in its representations to its interest in seeking "details around the external legal fees for the Brant Street Pier" and refers to the wording of the request resulting in this appeal, set out above.

[9] In this appeal, the appellant is clearly seeking access to "All written confidential updates, reports and documents ... providing updates of external legal costs for the Brant Street Pier" for a defined period of time.

[10] Some of the 36 records at issue relate exclusively to the Brant Street Pier. Other records relate to various legal matters, and information about the legal matters relating to the Brant Street Pier constitute only a portion of those records.

[11] Based on the appellant's clear interest in obtaining access to all records relating to the external legal costs for the Brant Street Pier, I find that any records or portions of records that relate to the legal costs for the pier are responsive to the request. However, any portions of the records that relate to other legal matters not involving the Brant Street Pier, or that do not relate to legal costs, are not responsive to the request.

[12] On my review of the records, I am satisfied that all of Records 1, 2, 3, 5, 6, 8, 10, 12, 17, 18 and 19 relate to the external legal costs for the Brant Street Pier. I note that portions of these records refer to the actual amounts of those costs, and other portions refer to the legal activities relating to those costs.

[13] I also find that only certain portions of Records 4, 7, 9, 11, 13, 14, 15, 16, 35 and 36 relate to the external legal costs for the Brant Street Pier. The other portions of these records either relate to other legal matters not involving the Brant Street Pier (portions of Records 4, 7, 9, 11, 13, 14 and 15), or to other matters involving the pier (Records 35 and 36) which are not legal in nature. I find that the portions of these records that do not relate to the external legal costs for the pier are not responsive to the request.

[14] Records 20-34 are Finance Department schedules entitled "Reserve for Contingencies," and are in the form of financial statements. Each of these financial statements refers to a variety of different matters, but each also includes line items referring to legal costs relating to the Brant Street Pier. The line items relating to the pier are the only portions of these records that are responsive to the request.

[15] I will only review the application of the exemptions claimed to the records or portions of records which are responsive to the request.

RECORDS:

[16] There are 36 records at issue in this appeal. The responsive portions of each of these records are identified as follows:

Legal Department Reports:

- Records 1, 2, 3, 5, 6, 8, 10, 12, 17, 18 and 19 in full.
- The portions of Records 4, 7, 9, 11, 13, 14, 15 and 16 that relate to the external legal costs for the pier.

Finance Department schedules entitled "Reserve for Contingencies:"

- Portions of Records 20-34 (only the specific line items relating to the legal costs for the pier).

Engineering Department Reports:

- The portions of Records 35 and 36 that relate to the external legal costs for the pier.

ISSUES:

- A Does the discretionary exemption at section 12 apply to the information at issue?
- B Do the records qualify for exemption under section 6(1)(b) of the *Act*?

DISCUSSION:

Issue A: Does the discretionary exemption at section 12 apply to the information at issue?

[17] The city takes the position that all of the records are exempt from disclosure under section 12 of the *Act*, which reads:

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.

[18] Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[19] 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.¹

Solicitor-client communication privilege

[20] 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.²

[21] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.³

[22] The privilege applies to “a continuum of communications” between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.⁴

[23] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.⁵

[24] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.⁶

Litigation privilege

[25] Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated.⁷

¹ 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).

² *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

³ Orders PO-2441, MO-2166 and MO-1925.

⁴ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

⁵ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

⁷ 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).

[26] In *Solicitor-Client Privilege in Canadian Law*,⁸ 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.

[27] The city takes the position that both branches of section 12 apply to the records at issue.

[28] On my review of the records, I note that all of them contain specific references to the actual amount of legal costs for the Brant Street Pier. Some of them also contain additional information about the services performed by external counsel in relation to those costs.

[29] I will begin my review of the application of section 12 by reviewing the application of that exemption to the actual amount of legal costs for the Brant Street Pier contained in each of the records.

Amount of external legal costs for the Brant Street Pier

[30] As indicated above, all of the records contain information about the amount of external legal costs for the Brant Street Pier at certain points in time (ie: when each of these records were created). For example, the Legal and Engineering Reports (Records 1-19 and 35-36) all contain information about the amount of the external legal costs incurred to the date of each report. The line items relating to the actual legal costs for

⁸ Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94.

the Brant Street Pier in the Finance Department schedules (Records 20-34) also relate to the legal expenses incurred up to the respective dates of each of those records.

[31] The actual amounts of the external legal fees and the dates during which those fees were incurred reflect the amount of the fees covering the specific time periods as at the dates of each of these records. In my view, these amounts constitute legal billing information up to the dates of each of these records.

[32] The question of whether legal billing information, including legal fees, is subject to solicitor-client privilege at common law has been the subject of many recent judicial decisions. The Supreme Court of Canada dealt with the issue in *Maranda v. Richer*,⁹ and found this information to be presumptively privileged unless this presumption can be rebutted and the information characterized as “neutral.”

[33] In determining whether or not the presumption has been rebutted, the following questions will be of assistance: (1) is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege? (2) Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications? If the information is neutral, then the presumption is rebutted. If the information reveals or permits solicitor-client communications to be deduced, then the privilege remains.¹⁰

[34] In the Notice of Inquiry sent to the parties, the parties were asked to address the question of whether the presumption of privilege in relation to legal billing information has been rebutted in this case.

Representations

[35] The city asserts that the amount of the legal fees identified in the records is not “neutral” information because its release would “permit solicitor-client communication to be deduced.” It states that all of the records contain “references to legal fees incurred and funds allocated to their payment.” It then states:

... in the portions of the Records that do provide specific updates on the to-date costs of the City’s external legal counsel, the information contained therein highlights the costs incurred to-date. The City, therefore, submits that there is a reasonable possibility that the amount of legal fees claimed by external legal counsel and presented to City council

⁹ [2003] 3 S.C.R. 193 (*Maranda*).

¹⁰ Order PO-2484, upheld on judicial review in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)* [2007] O.J. No. 2769 (Div. Ct.). See also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.); *Waterloo (City) v. Copley* 2010 ONSC 6522.

and/or standing committees at specific points in time would reveal information relating to the nature of the communications made between external legal counsel and the City. It would be readily discernible to a reviewer of the records that the costs of external legal fees at various periods in time would disclose privileged communications between the City and its lawyers relating to significant litigation proceedings.

[36] The city then distinguishes the circumstances in this appeal from the ones resulting in Order PO-2484, an order in which former Senior Adjudicator John Higgins ordered the disclosure of the total dollar figure on each of nine invoices for legal representation.¹¹ The city states:

Unlike [the requester] in Order PO-2484, the Appellant in this appeal seeks more than the total amount of fees paid to legal counsel, as the relevant information contained in the Records provide a summary of legal fees incurred to-date at specific points in time, as well as legal opinion. ...

[37] The city also submits that the appellant, a local media outlet, qualifies as an "assiduous inquirer" because it has extensive background information about the Brant Street Pier. The city states that the appellant intends to publish the requested information, and that the "periodic tracking of how much the city expended on external legal services" will enable the appellant and others to identify the extent to which legal efforts were expended at various points in the litigation. The city states that this would reflect the legal advice provided to the city's council and various committees. It states:

... disclosure of the Records would allow the Appellant to deduce or otherwise acquire privileged communications between the City and its lawyers and documents prepared in contemplation and in respect of litigation.

[38] The appellant's representations focus on the public interest in all issues regarding the Brant Street Pier and particularly the costs associated with it. I address these issues under the discussion of the exercise of discretion, below.

[39] With respect to the question of whether disclosure of the specific amounts in the records would reveal solicitor-client information, the appellant refers to the fact that the case has now been settled, and states: "There is ... no risk of giving away the legal strategy now that the settlement is done"

¹¹ This order was upheld on judicial review in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769 (Div. Ct.).

Analysis and findings

[40] As noted above, the actual amounts of the external legal fees, and the dates during which those fees were incurred, reflect the amount of the fees at those dates and constitute legal billing information.

[41] As set out above, the question of whether legal billing information, including legal fees, is subject to solicitor-client privilege at common law has been the subject of many recent judicial decisions. In *Maranda*, the Supreme Court of Canada found legal billing information to be presumptively privileged unless the information is “neutral.”

[42] In Order PO-2484, former Senior Adjudicator John Higgins had to determine whether the total dollar figure which appeared on nine separate legal invoices (with all other information, including the dates and number of hours, severed) qualified for exemption under the provincial equivalent to section 12 of the *Act*.¹² Senior Adjudicator Higgins examined in considerable detail the decision in *Maranda* as it applied to lawyers’ account and billing information. He confirmed that the principles established in that case regarding legal billing information applied in the civil law context, and found that they applied to the fees at issue in the appeal before him. As a result, he found that the total figure in each of the nine invoices was “neutral information” and ought to be disclosed, but that the other information on the invoices (including the dates of the invoices) was exempt from disclosure under section 12 of the *Act*.

[43] The ministry in that case sought to judicially review Order PO-2484. In *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*,¹³ the Ontario Divisional Court reviewed both Order PO-2484 and another similar order, and upheld both decisions. In doing so, the Court stated:

The Requesters asked only for the total amount of fees and did not seek any account details that would permit a deduction of privileged information. The IPC adjudicator ... clearly considered that the Requesters and counsel were “assiduous” and “knowledgeable” and stated that they were satisfied that the information sought would not result in their being able to discern information relating to litigation strategies pursued by the [Ministry of the Attorney General] or any other type of information that may be subject to privilege. *Redaction of the dates from the records was expressly designed to avoid any prospect of disclosing privileged information about legal strategies or the progress of the litigation.* Thus, the only information that was ordered disclosed consists

¹² Order PO-2484 dealt with section 19 of the *Freedom of Information and Protection of Privacy Act*, the relevant portions of which are similar to section 12 at issue in this appeal. For clarity, I will refer to section 12 of the *Act* in my discussion of PO-2484.

¹³ *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)* [2007] O.J. No. 2769.

of amounts with no corresponding dates or descriptive information.
[emphasis added]

[44] I adopt the approach taken in *Maranda* and by former Senior Adjudicator Higgins in Order PO-2484, and apply it to the information at issue in this appeal.

[45] In this appeal, the total amount of external legal fees for the Brant Street Pier has been disclosed to the public by the city. The portions of the records at issue contain the actual amounts of the external legal fees expended as of the dates of the various records. Some of these actual amounts also include a description of the nature of the work done.

[46] In the circumstances, applying the approach taken in *Maranda* and Order PO-2484, I find that the specific amounts of the fees expended as of the various dates of the 36 records, as well as any description of the legal services provided, is presumptively privileged information.

[47] Furthermore, I am not satisfied that the presumption of privilege which applies to this information has been rebutted. I am prepared to accept that the appellant can be considered an "assiduous inquirer" because of its extensive background knowledge of the events surrounding the Brant Street Pier. Indeed, the appellant has indicated that it seeks the information in the records to determine "how and why" the legal fees were expended. I also accept the city's position that the "periodic tracking of how much the city expended on external legal services" will enable the appellant and others to identify the extent to which legal efforts were expended at various points in the litigation and would allow the appellant or others to "deduce" the legal advice provided to the city's council and various committees.

[48] Applying the approach taken by the Supreme Court of Canada in *Maranda* and in Order PO-2484 to the dates, descriptions, and amounts at issue, I find that this information is solicitor-client privileged information and qualifies for exemption under branch 1 of section 12.

[49] I have also considered the appellant's position that, because of the settlement reached in the litigation, there is "no risk of giving away the legal strategy." The fact that a settlement has been reached or litigation concluded does not necessarily affect whether section 12 applies to legal billing information. Order PO-2484 also addressed legal billings records relating to litigation that had concluded, and former Senior Adjudicator Higgins stated: "In my view, the ability to draw inferences from the records is unaffected by the fact that ... the litigation has concluded."

[50] Accordingly, I find that the information in the records containing the actual amounts of the legal fees (including the dates and the descriptions) is "presumptively privileged," and that the presumption of privilege has not been rebutted, either by the

appellant or by my review of the records and the other circumstances of this appeal, including the fact that the litigation has concluded. As a result, the actual amounts of the external legal costs incurred that are described in the Legal and Engineering Reports (Records 1-19 and 35-36), and all of the responsive line items in the Finance Department schedules (Records 20-34) qualify for exemption under branch 1 of the solicitor-client privileged information, and are exempt under section 12 of the *Act*, subject to my review of the exercise of discretion, below.

[51] I will now review the application of the solicitor client privilege to the remaining portions of Records 1-19 and 35-36.

The remaining portions of Records 1-19 and 35-36

[52] The city takes the position that the responsive information contained in these records qualifies for exemption under section 12. It states:

Solicitor-client 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. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.

The City submits that [the responsive] portions of Records 1-19 and 35-36 meet the four factors attracting solicitor-client communication privilege - that is, they constitute written communications of a confidential nature between legal counsel for the City (either external legal counsel and/or the City's Solicitor & Director of Legal Service) and the City, made for the purpose of giving and obtaining professional legal advice in relation to legal opinions in regard to the Brant Street Pier matter.

[53] The city also submits that this privilege applies to the "continuum of communications" between a solicitor and client, where information is passed to or from the solicitor or client as part of the continuum aimed at keeping both the client and the lawyer informed so that advice may be sought and given as required. The city states that it relies on this principle in relation to "legal memoranda prepared by the City Solicitor and Director of Legal Services to the City's council and/or members of its standing committees whereby privileged and confidential communications and advice from its external legal counsel are attached and appended."

[54] Lastly, the city states that it has not waived the solicitor-client privilege in the information at issue. The city acknowledges that it "explicitly waived" solicitor-client privilege over the total aggregate external fees related to litigation involving the Brant Street Pier. It refers to the following motion approved at a special meeting of council held in January of 2014:

Waive solicitor client privilege over the total aggregate external legal fees paid by the City to Burlington to [a named law firm] since 2008 to present in respect of the Brant Street Pier matter. The privilege is waived solely to allow the City Manager to disclose the legal fees to the public at a press conference to be held by the City Manager on January 30, 2014. Solicitor-client privilege is waived for this expressed purpose only, and the privilege continues in effect with respect to all other aspects relating to the matter.

[55] The appellant's representations focus on the public interest in the details of the external legal fees.

Analysis and findings

Records 1-19: Legal Department Reports

[56] Records 1-19 are all Legal Department Reports prepared by a lawyer in the legal department for city council or a committee of council. In addition to the actual amounts of the legal costs incurred (addressed above), the remaining responsive portions of these reports provide council or the committee of council with updates of external legal costs for the Brant Street Pier, including summarizing ongoing or existing legal actions or providing legal advice on future actions.

[57] On my review of these records, I am satisfied that they constitute direct communications of a confidential nature between a solicitor (in-house legal counsel) and their client (the city, through council or one of its committees), made for the purpose of providing legal advice or keeping the city informed so that advice may be sought and given as required. Accordingly, I find that these records are subject to solicitor-client communication privilege under Branch 1 of section 12 of the *Act*.

Records 35-36: Engineering Department Reports

[58] Records 35 and 36 are both Engineering Department Reports prepared for a committee of council. Record 35 is a brief memorandum with one attachment. Record 36 is a lengthy memorandum with a number of attachments. Neither of these records are communications to or from legal counsel; rather, they are memos prepared by an engineer in the Engineering Department for the Community Services Committee of council.

[59] In addition to the actual amounts of the external legal costs referred to in these two records (addressed above), the remaining responsive portions of these two reports are the portions that relate to the external legal costs for the pier. This information includes references to the legal actions taken or the specific legal advice provided by counsel regarding the pier.

[60] Previous orders have established that communications between non-legal staff can nonetheless qualify for exemption under section 12 if disclosure would reveal solicitor-client privileged material. In Order PO-2624, Adjudicator Laurel Cropley considered whether e-mails exchanged between an institution's staff members qualified for solicitor-client communication privilege. In that order, she stated:

Previous orders of this office (Orders PO-2087, 2223 and 2370) have found that e-mail communications passing between non-legal Ministry staff that refer directly to legal advice originally provided by legal counsel to other Ministry staff would reveal privileged communications and were, therefore, exempt from disclosure under [the provincial equivalent of section 12].

[61] In Order PO-2767, Adjudicator Jennifer James applied the reasoning in Order PO-2624, and stated:

[The records at issue] qualify for solicitor-client communication privilege as they clearly address the subject matter for which in-house counsel was consulted [I am satisfied] that the withheld portions refer to legal advice provided by counsel or identify information required by counsel to formulate a legal opinion. In my view, disclosure of this information would reveal legal advice received or requested by [the institution] and thus would form part of "a continuum of communications" between [the institution] and its counsel. I also accept [the institution's] evidence that the communications ... were made in confidence.

[62] Record 35 is a brief memorandum with one attachment. The responsive portions of this record which remain at issue refer to actions taken by counsel for the city, and the activities relating to those actions. The attachment to the memorandum is an email from a city solicitor to council referring to specific legal advice. On my review of this record, I am satisfied that disclosure of the responsive portions remaining at issue would reveal legal advice received or requested by the city and, therefore, that they qualify for exemption under section 12 of the *Act*.

[63] Record 36 is a lengthy memorandum with a number of attachments. The responsive portions of this memo refer to specific legal advice sought or given. The attachments include privileged solicitor-client communications between the city and external counsel. On my review of the responsive portions of this record and attachments, I am satisfied that disclosure of them would reveal legal advice received or requested by the city, and these portions qualify for exemption under section 12 of the *Act*.

[64] In summary, I find that the responsive information contained in Records 1-19 and 35-36 relating to the external legal costs for the Brant Street Pier qualifies for exemption under branch 1 of section 12 of the *Act*, and is exempt from disclosure, subject to my review of the exercise of discretion below.

Exercise of discretion

[65] Section 12 is a discretionary exemption. When a discretionary exemption has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the records. On appeal, this office may determine whether the institution failed to do so.

[66] A finding may be made 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

[67] In such a case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁴ This office may not, however, substitute its own discretion for that of the institution.¹⁵

[68] The city takes the position that it properly exercised its discretion to apply the section 12 exemption. It reviews a number of factors it considered in exercising its discretion, and also specifically refers to its decision to disclose the total amount of the external legal fees. It states:

In this case, the City has made available information on the total costs incurred for external legal fees relating to the Brant Street Pier litigation. While the reports and information contained in the Records were noted on the City's various meeting agenda materials distributed to the public, at no time were any of the Records ever disclosed to the public due to their confidential and sensitive nature.

[69] The city also states that it considered whether the requester had a "sympathetic or compelling need to receive the information," and states:

In the City's view, there is no indication of a sympathetic or compelling need to receive the information, as the City has already released the total cost of the legal fees relating to the Brant Street Pier,

¹⁴ Order MO-1573

¹⁵ See section 43(2) of the *Act*.

[70] The appellant's representations focus on the public interest in information regarding the external legal costs for the pier. It confirms that this issue has been discussed in the media since 2005, and reviews a number of issues regarding the pier which have arisen since that time, including a crane accident, faulty steel, lawsuits and re-tendering. The appellant attaches to its representations a number of newspaper articles that relate to the issues surrounding the construction of the Brant Street Pier. It also refers to the costs associated with the pier, and states:

We don't feel the city's corporate policies should outweigh the public's right to know the full history of these fees and why they escalated

[71] In addition, the appellant refers to the fact that the matter is now settled, and argues that the "solicitor-client privilege is irrelevant and should not outweigh the public interest."

Analysis and findings

[72] To begin, although the appellant identifies the public interest in the disclosure of the information at issue, I note that the public interest override in section 16 of the *Act* does not apply to the solicitor-client privilege in section 12. This was confirmed by the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*.¹⁶

[73] With respect to the city's decision to apply section 12 to the records at issue, on my review of all of the circumstances surrounding this appeal, I am satisfied that the city has not erred in the exercise of its discretion to apply section 12 to the withheld information. It considered how the solicitor-client privilege applied to the records, as well as the nature of the information at issue, and the current status of the matter. Furthermore, as noted, while the litigation was ongoing, the city chose to voluntarily disclose the total amount of the external legal fees, and a number of the concerns identified by the appellant regarding accountability and public expenditures were addressed by disclosing this total amount.

[74] In the circumstances, I am satisfied that the city properly exercised its discretion to apply the section 12 exemption to the withheld information at issue, and has not done so in bad faith or for an improper purpose. As a result, I am satisfied that the city properly exercised its discretion to apply the exemption, and I uphold its exercise of discretion.

¹⁶ 2010 SCC 23 (CanLII), [2010] 1 S.C.R. 815.

[75] Having found that the responsive portions of the records qualify for exemption under section 12, there is no need for me to review whether the exemption in section 6(1)(b) also applies to the records.

ORDER:

I uphold the decision of the city, and dismiss this appeal.

Original signed by: _____
Frank DeVries
Adjudicator

_____ November 4, 2014