

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3432-I

Appeal MA16-27

City of Toronto

April 27, 2017

Summary: The appellant requested records from the City of Toronto about a named company's involvement with Toronto's taxi and limousine industries. The city granted access to a number of records and withheld others. The records at issue in this appeal were withheld under section 12 (solicitor-client privilege). In this interim order, the adjudicator determines that, with the exception of four pages, the exemption applies to the records for which it is claimed. With respect to those four pages, which consist of an email and attachment, this office will notify the author of the email and the named company and invite them to provide representations, and will invite other parties to provide further representations if necessary.

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: Order MO-2211.

OVERVIEW:

[1] The appellant made an access request to the City of Toronto (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

. . . copies of the following communications and replies received and sent by the Mayor's office regarding [named company's] involvement with the City of Toronto's taxi and limousine industries. We request any and all e-

mails, notes made regarding outbound and/or inbound telephone conversations plus the minutes of any staff meetings regarding the operations of [named company].

This request is to include any and all communications from the Mayor's office to:

1. [named company] and replies
2. Toronto Municipal Licensing and Standards and replies
3. The Toronto Police Service and replies
4. The Insurance Bureau of Canada and replies
5. The Financial Services section of the Provincial government and the replies
6. The City of Toronto's Legal Department and the replies notwithstanding lawyer/client privilege
7. Communications to any and all City councillors and replies received
8. Notwithstanding, possible compromising of ongoing investigations, any and all communications from the Mayor's office and replies received by the:

- 1) Toronto Police Service
- 2) Ontario Provincial Police
- 3) Royal Canadian Mounted Police

The time frame is from January 2014 up to and including the date of this application.

...

[2] In response to the request, the city issued a decision granting partial access to the records. The city denied access to parts of some records, and to other records in their entirety. In doing so, the city relied on the mandatory exemption in section 14(1) (personal privacy) and the discretionary exemption in section 12 (solicitor-client privilege). The city also removed some information on the basis that it is not responsive to the request.

[3] The appellant filed an appeal of the decision to deny access under sections 12

and 14(1).

[4] The appeal was assigned to a mediator under section 40 of the *Act*. During mediation, the appellant agreed that he would not pursue access to the information denied under section 14(1) of the *Act*, with the exception of pages 461 and 474. No further mediation was possible, and the appeal moved on to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[5] I began the inquiry by inviting the city and three affected parties to provide representations. The city responded with representations. The affected parties provided their consent to the city to disclose information about them, and pages 461 and 474 were disclosed. Those pages are therefore no longer at issue, and the section 14(1) exemption is no longer at issue.

[6] I then invited the appellant to provide representations, which it did not do.

[7] The only issue being decided in this order is whether section 12 applies to the records for which it has been claimed. In the result, I conclude that most of the records are exempt under section 12, while four pages of records are not. The city's exercise of discretion to claim section 12 is upheld for the records to which I find that it applies.

[8] Having determined that four pages (which comprise an email and attachment) are not exempt under section 12, I have decided to notify the author of the email and the company named in the request, as affected parties, and seek their views concerning disclosure before making a final determination concerning access to those pages.

RECORDS:

[9] The records remaining at issue consist of forty-two pages of e-mails and attachments that were withheld in their entirety under section 12: pages 241-261 inclusive (and including pages 259 B1 and 259 B2); pages 264 and 265; pages 308-313 inclusive, pages 337-343 inclusive; and pages 345-348 inclusive.

DISCUSSION:

A. Does the discretionary exemption at section 12 apply to the records for which the city claims this exemption?

[10] 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.

[11] 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.

[12] The city states that it relies on section 12 “. . . due to the fact that the documents relate to communications concerning legal advice, or to [an identified court judgment], or both.”

Branch 1: common law privilege

[13] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[14] 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. It applies to communications within the “framework” of the solicitor-client relationship.¹

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

[16] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.⁴

[17] 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

Litigation privilege

[18] 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

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

² Orders PO-2441, MO-2166 and MO-1925.

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

⁴ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

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.)

for trial.⁷ Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.⁸ 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.⁹ The litigation must be ongoing or reasonably contemplated.¹⁰

Branch 2: statutory privilege

[19] 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.

Analysis

[20] The city submits that the records fall into three groups: (1) emails and attachments between staff in the Legal Services Division (LSD) and staff in other city departments; (2) emails and attachments between city staff, not directly to or from LSD, where the content would reveal the content of discussions between LSD staff and other city staff, either by incorporating the advice provided or otherwise referring to its contents; and (3) other documents. To facilitate comprehension of the nature of the communications, the city has also provided a table that identifies its staff members and counsel according to their roles.

[21] The appellant did not provide representations.

[22] With respect to groups (1) and (2) as identified by the city, I have reviewed these records in detail. I find that they are either direct solicitor-client communications made for the purpose of giving and/or receiving professional legal advice, and/or communications between counsel relating to that same purpose. They are therefore direct solicitor-client communications or working papers directly related to obtaining or providing legal advice. As there is no evidence of disclosure to outside parties, there is no evidence that privilege has been waived. These records are therefore subject to common law solicitor-client privilege and I find that they are exempt under branch 1.

[23] The third record group, comprising pages 345-348, is somewhat different. These pages consist of an email and attachment. The city describes them as records involving a "third party," a city staff member assigned to a member of council, and another city

⁷ *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).

⁸ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

⁹ *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

¹⁰ Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

staff member. The city submits that the "other" city staff member was obtaining factual information and utilizing it for the purposes of collecting background information which the council member believed was relevant to the contents of specific motions, or the provision of advice with respect to these motions or other matters. Referring to Order MO-2211, the city claims that disclosure of these pages could allow an "assiduous inquirer" to discern the nature of the solicitor-client communication.

[24] I reject these claims. Although the city states that its staff person was "utilizing" the factual information in these records for the purposes of collecting background information, or the provision of advice, there is no specific evidence that pages 345-348, or the information they contain, were ever provided to counsel in relation to obtaining legal advice.

[25] These pages are not direct solicitor-client communications; they have not been shown to be part of a "continuum of communications" between solicitor and client; and they are not lawyers' working papers. Nor do they reveal advice that was sought or obtained. The information was provided by a third party who is external to any of the solicitor-client relationships identified by the city. For all these reasons, I conclude that pages 345-348 are not subject to solicitor-client communication privilege.

[26] As well, Order MO-2211 does not assist the city. It deals with the very specific situation of legal billing information, which is presumptively privileged unless it is found to be "neutral information." Order MO-2211 found that the presumption of privilege in the legal billing information at issue was not rebutted because of the specific facts and knowledge of the requester in that case. The "assiduous inquirer" concept relates to how fee information can be accumulated and used to deduce strategic decisions or other aspects of solicitor-client communications. Significantly, legal accounts are issued by lawyers to their clients on the basis of legal work they have done for those clients. By contrast, pages 345-348 have no apparent connection to any solicitor-client relationship, and I am not satisfied that their disclosure could be part of a step-by-step assembly of information leading to a breach of solicitor-client communication privilege.

[27] Accordingly, pages 345-348 are not subject to common law solicitor-client communication privilege. Nor has evidence been provided to the effect that they are subject to common law litigation privilege. These records are therefore not exempt under branch 1.

[28] Nor is there evidence to support a finding that the part 3 records were prepared by or for counsel for an institution for use in giving legal advice, or for use in, or in contemplation of, litigation. They are therefore also not exempt under branch 2.

[29] However, the author of the email and the company named in the request, who were not notified of the request or the appeal, may have an interest in pages 345-348. Accordingly, before making a final determination concerning the disclosure of these pages, I will provide notice of this appeal to the author of the email, and the named

company, and invite them to provide representations.

B. Exercise of Discretion

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

[31] In addition, the Commissioner may find that the city 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.

[32] In either case this office may send the matter back to the city for an exercise of discretion based on proper considerations.¹¹ This office may not, however, substitute its own discretion for that of the city.¹²

[33] In essence, the city submits that it withheld information under section 12 to protect confidential legal advice, and it also considered whether there would be a public benefit if the information were disclosed. The city states that it balanced the public interest in confidentiality against the public interest in disclosure and decided to rely on the exemption to withhold limited and specific information.

[34] I find that, in its exercise of discretion, the city considered relevant factors and did not consider irrelevant ones. I therefore uphold the city's exercise of discretion to apply section 12 to the information for which I have upheld its application.

ORDER:

1. I uphold the city's decision to deny access to all the records at issue except pages 345-348.
2. This office remains seized of this appeal in order to address pages 345-348. This office will notify the affected parties referred to in this order and invite them to provide representations, and will invite additional representations from other parties if necessary, prior to determining the issue of access to these pages.

Original Signed by: _____

April 27, 2017 _____

¹¹ Order MO-1573.

¹² Section 43(2).

John Higgins
Adjudicator