

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3405-I

Appeal MA14-557

The Corporation of the City of Kingston

January 31, 2017

Summary: This second interim order follows Interim Order MO-3294-I. The appellant sought access to records relating to the removal of a temporary sales office. The city denied access in full claiming that the records fall outside of the scope of the *Act* as a result of the operation of the exclusion for records relating to a prosecution at section 52(2.1) or, in the alternative, that they are exempt from disclosure pursuant to the solicitor-client privilege exemption at section 12 of the *Act*. The appellant appealed the city's decision. In Interim Order MO-3294-I, I found that the exclusion at section 52(2.1) had not been established and the records fall within the scope of the *Act*. In this interim order, I find that the city has established that section 12 applies to the responsive records and I uphold its decision not to disclose them.

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

Orders Considered: Order MO-3294-I.

OVERVIEW:

[1] This is a second interim order addressing issues on appeal in Appeal MA14-557. This order follows Interim Order MO-3294-I.

[2] This appeal arises from a request that was submitted to the Corporation of the City of Kingston (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for records relating to the removal of a temporary sales office. The appellant, an individual acting on behalf of the Board of Directors of a condominium corporation whose lands are adjacent to the land occupied by the sales

office, sought access to information relating to a specific amending agreement that was registered in the Land Registry Office. In the request he explains that the site plan agreement for the land allows for a temporary sales office to remain for a period of five years, after which it is to be either dismantled or, if it is to remain, an application to amend the site plan must be submitted. He further states that although no such application to amend the site plan was submitted, no action has been taken to remove the sales office. As a result, he seeks access to:

[C]opies of all documentation, including records of the relevant departments of the city, including without limitation, the Planning Department, the Property Standards Branch, the City Clerk's Office, members from time to time of the Planning Committee and the Mayor's Office together with details of any and all legal proceedings contemplated or commenced by the city in respect of the said Temporary Sales Office, including all building permits issued.

[3] The request was to cover records up until the date of the request and to include "all materials and notes of discussions regarding a sale or potential sale of the owner's lands."

[4] The city issued a decision advising that records relating to the subject property were available for public viewing at the Planning Development Department. In the decision, the city explained the following:

Searches have been conducted through the city's record holding, and there are no further records responsive to your *MFIPPA* request.

[5] In response to the decision, the appellant wrote to the city and explained that he sought access to all information relating to the sales office and was of the view that records relating to the removal of the sales office should exist. The appellant stated:

...I remind you that what I am trying to ascertain is who made the decision that the city not pursue it[s] rights against the owner with respect to the sales office and what the reasons were for such a decision.

[6] The city issued a supplementary decision in which it indicated that any records in the prosecutor's office are privileged and exempt pursuant to the solicitor-client exemption at section 12 of the *Act*. The appellant appealed the decision.

[7] During mediation, the appellant advised that in addition to seeking access to the information that had not been disclosed to him, he was seeking access to a list of all the responsive records and the court file number. The city advised that it would not produce a list of responsive records. It also advised that the appellant could contact them directly to obtain information relating to the court file.

[8] The city confirmed its position that the responsive records are subject to solicitor-client privilege. The city also issued a supplemental decision in which it claimed

that the exclusion at section 52(2.1) of the *Act* applies as “the records are contained within a prosecutor’s file where all proceedings in respect of a prosecution that has not yet been completed.” The city declined to provide the appellant with further details about the prosecution, including identifying the nature or type of proceeding being considered, the underlying legislation being relied upon for the proceeding, or a reasonable proximate date by which an actual formal proceeding might be commenced.

[9] As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. I began my inquiry into this appeal by sending a Notice of Inquiry to the city, initially. In that notice I stated that the city had not yet provided this office with a copy of the records at issue and requested that it do so. In its representations the city advised that it declined to provide this office with a copy of the records due to the application of the exclusion for records relating to a prosecution at section 52(2.1). The city provided representations on the application of that exclusion, as well as on its alternative claim that, should the *Act* apply, the records are exempt under section 12.

[10] The city’s representations were shared with the appellant, in accordance with this office’s *Practice Direction 7*, and the appellant provided representations in response on both sections 52(2.1) and on section 12.

[11] In Interim Order MO-3294-I, I addressed the preliminary jurisdictional issue of whether the exclusion at section 52(2.1) for records relating to a prosecution applies in the circumstances of this appeal and found that it had not been established. As the exclusion does not apply, the responsive records fall within the scope of the *Act*. Accordingly, I must now determine whether the records are exempt from disclosure by virtue of the application of the solicitor-client privilege exemption set out in section 12 of the *Act*.

[12] Following the issuance of Interim Order MO-3294-I, I proceeded with my inquiry with respect to the application of section 12 of the *Act*. As the city had not provided me with a copy of the records at issue due to the application of the exclusion, I requested that it do so or provide me with a sworn affidavit of documents in support of their solicitor-client privilege claim and include in such affidavit any additional information in support of its claim that section 12 applies to the records.

[13] The city provided me with an affidavit of responsive records. I shared the affidavit with the appellant. The appellant provided me with representations with respect to the city’s affidavit of responsive records and its claim that section 12 applies to the records.

[14] In his representations, the appellant takes the position that additional responsive records, in addition to those identified by the city in its “Affidavit of Responsive Records,” should exist. Although the issue of the reasonableness of the city’s search for responsive records was not canvassed at the outset of this appeal, given that the city had not provided the appellant with any indication of the nature or number of responsive records at that time, this was the first opportunity for the appellant to raise

this issue. In the circumstances, I will be seeking further representations from the parties on the reasonable search issue, and will not address this issue in this interim order. I will be contacting the parties with further information.

[15] In this interim order, I find that the solicitor-client exemption at section 12 applies to the records identified as responsive to the request and I uphold the city's decision to deny access to them.

RECORDS:

[16] The city has identified four responsive records which its describes in its sworn affidavit of responsive records, as follows:

1. May 24, 2013 11:33 AM email from [named individual] (Senior Planner) to [named individual] (Associate Legal Counsel & Municipal Prosecutor) regarding [identified address] – Site Plan Control Violation – Temporary Sales Structure;
2. June 24, 2013 1:34 PM email from [Associate Legal Counsel & Municipal Prosecutor] to [Senior Planner] regarding [named individual] – Site Plan Control Violation – Temporary Sales Structure;
3. June 24, 2013 2:45 PM email from [Senior Planner] to [Associate Legal Counsel & Municipal Prosecutor] regarding [identified address] – Site Plan Control Violation – Temporary Sales Structure;
4. August 16, 2013 1:04 PM email from [Associate Legal Counsel & Municipal Prosecutor] to [named individual] (Manager of Building Services) regarding “[identified address] – Site Plan Control Violation – Temporary Sales Structure.

PRELIMINARY ISSUE:

Scope of Request

[17] At the end of the appellant's representations commenting on the city's "Affidavit of Responsive Records" he submits:

In the event that the city's obligation to disclose is only with respect to documents or materials in existence at [the date of the original request], we respectfully request the Commissioner treat our inquiry and this appeal as relating to all relevant documents up to the current date.

[18] Generally, records created after the date of the request fall outside of the scope of the request.¹ Additionally, I note that the appellant's request for information itself stipulates that "[t]he materials requested should be current to the date of this request...."

¹ Orders M-909, P-655, and MO-2589.

[19] Therefore, in my view, any responsive records that might have been created since the date that the appellant's request was submitted fall outside of the scope of the current appeal. Should the appellant wish to request records that were created beyond the date of his original request, he can submit a new access request to the city for such records.

DISCUSSION:

[20] The issue that I will be addressing in this interim order is whether the exemption for solicitor-client privileged information at section 12 of the *Act* applies to the records that the city has identified as responsive to the request.

[21] As noted above, for the duration of this appeal process, including throughout my inquiry into the matter, the city has not provided me with copies of the responsive records. Under section 42 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies with the institution. In this appeal, the burden of proof lies upon the city.

[22] As noted above, in support of its position that the responsive records meet the requirements of the solicitor-client privilege exemption at section 12, the city has provided me with an affidavit with an attached schedule describing the responsive records as set out above in the "Records" portion of this order. Following my review of the schedule to the affidavit, I have determined that although it is not particularly detailed in nature, together with the city's representations on the application of section 12, it does provide me with sufficient information to adjudicate on whether the records are subject to solicitor-client privilege as contemplated by the section 12 exemption.

Section 12: solicitor-client privilege

[23] Section 12 states as follows:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[24] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution...") is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

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. In the circumstances of this appeal, there is no evidence before me to suggest that litigation privilege

applies.

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.² The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.³ The 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.⁴

[27] 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.⁵ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.⁶

Branch 2: statutory privilege

[28] 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 statutory and common law privileges, although not identical, exist for similar reasons. Again, in the circumstances of this appeal there is no evidence that the statutory litigation privilege applies.

Statutory solicitor-client communication privilege

[29] Like the common law solicitor-client communication privilege, this statutory solicitor-client communication privilege covers records prepared for use in giving legal advice. However, the statutory privilege applies to records prepared by or for counsel employed or retained by the institution and were prepared for use in giving legal advice.

Representations

[30] In its initial representations, the city made submissions on the possible application of the exemption at section 12 to the responsive records. Following Interim Order MO-3294-I I provided both parties with the opportunity to provide additional representations on section 12 in light of the responsive records identified in the city’s “Affidavit of Responsive Records.”

[31] In its initial representations, addressing its claim that Branch 1, solicitor-client

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 *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁶ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

communication privilege applies to the records, the city submits:

Confidential communications to a lawyer represent an important exercise of the right to privacy and they are central to the administration of justice in an adversarial system. Unjustified or even accidental infringement of the privilege erode the public's confidence in the fairness of the justice system.⁷

Solicitor-client privilege applies to all communications, verbal or written of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers).⁸

Records in the City Prosecutor's file contain confidential communications between the City Prosecutor and City Staff directly related to the seeking formulating and giving of legal advice. They are therefore privileged.

[32] With respect to Branch 2 of section 12, the statutory privilege, the city submits that the records were prepared by or for counsel employed or retained by the institution, that the records were prepared for use in giving or seeking legal advice, and that the records were prepared in contemplated of or for use in litigation.

[33] The city also submits that neither the common law privilege nor the statutory privilege has been lost through waiver.

[34] In its representations following MO-3294-I, the city reiterates that section 12 of the *Act* applies "because [the records] are subject to solicitor-client privilege or were prepared by or for counsel employed by the city for use in giving legal advice or in contemplation of or for use in litigation."

[35] The appellant submits:

...[A]ll legal personnel employed by the city are employees of the city and as such records their "possession, control or power" are not their property but that of their employer, the City of Kinston. On that basis the city is bound to disclose such records as part of this proceeding. We acknowledge that privilege can attach to some, but not necessarily all of such records.

By way of example, letters from the solicitor to third parties or those in an adverse interest are not, by definition, subject to privilege. We submit that all communications between the city's legal department and all persons or entities not part of the city are subject to disclosure. That would clearly apply to communications with the owner of the subject land or representatives of such owner.

⁷ *Lavallée, Rackel & Heintz v. Canada*, [2002] 3 S.C.R. 209, paragraph 49.

⁸ *Susan Hosiery Ltd. v. Canada (Minister of National Revenue)*, [2969] 2 Ex. C.R. 27, paragraph 12.

[36] The appellant submits in his representations that the Supreme Court of Canada has confirmed that the work of lawyers in positions of “in house” counsel, whether in public service or private practice, is entitled to the same benefits of privilege as outside counsel.⁹ He further submits:

[L]etters and other communications from the solicitor to third parties or those in an adverse interest are not, by definition, subject to privilege. We submit that all communications between the city’s legal department and all persons or entities not part of the city are subject to disclosure....

Analysis and findings

[37] Based on my review of the representations and the schedule attached to the city’s “Affidavit of Records” which describes the four emails that it identifies as responsive to the request, I accept the city’s claim that the records are privileged communications between a lawyer and her client within the meaning of section 12. Specifically, I find that the emails fall within both the common law solicitor-client communication privilege and the statutory solicitor-client communication privilege. All the records are emails, and therefore communications, between the city’s legal counsel and city employees. I note that the subject matter of the emails, as identified by the city, relates to city matters and I accept, based on the affidavit evidence, that they are direct communications of a confidential nature exchanged in the course of giving and receiving legal advice, or that they fall within the type of information that can be characterized as part of a continuum of communications between a lawyer and her client, necessary in order to permit advice to be sought and received. Additionally, in the context of this appeal, the lawyer who is the sender or the recipient of these communications, is counsel employed by the city.

[38] In the absence of any evidence to suggest that the city has waived its privilege in these records, I find that the records are exempt pursuant to the solicitor-client privilege exemption at section 12 of the *Act*.

Exercise of discretion

[39] The city submits that it exercised its discretion to withhold the records at issue pursuant to the exemption at section 12 taking into consideration the purpose of the *Act*, the wording of the exemption and the interest that it protects, whether the appellant had a compelling need for the information, the sensitive nature of the information and the impact on the city of its disclosure, the city’s historic practice and the ongoing importance of the legal advice contained in the records.

[40] Considering the circumstances surrounding this appeal and the city’s representations which also detail the factors that it considered when determining whether it should exercise its discretion with respect to section 12, I am satisfied that the city has not erred in its exercise of discretion and I am satisfied that it did not

⁹ *R. v. Campbell*, [1999] 1 S.C.R. 565 at para. 49.

exercise its discretion in bad faith or for an improper purpose. The city has considered the purposes of the *Act*, and has given due regard to the nature and sensitivity of the undisclosed information in light of the context of this appeal. Accordingly, I find that the city took relevant factors into account and I uphold its exercise of discretion in this appeal.

ORDER:

1. I uphold the city's decision to deny access to the records under the solicitor-client privilege exemption at section 12 of the *Act*.
2. I remain seized of this appeal to address the issue of whether the city conducted a reasonable search for responsive records.

Original Signed By: _____
Catherine Corban
Adjudicator

_____ January 31, 2017