

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3409

Appeal MA15-106-2

City of Brampton

February 9, 2017

**Summary:** The appellant requested records relating to work done on a particular civic project by a named law firm. The city denied access to the records under section 12 (solicitor-client privilege) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). During mediation of the appeal, the appellant reduced the scope of the request to the names of the authors of the requested documents. This order determines that the records are subject to common law solicitor-client communication privilege, and in the circumstances of this appeal, the names of the authors are not subject to severance and are exempt under branch 1 of section 12. The appeal is dismissed.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 4(2) and 12.

**Cases Considered:** *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997) 102 O.A.C. 71, 46 Admin L.R. (2d) 115, [1997] O.J. No. 1465 (Div. Ct.); *Corp. of the District of North Vancouver v. B.C. (The Information and Privacy Commissioner)*, 1996 CanLII 521 (BCSC); *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

### OVERVIEW:

[1] The appellant, a journalist, submitted a request under the *Act* to the City of Brampton (the city) for access to all documents that a named lawyer and/or his firm “worked on/authored/drafted/reviewed/prepared/consulted on” for a particular civic

project, prior to a specific date.

[2] The city initially claimed a time extension for processing the request, which was the subject of Appeal MA15-106. That appeal has been resolved and is now closed.

[3] The city then denied access to the requested information under section 12 of the *Act* (solicitor-client privilege). The appellant appealed the city's decision to this office and the current appeal file (MA15-106-2) was opened.

[4] During mediation of the appeal, the appellant narrowed the scope of the records at issue. He now seeks only the names of the authors of the requested documents.

[5] The parties were unable to resolve this appeal through the process of mediation, and accordingly, it proceeded to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I began the inquiry by providing a Notice of Inquiry summarizing the facts and issues in the appeal to the city, and inviting the city to provide representations, which it did. Later, I invited the city to provide supplementary representations, which it did.

[6] I then provided a Notice of Inquiry to the appellant, along with the city's representations, and invited him to provide representations. I did not share the affidavit that accompanied the city's representations, for reasons of confidentiality. Despite a number of follow-up contacts with the appellant, he did not provide representations.

## **RECORDS:**

[7] The information remaining at issue consists of the names of the authors of the documents that were initially requested.

## **ISSUES:**

[8] The issues in this appeal are:

- A. Does the discretionary exemption in section 12 apply?
- B. Did the city exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

## **DISCUSSION:**

### **SOLICITOR-CLIENT PRIVILEGE**

#### ***A. Does the discretionary exemption in section 12 apply?***

[9] 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.

[10] 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.

[11] Branch 1 encompasses common law solicitor-client privilege, which includes two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

[12] In this case, the city claims that the requested information is subject to common law solicitor-client communication privilege. If established, this claim would render the information exempt under branch 1.

[13] 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.<sup>1</sup> The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.<sup>2</sup> 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.<sup>3</sup>

[14] In its representations, which were shared with the appellant as I have noted, the city affirms that it located no records relating to the lawyer named in the request, and that he did not, during the time frame specified in the request, do any work for the city in relation to the civic project mentioned in the request.

[15] The city makes the following submissions to the effect that the records containing the information remaining at issue are subject to common law solicitor-client communication privilege:

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<sup>1</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>2</sup> Orders PO-2441, MO-2166 and MO-1925.

<sup>3</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

- protecting legal work through solicitor-client privilege is extremely important;
- the evidence is that all of the responsive records are privileged; and
- each of the responsive records was reviewed and determined to relate to a specific request for legal advice.

[16] The confidential affidavit that accompanied the city's representations provides further details about these records that support the city's position that they are subject to solicitor-client communication privilege. It is evident that they are all direct communications between the city and the named law firm and they relate to the city, as client, seeking or receiving legal advice. There is no evidence to suggest that the privilege was waived by the city.

[17] However, the narrowed request in this case does not seek access to any information in these records except the author's names. This raises the question of whether the names themselves could be severed and disclosed without revealing privileged information.<sup>4</sup>

[18] While there are classes of records claimed to be exempt under section 12 that may be subject to an order that they be severed and partially disclosed, I conclude that this is not possible here because class-based privilege applies to direct communications between solicitor and client that relate to the client seeking and receiving legal advice.<sup>5</sup> As Ontario's Divisional Court stated in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*:<sup>6</sup>

Once it is established that a record constitutes a communication to legal counsel for advice, it is my view that the communication *in its entirety* is subject to privilege.

[19] Clearly, this would also be the case with respect to the lawyer's response containing the advice. I therefore conclude that the records, all of which are direct solicitor-client communications that relate to the city seeking or receiving legal advice, are subject to class-based privilege and are not subject to severance.

[20] Other case law suggests that the existence of a solicitor-client relationship is not privileged. In *Corp. of the District of North Vancouver v. B.C. (The Information and Privacy Commissioner)*<sup>7</sup> the Court stated:

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<sup>4</sup> Section 4(2) of the *Act* requires the city to disclose ". . . as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions."

<sup>5</sup> This is not to say that institutions cannot exercise discretion by severing and disclosing information that would otherwise be subject to a class-based privilege and exempt under section 12.

<sup>6</sup> (1997) 102 O.A.C. 71, 46 Admin L.R. (2d) 115, [1997] O.J. No. 1465 (Div. Ct.) at para. 17.

<sup>7</sup> 1996 CanLII 521 (BCSC) at para. 27

The terms of a solicitor/client relationship are privileged, although the existence of the relationship in itself is not. . . .

[21] The city submits that it has confirmed that it retained the law firm named in the request when the city acknowledged that it has responsive records.

[22] The city goes on to submit that the names of individual counsel who worked under the retainer are “details” that are protected. It submits that *North Vancouver* affirms this view because, in that case, the Court withheld additional information of this nature. The only information disclosed was the name of the law firm, which, as in the present case, was known to the requester before the request was submitted.

[23] More particularly, *North Vancouver* denies access to an interim invoice for legal costs incurred in defending an ongoing lawsuit. On my reading, it does not affirm that the invoice included individual counsel names, though it is likely that it did.

[24] In any event, in the circumstances of this appeal, I have concluded that, as direct solicitor-client communications relating to the seeking or receiving of legal advice by the city, the records are subject to a class-based privilege as noted in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*,<sup>8</sup> and for that reason, they are not subject to severance.

[25] I therefore find that the information remaining at issue, that is, the names of the authors of the documents, is subject to common law solicitor-client privilege and exempt under branch 1 of section 12, subject to the discussion of the city’s exercise of discretion, below.

## **EXERCISE OF DISCRETION**

***Issue B: Did the city exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?***

### *General principles*

[26] The section 12 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[27] 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

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<sup>8</sup> cited above.

- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[28] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>9</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>10</sup>

[29] The city submits that, in exercising its discretion, it considered the importance of solicitor-client privilege as expressed by the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*,<sup>11</sup> and in particular, the following commentary by the Court:

Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in *McClure*,<sup>12</sup> stressed the categorical nature of the privilege:

. . . solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. [Emphasis added; para. 35.]

[Underlining added by the Court.]

[30] The city also refers to the Court's affirmation that the solicitor-client privilege exemption,<sup>13</sup> properly applied, encompasses the consideration of the public interest.<sup>14</sup>

[31] The city goes on to submit that it ". . . did exercise its discretion by considering the appropriate factors." It is evident from the confidential affidavit that accompanied the city's representations that the city considered relevant factors, including the public interest. There is no indication that the city considered irrelevant factors.

[32] I also note that, in its representations that were shared with the appellant, the city affirmed that it located no records relating to the named lawyer, and that he did not, during the time frame specified in the request, do any work for the city in relation

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<sup>9</sup> Order MO-1573.

<sup>10</sup> Section 43(2).

<sup>11</sup> 2010 SCC 23 at para. 75.

<sup>12</sup> 2001 SCC 14.

<sup>13</sup> In *Criminal Lawyers' Association*, the Court referred to the solicitor-client privilege exemption at section 19 of the *Freedom of Information and Protection of Privacy Act*, which is the equivalent of section 12 of the *Act*.

<sup>14</sup> See paragraph 61 of the judgment.

to the civic project mentioned in the request. In so doing, the city did provide relevant information to the appellant.

[33] Based upon the foregoing, I find that the city exercised its discretion properly.

[34] In the result, section 12 applies to the information that remains at issue, and I uphold the city's decision to deny access under section 12 of the *Act*.

**ORDER:**

The appeal is dismissed.

Original Signed by: \_\_\_\_\_

John Higgins  
Adjudicator

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February 9, 2017