Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3357

Appeal MA14-274

City of Vaughan

September 20, 2016

Summary: The appellants requested records from the City of Vaughan (the city) relating to land they own in the city. The city disclosed some information to the appellants, withholding other information under section 14(1) (personal information) and section 12 (solicitor client privilege) of the *Municipal Freedom of Information and Protection of Privacy Act.* Some of the information withheld under section 12 was also withheld under section 11 (economic and other interests). This order upholds the city's decision regarding the information withheld under section 14(1), and some information withheld under section 12, including the information withheld under section 11. The city is ordered to disclose the remaining information because it is not exempt under section 12.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1), 12, 14(1).

Orders and Investigation Reports Considered: Order MO-1337-I.

Cases Considered: *The Minister of Public Safety and Emergency Preparedness and the Minister of Justice v. the Information Commissioner of Canada,* 2013 FCA 104 (CanLII); *Balabel v. Air India*, [1988] 2 W.L.R. 1036 (Eng. C.A.); *Jetport v. Global Aerospace* 2013 ONSC 235 (CanLII).

OVERVIEW:

[1] The appellants submitted an access request under the *Municipal Freedom of*

Information and Protection of Privacy Act (the *Act)* to the city for records relating to property they own in the city.

[2] The city located more than 1000 pages of responsive records. It sent an index of records and decision letter to the appellants advising it was providing them with access to many of the records. It denied access to other records, some in full and others in part, under the discretionary exemptions in sections 6(1)(b) (closed meeting), 11 (economic and other interests) and 12 (solicitor-client privilege), and the mandatory exemption in section 14(1) (personal privacy).

[3] The appellants appealed the city's access decision to this office. The appeal was not resolved during mediation and at the appellants' request the appeal proceeded to the adjudication stage for an inquiry. Representations were sought and exchanged between the city and the appellants in accordance with the IPC's *Code of Procedure*. In its initial submissions, the city withdrew its reliance on the section 6(1)(b) exemption as a basis for withholding records.

[4] In this order, I uphold the city's application of section 14(1) to the information withheld under that section. I uphold the application of section 12 to some of the withheld records, including the records that were also withheld under section 11. I uphold the city's exercise of discretion with respect to those records to which section 12 applies. The remaining records withheld under section 12 are ordered disclosed.

RECORDS:

[5] The records arise from matters related to the appellants' property. Most of the records comprise email exchanges between city employees (including city lawyers), and between city employees and an insurance adjuster. The records also include:

- email correspondence between one of the appellants and city employees,
- email correspondence between external lawyers for the city and city employees,
- city employees handwritten meeting notes,
- city employees handwritten annotations on correspondence,
- copies of court documents including statements of claim, and
- reports prepared by insurance adjusters.

ISSUES:

[6] The issues in this appeal are:

A. Do the records contain personal information as defined in section 2(1) and, if so, to whom does it relate?

B. Does the section 14(1) mandatory exemption from disclosure for personal information apply to the personal information in the records?

C. Does the discretionary exemption at section 12 (solicitor-client privilege) apply to the records?

D. Does the discretionary exemption at section 11 (economic and other interests) apply to the records?

E. Did the institution exercise its discretion under the *Act*? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Do the records contain personal information as defined in section 2(1) and, if so, to whom does it relate?

[7] The personal privacy exemption in section 14(1) only applies to "personal information." Consequently, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates.

[8] Section 2(1) defines "personal information" as recorded information about an identifiable individual, and goes on to list examples of qualifying information. The list of examples is not exhaustive, so information not listed within section 2(1) may still qualify as personal information.[1] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[2]

[9] The information withheld under section 14(1) by the city is personal information of identifiable individuals other than the appellants. It comprises individuals' names, personal email addresses, home addresses and other information about individuals' property which would identify those individuals as the source of complaints made to the city. The adjudicator in Order M-175 found that information about a property owned by an individual does not itself constitute personal information as it is information about the property, not the individual. However, in the context in which this information appears, I am satisfied that the property information reveals the identity of the complainants that would allow them to be identified, so it is personal information in this

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[1] Order 11.

[2] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, 2002 CanLII 30891 (ON CA).

context.

[10] In addition to the information identified by the city as personal information discussed above, I find some personal information relating to a city employee's work absence is contained in an email at page 997 of the records.

Issue B: Does the section 14(1) mandatory exemption from disclosure for personal information apply to the personal information in the records?

[11] Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

[12] The appellants did not address the application of section 14(1) in their submissions.

[13] The only exception that could apply here is section 14(1)(f), which allows disclosure of information if disclosure would not be an unjustified invasion of personal privacy.

[14] The factors and presumptions in sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f).

[15] Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy but none were raised or arise.

[16] Where no section 14(3) presumption applies and section 14(4) does not apply, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[3] In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure must be present. In the absence of such factors, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.[4]

[17] The only factor listed the city identifies as relevant to the information it withheld is in section 14(2)(h). Section 14(2)(h) states:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

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[3] Order P-239.

[4] Orders PO-2267 and PO-2733.

> …
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> the personal information has been supplied by the individual to whom the information relates in confidence;

[18] This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.[5]

[19] The city says that it is likely the complainants' personal information that it withheld was provided in confidence and with the expectation that it not be shared with the appellants. While the city did not provide evidence that it provided an assurance of confidentiality regarding the complainants' identity, from my review of the record, in the context, it is reasonable to conclude that the complainants expected that their identity would be kept confidential by the city. I therefore conclude that section 14(2)(h) is a factor that weights against disclosure of the personal information the city withheld under section 14(1).

[20] With regard to the information withheld under section 14(1) by the city, there are no identified factors in favour of disclosure of the information in the parties' submissions or apparent from my review of the withheld personal information. Section 14(2)(h) is a factor in support of withholding certain records. Therefore, I am satisfied that disclosure of the personal information withheld by the city, comprising the information highlighted in the copy of the records provided by the city for the inquiry at pages 111-119, 128 and 208-217 would be an unjustified invasion of personal privacy under section 14(1).

[21] Last, page 997 in the records was withheld by the city under the discretionary exemption in section 12, but I find it must be withheld under section 14(1), because it contains personal information of a lawyer relating to a work absence and there are no factors in favour of disclosure of the information.

Issue C: Does the discretionary exemption at section 12 (solicitor-client privilege) apply to the records?

[22] Section 12 states:

> 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.

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[5] Order PO-1670.

[23] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 is a statutory privilege. It is applied where the records were "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." The statutory and common law privileges, although not identical, exist for similar reasons. The institution must establish that one or the other (or both) branches apply.

[24] The city relies on both the common law and statutory privileges to withhold records under section 12. First, I will consider whether these records are subject to the common law privilege at Branch 1.

Branch 1: common law privilege

[25] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. The city takes the position that both types apply to all the records withheld under section 12 in this appeal. I will deal with solicitor-client communication privilege first.

Solicitor-client communication privilege

[26] 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.[6] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[7]

[27] Solicitor-client communication privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given. As the the English Court of Appeal in *Balabel v. Air India* stated:

> ... the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor

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[6] *Descôteaux v. Mierzwinski,* [1982] 1 S.C.R. 860.

[7] Orders PO-2441, MO-2166 and MO-1925.

> 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. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.[8]

[28] The continuum is further explained in The Minister of Public Safety and Emergency Preparedness and the Minister of Justice v. the Information Commissioner of Canada:

> Part of the continuum protected by privilege includes "matters great and small at various stages… includ[ing] advice as to what should prudently and sensibly be done in the relevant legal context" and other matters "directly related to the performance by the solicitor of his professional duty as legal advisor to the client…
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> In determining where the protected continuum ends, one good question is whether a communication forms "part of that necessary exchange of information of which the object is the giving of legal advice"… If so, it is within the protected continuum. Put another way, does the disclosure of the communication have the potential to undercut the purpose behind the privilege – namely, the need for solicitors and their clients to freely and candidly exchange information and advice so that clients can know their true rights and obligations and act upon them."[9]

[29] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[10]

[30] 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.[11] The privilege does not cover communications between a

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[8] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409.

[9] 2013 FCA 104 (CanLII) at paras. 27-28.

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

[11] *General Accident Assurance Co. v. Chrusz,* 1999 CanLII 7320 (ON CA); Order MO-2936.

solicitor and a party on the other side of a transaction.[12]

Submissions

[31] The city says that the records contain advice from the city solicitor to senior employees, as well as emails from outside counsel regarding the litigation matters. They say common law legal advice privilege also covers documents that contain the advice, but they do not specify which documents contain advice.

[32] The city states that though the records have not been explicitly marked as "solicitor-client privileged", the implication of confidentially extends to email exchanges between the city solicitor, outside counsel, and senior staff because the records contain discussions about an ongoing legal matter.

[33] The city did not provide record-by-record submissions about the application of section 12 to the records withheld under section 12. Nor did it provide affidavit evidence in support of its section 12 submissions.

[34] The appellants submit that without the benefit of reviewing the records over which section 12 is claimed they have no way of confirming or responding to the city's submissions that privilege applies to them. The appellants accept that any records that are privileged after the commencement of litigation between the appellants and the city are properly subject to privilege.

Analysis and Findings

[35] As identified above, the city's submissions do not apply the exemptions on a record by record basis. The city's submissions also do not identify the job functions or titles of the individuals in the records, and most importantly for a claim under section 12, who is a lawyer. Because most records in issue are emails, the author of the record is apparent from the records themselves. From the information in the records, I have been able to discern from publically available information and from context the job title of individuals in the records, including more than one lawyer.

[36] In light of the above, I have reviewed the records in detail and categorized them. I make my findings on the categories of the records at issues as follows:

Handwritten notes

[37] For some handwritten notes, it was difficult to identify from context who wrote the notes and therefore, whether a lawyer was involved. The burden is on the city to provide sufficient evidentiary foundation to establish that the exemptions apply to the

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[12] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (CanLII) (Div. Ct.)

records. It is apparent from their context and content that the annotations on the records at pages 1004-1014 are made by a lawyer. For those records where the city did not provide evidence to identify the involvement of a lawyer in the record and no connection to legal advice is apparent from the context, the city has failed to discharge its burden to apply the section 12 exemption with regard to those records. The information comprises handwritten annotations on records at pages 1023-1027, 1046, 1100, and handwritten notes at pages 1043-1045 and 1048-1049.

Records containing or relating to legal advice

[38] I am satisfied that two email exchanges, comprising five emails, qualify as direct communications of a confidential nature between the city solicitor and an employee for the purpose of obtaining and giving legal advice. These email exchanges fall within the scope of common law solicitor client privilege and may be withheld under section 12 of the *Act.* The emails that fall within this category are the first two emails on page 904, and the emails (and attachment) on pages 1104-1107.

[39] I am also satisfied that some other withheld records fall within the scope of the continuum of communications between a lawyer and client relating to legal advice and therefore are within the scope of common law solicitor client privilege and may be withheld under section 12 of the *Act*. The records are at pages 780, 893, 895, 988, the 1st email on page 757, the first two emails on pages 1034 and the duplicates of these two emails on pages 1037 and 1040, pages 1067-1068, page 1079, the first paragraph on page 1082, and the second paragraph on page 1102.

Records not containing or relating to legal advice

[40] There are two main categories of records that do not fall within the scope of common law solicitor-client communication privilege. First, there are records that were not created by or sent to a lawyer and for which there is also no evidence that the record contains or repeats legal advice. Second, there are records where I am satisfied that a lawyer was part of the email exchange only for informational purposes or administrative reasons, and not for the purpose of legal advice.

[41] For those records which a lawyer was not a party to, many are emails between city employees or between city employees and an insurance adjuster relating to issues of insurance coverage. While the insurance adjuster's email signature indicates she has a law degree, it is clear the adjuster is not acting as a legal advisor in the context. The adjuster is instead carrying out her job function, gathering information necessary to determine issues of insurance coverage. I note also that some of the records comprise the appellants own emails to the city. The records are at pages 865-866, 867, 874, 993-994, 995-996, 998, 999, 1000-1001, 1016-1018, 1021-1022, 1023-1025, 1046-1047, 1050, 1051, 1052-1054, 1055-1057, 1058, 1059, 1060, 1061-1063, 1064-1066, 1069-1070, 1102 except the 2nd paragraph which relates to legal advice, 1103.

[42] Some other records that also do not involve a lawyer recipient or sender do not directly relate to insurance coverage but to other matters, for example interactions between the appellants and the city, and therefore also cannot be withheld as subject to solicitor-client privilege at common law. These records are at pages 875, pages 1034-1042 except the first two emails on page 1034 and the duplicates of these two emails on pages 1037 (first two emails) and 1040 (first two emails), pages 1048-1049.

[43] Further, while recognizing the broad scope of solicitor client privilege outlined above, I am satisfied that for some records where the city solicitor or other city legal counsel are one of several recipients of an email, legal counsel were only included in the email exchange for informational purposes or administrative reasons. Many of the withheld records were generated or collated in response to requests for information from the city's insurance adjuster relating to issues of insurance coverage. A lawyer for the city was one employee referred to in a record as a "point person" for communications with the city's adjuster. As discussed above, in some cases information flowed directly between city employees and the adjuster, with no lawyer copied at all. However, in other instances the lawyer was copied on email exchanges between employees or between an employee and the adjuster relating to the adjuster's information requests.

[44] There is no indication in the records that the city sought or contemplated seeking legal advice relating to the adjuster's requests for information to progress the issue of insurance coverage. It is clear the city had a cooperative rather than adversarial relationship with the adjuster, who was working for the city's insurer. The record reveals the city responding to the insurance adjuster to provide information in response to requests from the adjuster, to facilitate the adjuster's work. There is no evidence that city lawyers provided any advice on how to respond to the adjuster and no indication in the records that the city needed any advice on the issue of coverage. I am satisfied therefore that in many cases where a city lawyer was copied on correspondence that this was merely to keep them informed as a city "point person" and not for the purposes of giving advice.

[45] In summary, I find that several email records copied to lawyers do not fall within the scope of solicitor-client communication privilege. These records are the second email on page 757, records at pages 758-760, 848-850, 863-864, 989-992, 1019-1020, 1026-1029, 1030-1033, 1076-1078, 1099, 1110.

[46] For the same reason, the handwritten notes at pages 1080-1087 of a meeting between city employees, including a lawyer, and the insurance adjuster investigating the issue of insurance coverage does not fall within the scope of legal advice privilege, except for the first paragraph on page 1082 of those notes which refers to obtaining legal advice from a city lawyer, so I consider it is part of a continuum of communications for legal advice.

Publically available information

[47] In addition to the two main categories described above there are some records that comprise publically available information, filed with a court, and which the appellants will already possess, so the records lack the necessary confidentiality to be subject to privilege. The records are at pages 1002-1003, 1015, 1088-1098, 1100-1101, 1108-1109, 1111-1124.

Litigation privilege

[48] I will now consider whether Branch 1 litigation privilege applies to the records withheld under section 12 that I did not find subject to solicitor-client privilege above, except for the records I found were publically available.

[49] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[13] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[14] It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[15] The litigation must be ongoing or reasonably contemplated.[16]

Submissions

[50] The city says that in considering the application of the litigation privilege exemption to the records, the city applied the dominant purpose test in Order MO-1337-I. The city cites the three requirements that must be met under the test in MO-1337-I:

> 1. The record must have been created with existing or contemplated
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> litigation in mind;
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> 2. The record must have been created for the dominant purpose of existing

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[13] *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319.

[14] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer),* 2002 CanLII 18055 (ON CA).

[15] *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

[16] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

or contemplated litigation;

3. If litigation had not been commenced when the record was created there must have been a reasonable contemplation of litigation at that time, i.e., more than a vague or general apprehension of litigation.

[51] The city says that the records were prepared after litigation had begun and were being circulated between authorized staff as litigation was still ongoing, like the records in Order MO-1337-I. The city says that the dominant purpose test is met because the records came into existence after litigation had commenced and because the records were created in response to the litigation. It states that the records were prepared with the dominant purpose of litigation in mind. It states the third part of the test does not apply because litigation had already commenced at the time the records were created.

Part 1: created with existing or contemplated litigation in mind

[52] The city's submissions describe the relevant litigation as arising from various city decisions that affect the use of the appellants' land. The appellants' submissions contain a statement of claim dated June 13, 2013 that marks the beginning of litigation between the appellants and the city regarding the city's decisions about the appellants' land.

[53] Many of the records withheld by the city were created before the date of the statement of claim, in some cases, several years before litigation commenced. Records can still be subject to litigation privilege if litigation was reasonably contemplated when the records were created, but the city did not provide any evidence about when it might have reasonably contemplated litigation. The city's submission is that litigation had already commenced when the records in issue were created.

[54] I therefore find that for the withheld records created before the commencement of litigation on June 13, 2013, the city has not established that they fall within the scope of common law litigation privilege because there is no evidence that they were prepared in anticipation of litigation. I note that many of these records also fail to meet the dominant purpose test, for the reasons discussed below.

[55] The records that were created after litigation commenced meet the first part of the test, so I will proceed to consider the next part of the litigation privilege test for those records.

Part 2: Dominant purpose of records

[56] For a document to be protected by litigation privilege the "dominant purpose" for preparing the document must relate to the obtaining of legal advice. Not every record created after litigation commences meets the dominant purpose test. As stated in

Jetport v. Global Aerospace[17] in relation to emails, in order for [the party asserting litigation privilege] to succeed, it would have to establish that: (a) at the time the emails were sent, there was a reasonable contemplation of litigation; and (b) the emails were created for the dominant purpose of litigation.

Analysis

Litigation as dominant purpose

[57] I accept that the dominant purpose of some of the records was to prepare for litigation, because they were created after litigation had commenced and the dominant purpose of the records is to deal with issues arising from the litigation. They may be withheld under common law litigation privilege. These records are at pages 862, 1004-1014, 1071-1075, 1099 and 1110.

Litigation not dominant purpose

[58] For the other withheld records prepared after litigation commenced, from my record-by-record review, I am not satisfied that the dominant purpose for their preparation was litigation. Most of the records are requests for records or questions from the city's insurance adjuster and the resulting responses from the city's employees providing city records relating to the appellant's properties. I identified records that are about insurance coverage in discussing solicitor-client communication privilege above. It is clear that the task of the adjuster was to determine whether the city had insurance coverage. The dominant purpose of creating these records was therefore dealing with the insurance coverage issue, not litigation. I note that this issue of coverage was a separate task from dealing with questions of the city's liability, and the records themselves show that the insurer made that distinction clear to the city. The records I identified above as having the dominant purpose of preparing for litigation had a direct connection to defence of the claim against the city, distinct from the question of insurance coverage.

[59] Further, of the records withheld, many were prepared in the ordinary course of the city dealing with issues involving the appellants' property, and were created over a time span of up to seven years prior to the commencement of litigation, well before even the issue of insurance coverage arose. Those records were then subsequently shared with the city's insurance adjuster in response to the adjuster's request for information to help them determine insurance coverage issues. These records were therefore not prepared for the purpose of litigation and, even in the context in which they are re-produced or shared with the insurance adjuster, were shared for the purpose of determining insurance coverage. They therefore do not satisfy the test for litigation privilege at common law.

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[17] 2013 ONSC 235 (CanLII).

Waiver

[60] Under the common law, solicitor-client privilege may be waived. There is no assertion, nor any evidence in the records, that privilege over any records has been waived.

Termination of litigation

[61] Common law litigation privilege generally comes to an end with the termination of litigation.[18] The city's submissions state that litigation continues, and this was not disputed by the appellant, so there is no evidence to suggest that litigation privilege has ended for the records to which it applies.

Branch 2: statutory privilege

[62] Branch 2 is a statutory privilege that applies where the records were "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." The city also claimed the records withheld under section 12 fall within the scope of the Branch 2 privilege so I will consider below its application to the records that I have found do not fall within the Branch 1 privilege.

Statutory solicitor-client communication privilege

[63] Like the common law solicitor-client communication privilege, this privilege covers records prepared for use in giving legal advice.

[64] The city's submissions regarding statutory solicitor client privilege state that the records were prepared by and for counsel employed or retained by the city, including the city solicitor and that the records were prepared for use in giving or receiving legal advice.

[65] In considering common law solicitor client privilege, I found some records were not prepared by or for counsel or were prepared by or for counsel but not for use in giving or receiving legal advice. For the records in issue, considering the statutory solicitor client privilege requirements renders the same result for the records withheld under section 12 as under the common law solicitor client privilege test. In short, those records also fail the statutory privilege requirement for the same reasons they fail the common law solicitor client privilege requirements discussed above.

Statutory litigation privilege

[66] Statutory litigation privilege applies to records prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation." It

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[18] *Blank v. Canada (Minister of Justice)*, cited above.

does not apply to records created outside of the "zone of privacy" intended to be protected by litigation privilege, such as communications between opposing counsel.[19]

[67] The statutory litigation privilege in section 12 also protects records prepared for use in the mediation or settlement of litigation.[20] As noted above, in contrast to common law privilege, termination of litigation does not end statutory litigation privilege under section 12.[21]

City's submissions and analysis

[68] The city's submission is that the records were prepared by the city solicitor and legal staff and that they were prepared in contemplation of and for use in litigation. It says the records contain advice on different courses of action available to the city in ongoing litigation and that they were produced after litigation was in process as a response to that litigation.

[69] In considering whether the records are subject to common law litigation privilege I have already considered the city's submission that records were prepared by or for the city solicitor and legal staff. I found that while some records were, others were not prepared by or for the city solicitor and legal staff.

[70] In considering the application of common law litigation privilege I have also already considered whether the records that were prepared by or for legal staff were prepared in contemplation of and for use in litigation.

[71] The major substantive difference between the city's submission regarding the Branch 1 common law litigation privilege and the statutory litigation privilege of Branch 2, is the city's submission that the records were prepared for use in the mediation or settlement of litigation, which is part of Branch 2 litigation privilege. However, the city has provided no evidence to support this assertion and no evidence to support the submission is apparent from my review of the records. I note that the city also does not reconcile its submission that the records were used in the settlement of litigation with its submission that the litigation is still ongoing, though I accept the two positions may be reconciled. In short, the city has not provided sufficient evidence to support its assertion that the records withheld under section 12 were prepared for use in the mediation or settlement of litigation.

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[19] *See Ontario (Attorney General) v. Big Canoe*, 2006 CanLII 14965 (ON SCDC) at para. 45; *Ontario (Ministry of Correctional Service) v. Goodis, cited above.*

[20] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 (CanLII).

[21] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

Summary: Branch 2 litigation privilege

[72] Those records that did not meet the common law litigation privilege requirement also fail to meet the requirements for statutory litigation privilege, for the same reasons.

Conclusion

[73] I have found the first two emails on page 904, the records at pages 1104-1107, 780, 893, 895, 988, the 1st email on page 757, the first two emails on pages 1034 and the duplicates of these two emails on pages 1037 and 1040, pages 1067-1068, page 1079, the first paragraph on page 1082, the second paragraph on page 1102, the records at pages 862, 1004-1014, 1071-1075 1099 and 1110 are subject to section 12. I find that the privilege in these records has not been waived. Therefore, subject to my review of the city's exercise of discretion, these records are exempt under section 12.

[74] The remaining records are not subject to section 12. These records comprise handwritten annotations on records at pages 1023-1027, 1046, 1100, handwritten notes at pages 1043-1045, 1048-1049, and 1080-1087 except for the first paragraph on page 1082 that is part of a continuum of communications for legal advice because it refers to obtaining legal advice from a city lawyer. Records at pages 865-866, 867, 874, 993-994, 995-996, 998, 999, 1000-1001, 1016-1018, 1021-1022, 1023-1025, 1046-1047, 1050, 1051, 1052-1054, 1055-1057, 1058, 1059, 1060, 1061-1063, 1064-1066, 1069-1070, 1100-1101, 1102 except the 2nd paragraph which relates to legal advice, 1103. Records at pages 875, pages 1034-1042 except the first two emails on page 1034 and the duplicates of these two emails on pages 1037 (first two emails) and 1040 (first two emails), pages 1048-1049. The second email on page 757, records at pages 758-760, 848-850, 863-864, 989-992, 1019-1020, 1026-1029, 1030-1033, 1076-1078, 1110. Records at pages 1002-1003, 1015, 1088-1098, 1108-1109, 1111-1124.

[75] As no other discretionary exemptions have been claimed and no mandatory exemptions apply,[22] I will order these records disclosed.

Issue D: Does the discretionary exemption at section 11 (economic and other interests) apply to the records?

[76] The city withheld the records at pages 780, 893 and 895 under sections 11(c), (d), (e) and (g) of the *Act*. As I have already found that these records can be withheld under section 12, I do not need to consider the application of section 11 to these records.

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[22] Except for page 997, which I found must be withheld under section 14(1).

Issue E: Did the city exercise its discretion under the *Act*? If so, should this office uphold the exercise of discretion?

[77] 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. In an appeal, the Commissioner may determine whether the institution failed to do so.

[78] 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; or it fails to take into account relevant considerations.

[79] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[80] It is apparent from the city's submissions that it exercised its discretion. For the records that do fall within the scope of section 12 the city's desire to protect solicitor-client privileged communications, particularly while litigation is ongoing, is consistent with the purpose of section 12, and is therefore a legitimate basis for its decision to withhold the records. The city's submission emphasises that it disclosed as much of the information in issue as it considered it could. I am satisfied that the city did not base its exercise of discretion on irrelevant factors.

[81] I therefore uphold the city's exercise of discretion to rely on sections 12 for the records that meet the section 12 requirements.

ORDER:

1. I uphold the city's decision to withhold access to the information the city withheld under section 14(1) highlighted in the copy of the records provided by the city for the inquiry at pages 111-119, 128, 208-217.

2. I order the city to withhold under section 14(1) the information at page 997 withheld by the city under section 12.

3. I uphold the city's decision to withhold access under section 12 to the first two emails on page 904, the records at pages 1104-1107, the records at pages 780, 893, 895, 988, the 1st email on page 757, the first two emails on pages 1034 and the duplicates of these two emails on pages 1037 and 1040, the record on page 1079, the first paragraph of the record on page 1082, the second paragraph of the record on page 1102, the records at pages 862, 1004-1014 and 1071-1075.

4. I order the city to disclose the remaining records withheld under section 12 to the appellants by **October 25, 2016** but not before **October 19, 2016**.

Original Signed by: September 20, 2016

Hamish Flanagan
Adjudicator