

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-3525

Appeal MA16-79

The Corporation of the City of Oshawa

November 22, 2017

**Summary:** The Corporation of the City of Oshawa (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)* for a copy of Report CM-15-27 presented to city council at its December 14, 2015 meeting. The city denied access to the report and attachments, citing the application of the secrecy provision in section 223.22 of the *Municipal Act, 2001*. The city also relied on several exemptions in *MFIPPA*, including the exemption for solicitor client privilege in section 12. The requester appealed. In this order, the adjudicator finds that the secrecy provision in section 223.22 of the *Municipal Act* does not apply, but that the report and attachments are exempt from disclosure pursuant to section 12 of *MFIPPA*.

**Statutes Considered:** *Municipal Act, 2001*, SO 2001, c.25, s. 223.22; *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 12 and 53(1).

**Orders and Investigation Reports Considered:** Orders MO-2975-I, MO-2439, MO-2843, MO-2629-R, and PO-2733.

**Cases Considered:** *David McCartney v. The City of Ottawa*, 2010 ONSC 2690 (CanLII).

### BACKGROUND:

[1] On December 14, 2015, council for the City of Oshawa (the city) met in closed session to discuss the potential public release of certain documents. The documents in

question consisted of certain attachments to the Auditor General's report AG-13-09 (received by council on May 21, 2013) that the Auditor General had designated as being confidential attachments. According to the city, to date it has not made any of these documents public.

[2] Subsequent to the December 14, 2015 closed meeting, the appellant submitted an access request to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for "a copy of report CM-15-27 presented to City Council at their December 14, 2015 meeting".

[3] The city identified the responsive records, being Report CM-15-27 and attachments. It issued a decision denying access to the records on the basis that they are exempt pursuant to the discretionary exemptions for solicitor-client privilege (section 12 of *MFIPPA*) and closed meetings (section 6(1)(b) of *MFIPPA*). The appellant appealed the city's decision to this office.

[4] During mediation, the city clarified that it is claiming sections 12 and 6(1)(b) of the *Act* for all records at issue, i.e. the report and all the attachments to the report. Furthermore, it relies on sections 7 (advice and recommendations) and 14(1) (personal privacy) of *MFIPPA* for one attachment (Record 6), and section 14(1) for another attachment (Record 7). The city also added that it relies on section 53 of the *Act* in conjunction with the confidentiality provision found at section 223.22 of the *Municipal Act* for three attachments (Records 4, 8 and 12).

[5] The appellant advised the mediator that he disputes the application of these exemptions to any of the information at issue and also asserted that there is a public interest in disclosure, thereby raising the public interest override found in section 16 of *MFIPPA*.

[6] Mediation efforts did not resolve this appeal and it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by inviting representations from the city, followed by representations from the appellant, reply from the city and sur-reply from the appellant.<sup>1</sup>

[7] In this order, I find that section 223.22 of the *Municipal Act* does not apply to the records at issue, but I uphold the city's decision to withhold the records pursuant to section 12 of *MFIPPA*.

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<sup>1</sup> Although it appeared the city raised section 223.22 of the *Municipal Act* for only some of the records at issue, I asked the parties for representations on whether section 223.22 applies to any of the records at issue.

## **RECORDS:**

[8] The records at issue are Report CM-15-27 and all attachments thereto. The records are listed as records 3 through 12 on the index of records.<sup>2</sup> Record 3 is Closed Report CM-15-27. As discussed in more detail below, Records 4 through 12, which are the attachments to the report, consist of the confidential attachments to the Auditor General's Report AG-13-09.

## **ISSUES:**

- A. Does the secrecy requirement relating to an Auditor General in section 223.22 of the *Municipal Act, 2001* apply to any of the records?
- B. Does the discretionary exemption at section 12 of *MFIPPA* apply to the records?
- C. Did the city exercise its discretion under section 12 of *MFIPPA*? If so, should I uphold the city's exercise of discretion?

[9] As a result of the findings I make on these issues, it is not necessary for me to make a finding on the applicability of the exemptions at sections 6(1)(b), 7 or 14(1) of *MFIPPA*.

## **DISCUSSION:**

### **Further background**

[10] The city explains in its representations that the record at issue, Confidential Report CM-15-27, was prepared in response to a prior council direction for a report to be provided to it on the legal implications and risks of releasing the confidential attachments to the Auditor General's Report AG-13-09. Report AG-13-09, which had been received at a council meeting on May 21, 2013, included attachments that were originally identified as confidential by the Auditor General. The Auditor General's Report AG-13-09, except for the confidential attachments, was made public on or about May 21, 2013.

[11] On March 17, 2014, council referred the matter of whether "the confidential attachments to Report AG-13-09 would be released publicly, subject to compliance with the *Municipal Freedom of Information and Protection of Privacy Act*, including in relation to personal information, third party information, and solicitor/client privilege as may be

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<sup>2</sup> Records 1 and 2 are the access request and the city's decision. During the mediation stage of the appeal, the city provided an index of records to the mediator. With the city's consent, a redacted version of the index was provided to the appellant during adjudication.

applicable" for a written report on the legal implications and risks of releasing the confidential attachments. The resulting Confidential Report CM-15-27 was received by council in closed session on December 1, 2015.

[12] All of the confidential attachments to the Auditor General's Report AG-13-09 were included as attachments to the City Solicitor's Confidential Report CM-15-27.

**Issue A: Does the secrecy requirement relating to an Auditor General in section 223.22 of the *Municipal Act, 2001* apply to any of the records?**

[13] The *Municipal Act, 2001*<sup>3</sup> (the *Municipal Act*), Part V.1 contains provisions allowing for the appointment of accountability officers. The Auditor General is one such accountability officer.

[14] Part V.1 of the *Municipal Act* also contains secrecy provisions that prevail over *MFIPPA* as a result of certain provisions of the *Municipal Act* itself in combination with section 53(1) of *MFIPPA*, which states:

This Act prevails over a confidentiality provision in any other Act unless the other Act or this Act specifically provides otherwise.

[15] Section 223.22 of the *Municipal Act* contains a secrecy provision relating to an Auditor General:

(1) The Auditor General and every person acting under the instructions of the Auditor General shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part.

(2) Subject to subsection (3), the persons required to preserve secrecy under subsection (1) shall not communicate information to another person in respect of any matter described in subsection (1) except as may be required,

(a) in connection with the administration of this Part, including reports made by the Auditor General, or with any proceedings under this Part; or

(b) under the Criminal Code (Canada).

(3) A person required to preserve secrecy under subsection (1) shall not disclose any information or document disclosed to the Auditor General under section 223.20 that is subject to solicitor-client privilege, litigation

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<sup>3</sup> SO 2001, c.25.

privilege or settlement privilege unless the person has the consent of each holder of the privilege.

(4) This section prevails over the *Municipal Freedom of Information and Protection of Privacy Act*.

[16] As noted in Order MO-2975-I, this office has not treated section 53(1) of *MFIPPA* as a jurisdiction-limiting provision, but rather as a direction that *MFIPPA* is not the controlling statute for protecting the confidentiality of information that falls within the scope of the confidentiality provision in the other statute. I must determine, therefore, whether any of the records at issue in this appeal are captured by the wording of section 223.22 of the *Municipal Act*.

### ***City's representations***

[17] The city submits that the requirement to preserve secrecy under subsection 223.22(1) is wide, and relates to "all matters" coming to the knowledge of the Auditor General during the course of his duties. The city notes that while the balance of the Auditor General's report was made public, the confidential attachments were not, and fall outside the scope of the exception for reports made by the Auditor General at section 223.22(2)(a) of the *Municipal Act*. The city submits that the access request related directly to a report prepared by the then current (now former) Auditor General in the course of his duties, which is clearly caught by the wording of section 223.22. The city submits that due to their sensitive nature, the city has never made these records public.

### ***Appellant's representations***

[18] The appellant goes into considerable detail about the background to this matter. He submits that Report AG-13-09 was the result of the process leading to the city's acquisition of a particular property. The appellant submits that the process was controversial and that the Auditor General tried to address some of the issues but was thwarted by a member of city staff. The Auditor General's Report AG-13-09 was an attempt to bring to council's attention some of the flaws in the information provided to council on the basis of which to make its decision to acquire the property in question.

[19] The appellant submits that the attachments to Report AG-13-09 are significant documents that the city is trying to keep confidential because they show that council was not provided with all of the relevant information when it voted to acquire the property.

[20] The appellant submits that the exception for reports made by the Auditor General at section 223.22(2)(a) applies and that the attachments to that report should therefore be disclosed. He also submits that certain attachments were made confidential in keeping with the Auditor General's responsibilities under section 223.22, but that the public interest override at section 16 of *MFIPPA* overrides the provisions of

section 223.22 of the *Municipal Act*.

[21] The appellant also relies on a decision of the Ontario Superior Court of Justice, *David McCartney v. The City of Ottawa*,<sup>4</sup> where a Master ruled that the City of Ottawa, on examination for discovery in a civil action, was required to answer certain questions relating its Auditor General's investigation. The Master reasoned as follows:

Therefore, the City cannot, at present, obtain information from the AG concerning his investigation leading to his reports as this is protected by the above provisions and such a request would not fall within the exceptions.

However, this is not necessarily dispositive of the questions objected to by the City. The AG might very well have legitimately provided information to the City while it conducted its investigation into circumstances relating to the unauthorized discharge (in connection with the administration of Part V.1 or with any reports made by the AG or with any proceedings under Part V.1, as provided by the exception). Any information or document communicated to the City (to its staff or to council) by the AG is not protected by these provisions to the extent that this information is with the City. Any such information or document communicated to the City by the AG, relevant to this action, is caught by Rules 30.02 and 31.06 and must be provided or answered (as the case may be) by the City unless the information is protected by privilege, in which case documents must nonetheless be disclosed at Schedule B of the City's Affidavit of Documents. In addition, any documentation that the City provided to the AG for the purpose of its investigation into circumstances relating to the unauthorized discharge must be produced. The City would, independently of the AG, have possession of either the original or a copy of documents it gave to the AG. As well, related questions as to what information or document was provided to the AG by the City must be answered, subject to any claim of privilege. Similarly, whatever information the City has about why the AG made certain decision(s), must be provided or answered to the extent that this information is relevant to this dispute as any such information of the City is not protected by the *Municipal Act, 2001*, once within the knowledge of the City. The scope of examination requires disclosure of the City's knowledge, information and belief by way of answer to relevant questions irrespective of whether this was communicated by or to the AG. Secrecy under these provisions does not apply to the City but to the AG. Proper questions arising from answers must be answered.

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<sup>4</sup> 2010 ONSC 2690 (CanLII).

[22] The appellant also goes into some detail regarding the replacement motion (replacing the recommendation in Report AG-13-09) whereby certain city councillors recommended that the city appoint an investigator to investigate the allegations set out in Report AG-13-09. The appellant submits that members of council including the Mayor acted improperly in voting in favour of the motion to appoint the investigator.

***City's reply representations***

[23] The city submits that none of the confidential attachments to the Auditor General's report are in the public domain. The city submits that council turned its mind as to what records to release and decided specifically not to release the confidential attachments to report AG-13-09.

[24] The city submits that the Auditor General chose to withhold the confidential attachments from the public and disclosed them only to a very limited group of individuals including city council. The city submits that those persons could also be seen as persons acting under the instructions of the Auditor General who are themselves prohibited from disclosing the records pursuant to section 223.22 of the *Municipal Act*. It submits that the Auditor General is vested with the authority and obligation to preserve, or direct someone to preserve, secrecy.

[25] The city submits, further, that the exceptions to this requirement of secrecy are found in subsection 223.22(2) which allows the communication of the information protected under subsection (1) "as may be required...in connection with the administration of this Part, including reports made by the Auditor General, or with any proceedings under this Part". The city submits that the "administration of this Part" was conducted by the duly appointed Auditor General in choosing how to release his report, and by choosing to keep certain attachments confidential, presumably also on the basis that disclosure of the confidential attachments would contravene subsection (3). The city submits that the appellant's access request is not an activity conducted under the *Municipal Act* so as to bring it under either of the exceptions to the secrecy requirement in subsection 223.22(2). The city submits that the attachments are not just confidential because the Auditor General labelled them as such, but because of the statutory requirement to preserve secrecy.

***Appellant's sur-reply representations***

[26] The appellant submits that all of the Auditor General's records have been in the custody and control of the city since September 5, 2013, when the Auditor General's office was closed. He submits, further, that only the Auditor General and individuals working directly under him are subject to the secrecy provisions of the *Municipal Act*, and disputes the city's submission that councillors and others could be seen to be persons acting under the instructions of the Auditor General for the purposes of section 223.22.

### ***Analysis and findings***

[27] I begin with the appellant's observation that all of the Auditor General's records have been in the custody and control of the city since September 5, 2013, when the Auditor General's office was closed. I understand the appellant to be arguing that on this basis, section 223.22 does not apply. However, the intent of section 223.22 is to allow an Auditor General to perform his or her functions in an independent matter. This purpose would be seriously undermined if the confidentiality provision were no longer to apply simply because the Auditor General position is currently empty. In my view, section 223.22 obliges the city to preserve the secrecy of matters that were in the hands of the Auditor General or anyone acting under his instructions.

[28] On the other hand, previous orders of this office have held that information in the hands of city staff members for the purposes of their ordinary tasks is not subject to section 223.22, even if a copy has been given to the Auditor General. In Order MO-2439 (reconsidered on other grounds in Order MO-2629-R), Senior Adjudicator John Higgins considered the meaning of the phrase "in the course of duties under this Part" in section 181(1) of the *City of Toronto Act (COTA)*, which is equivalent to section 223.22(1) of the *Municipal Act*. He stated:

[I]nformation provided pursuant to section 179(1) [of *COTA*] is subject to the confidentiality requirement in section 181(1) where this information is in the hands of the Auditor General or a person acting under his or her "instructions". But this is to be distinguished, in my view, from information in the hands of a staff member of the City that such a person receives in the course of his or her normal duties, which later becomes the subject of a request for information by the Auditor General. In my view, such information (as opposed to knowledge of the "matter" of the investigation or complaint) would *not* be caught by section 181(1) because it did not come to the staff member's knowledge "in the course of duties under" Part V of the *COTA* as the section requires.

Moreover, imposing the non-disclosure obligation on original information in the hands of such staff members would, in many instances, render them unable to perform their day-to-day functions to which original information relates. Where applicable, this analysis would also apply to staff of another institution under the *Act* that is compelled to provide information to the Auditor General under section 179(1), such as a local board or city-owned corporation.

Accordingly, I conclude that, in the hands of City staff (or staff of another institution under the *Act* compelled to provide information to the Auditor General under section 179(1), such as a local board or city-owned corporation), and who are not staff of the Auditor General, original information that remains in the hands of the staff member for the



purposes of his or her ordinary tasks would not be subject to section 181(1), even if a copy has been given to the Auditor General. Only information about the complaint or investigation being conducted by the Auditor General would be caught.

With respect to the nature of "duties" under Part V, I conclude that providing information when "instructed" to do so by the Auditor General would be a duty under Part V, but as already noted, if the information came to the knowledge of the staff member as part of his or her everyday work, and not in connection with Part V of the *COTA*, the information itself would not be caught by section 181(1) in the hands of the staff member. Only information about the Auditor General's investigation that was acquired by the staff member as a consequence of being instructed or asked to provide information to the Auditor General would be covered.

[29] In Order MO-2843, Senior Adjudicator Frank DeVries followed this approach and found that correspondence from the Toronto Community Housing Corporation to the Toronto Ombudsman, including attachments, was a record falling within the ambit of the confidentiality provision in section 173(1) of the *COTA*. Senior Adjudicator DeVries found that although the staff member who sent the information to the Ombudsman was not staff of the Ombudsman, he or she was compelled to provide the information to the Ombudsman and in so doing was acting under the instructions of the Ombudsman.

[30] In Reconsideration Order MO-2629-R, Senior Adjudicator John Higgins discussed the effect of section 181(2)(a) of the *COTA*, which is equivalent to section 223.22(2)(a) of the *Municipal Act*. For ease of reference, I reproduce section 223.22(2)(a) again here:

(2) Subject to subsection (3), the persons required to preserve secrecy under subsection (1) shall not communicate information to another person in respect of any matter described in subsection (1) except as may be required,

(a) in connection with the administration of this Part, including reports made by the Auditor General, or with any proceedings under this Part; or

[31] Senior Adjudicator Higgins stated:

Section 181(2)(a) provides an exception to the confidentiality clause for reports made by the Auditor General, but the exception is limited to "the administration of this Part" – a reference to Part V of *COTA*. That part outlines the functions of the [accountability officers]. An access request under the *Act* is not an activity conducted under Part V of *COTA* and there is no sound basis for arguing that it is. Accordingly, in my view, even if

the record is a report, the exception at section 181(2)(a) does not have the effect of making the report, in the hands of the Auditor General or those acting under his instruction, accessible under the *Act*. On the contrary, I conclude that section 181 would apply, and as a consequence, such a report could not be disclosed in response to a request under the *Act*..

*On the other hand, if a report has been provided to a City staff member who does not act under the Auditor General's instructions in that regard, it would be subject to an access request under the Act. As already noted, no such record has been found in this case. [emphasis added].*

[32] I agree with the reasoning in the above orders. In my view, the effect of the confidentiality provision found in section 223.22(1) of the *Municipal Act* is that records in the hands of the Auditor General, or anyone acting under his instructions, that came to their knowledge in the course of their duties under the *Municipal Act* fall within section 223.22(1). I also agree that the exception at section 223.22(2)(a) does not have the effect of making an Auditor General's report, in the hands of the Auditor General or those acting under this instructions, accessible under *MFIPPA*.

[33] However, records in the hands of city staff that such a person receives in the course of his or her normal duties, and not under the Auditor General's instructions, do not fall within section 223.22(1). In this latter scenario, section 223.22(2) is of no relevance because that provision only applies to the persons required to preserve secrecy under section 223.22(1).

[34] Applying this reasoning, I find that the records at issue in this appeal do not fall within section 223.22(1). The city solicitor provided the report and attachments to council. Nothing in the parties' representations or in the records leads me to conclude that the city solicitor or council were acting under the Auditor General's instructions in this regard. In fact, the city no longer had an Auditor General when the city solicitor prepared his report.

[35] I understand the city to argue that the attachments to the city solicitor's report are subject to section 223.22(1) because they are the confidential attachments to the Auditor General's report, which the Auditor General prepared in the course of his duties under the *Municipal Act*. However, as noted above, records in the hands of city staff in the course of their normal duties, and not under the Auditor General's instructions, are not subject to section 222.23(1). Since the Auditor General provided his report (including confidential attachments) to the city itself through council, which was not acting under the Auditor General's instructions, the report does not fall within section 223.22(1).

[36] In coming to my conclusion, I have considered the city's submission that council could be seen as acting "under the instructions" of the Auditor General when receiving

his report. The city did not elaborate on this argument. In my view, however, the city's interpretation stretches the phrase "under the instructions of" beyond its intended meaning in section 223.22(1). If I were to accept the city's submission, in many cases simply receiving any information from the Auditor General would be seen as acting under his "instructions", and therefore a person receiving information from the Auditor General would be required to preserve secrecy about the matter. Such an interpretation would significantly impair city staff's ability to carry on with their work without breaching section 223.22(1). In my view, council was acting in the course of its normal duties when it received the Auditor General's report, and was not acting under the Auditor General's "instructions". In any event, and as noted above, the records at issue in this appeal are in the form of attachments to the report of the city solicitor. Neither the city solicitor nor council were acting under the Auditor General's instructions when Report CM-15-27 was provided to council.

[37] In light of my finding under section 223.22(1) of the *Municipal Act*, section 223.22(2) is of no relevance. Subsection (2) provides that the persons required to preserve secrecy under subsection (1) shall not communicate information to another person in respect of any matter described in subsection (1) except as may be required in connection with the administration of Part V.1 of the *Municipal Act*, including reports made by the Auditor General. However, the city, which has possession of the report, is not in these circumstances a person required to preserve secrecy under subsection (1). Similarly, section 223.22(3), which prohibits a person required to preserve secrecy under subsection (1) from disclosing certain types of information, does not apply, because the city *per se*, as distinct from the office of the Auditor General within the city, is not a person required to preserve secrecy under section (1) with respect to the Auditor General's report provided to it.

[38] Given my findings, I do not need to make any finding about whether the approach taken by this office in previous orders such as Order MO-2843 is consistent with the *McCartney* decision relied on by the appellant. Arguably, *McCartney* sets out a more restrictive approach than the above-noted orders because the Master in *McCartney* does not appear to allow for the possibility that city staff, other than staff of the Auditor General, act under the instructions of an Auditor General in some circumstances, and are therefore subject to the secrecy provisions found in section 223.22(1) of the *Municipal Act*. As mentioned above, I have found that the records at issue in this appeal are in the hands of individuals with the city who were not acting under the instructions of the Auditor General. As a result, section 223.22(1) does not apply to them. My finding would be the same applying the analysis in *McCartney*.

[39] I conclude that section 223.22(1) of the *Municipal Act* does not apply to the records at issue. Since section 223.22(1) of the *Municipal Act* does not apply to the records, *MFIPPA* is the controlling statute for determining access to the information at issue.

**Issue B: Does the discretionary exemption at section 12 of *MFIPPA* apply to the records?**

[40] Section 12 of *MFIPPA* 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.

[41] 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***

[42] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. The city claims that solicitor-client communication privilege applies to the records at issue.

[43] 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>5</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>6</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>7</sup>

[44] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.<sup>8</sup>

[45] 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.<sup>9</sup> The privilege does not cover communications between a solicitor and a party on the other side of a transaction.<sup>10</sup>

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<sup>5</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>6</sup> Orders PO-2441, MO-2166 and MO-1925.

<sup>7</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

<sup>8</sup> *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

<sup>9</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

<sup>10</sup> *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

***Branch 2: statutory privilege***

[46] 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.

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

*City’s representations*

[48] The city submits that at its December 1, 2015 meeting, city council went into closed session to discuss litigation or potential litigation and to receive advice that is subject to solicitor client privilege. During that closed session, council received the city solicitor’s Confidential Report CM-15-27 concerning the legal implications and risks involved in the release of confidential attachments to the Auditor General’s report AG-13-09. At its meeting on March 17, 2014, council had specifically given the direction that such a report be prepared by the city solicitor.

[49] The city submits that when council subsequently rose from closed session, the related recommendation carried as part of the consent agenda. The City Council Closed Agenda for Public Distribution records the outcome as follows:

1. [named individual], City Solicitor submitting Report CM-15-27 concerning Confidential Documents

Recommendation

That Option 1 in section 5.0 of Report CM-15-27 be approved.

[50] The city submits that Confidential Report CM-15-27 from the city solicitor to city council was prepared pursuant to a council direction dated March 17, 2014 in which council sought legal advice from its legal counsel, the city solicitor. The city submits that the communications between the city solicitor and his client were expressly made in confidence.

*Appellant’s representations*

[51] The appellant submits that there is no doubt that legal advice was sought and given, but that whether the subject matter of the advice can be released to the public is a matter of discretion. The appellant submits that since the acquisition of the property in question is now complete and the building is occupied by city staff, there is no reason to keep the acquisition process confidential.

[52] The appellant submits, further, that since attachments 9 and 10 to Report AG-

13-09 deal with closed reports CM-12-32 and CM-13-29, and since these closed reports have since been released to the public, it makes sense that attachments 9 and 10 should now also be released to the public.

[53] The appellant submits that at the March 17, 2014 meeting of council, it was moved that the confidential attachments to Report AG-13-09 be released publicly, subject to compliance with *MFIPPA* including in relation to personal information, third party information, and solicitor-client privilege as may be applicable. That motion did not pass, but another motion was carried referring the issue of the release of the confidential attachments to the city solicitor for a written report on the legal implications and risks of releasing the confidential attachments.

[54] The appellant submits that the intention was clearly to have the confidential attachments to the Auditor General's Report AG-13-09 released to the public. He submits that the fact that the city solicitor chose to include several attachments to his Report CM-15-27 "muddies the waters" in that it was not necessary to include them with the solicitor's report.

*City's reply representations*

[55] The city submits that the privilege covers the entirety of the communication between solicitor and client. The city submits that the privilege belongs to the city council and that council has never waived the privilege. The records go to the heart of the privilege because they were created at the specific direction of the city council to seek and receive legal advice which is contained in Confidential Report CM-15-27. The city also submits that, contrary to the appellant's submission that the reason for the confidentiality claimed over the records no longer holds, solicitor client privilege does not expire.

*Appellant's sur reply representations*

[56] The appellant explains that the city retained an investigator to investigate the allegations contained in the Auditor General's Report AG-13-09. He submits that the city waived privilege over the attachments to the Auditor General's report when it shared them with the investigator.

[57] The appellant also submits that solicitor-client privilege cannot be claimed when the communication is itself criminal or the advice is sought to facilitate the commission of a crime or fraud. He submits that council's direction to obtain a legal opinion was illegal as its sole purpose was to continue to withhold records which would reveal that the actions of members of council and senior staff contravened various pieces of legislation. The appellant takes issue, in particular, with the process by which council retained the investigator to investigate the allegations contained in Report AG-13-09; alleged council interference in the investigator's investigation; and other issues surrounding the investigation.

*Analysis and findings*

[58] What the appellant seeks is a copy of a legal opinion prepared by the city solicitor at the request of council, presented in a closed meeting of council. I find that solicitor-client communication privilege applies to the record, as it constitutes a direct communication of a confidential nature between a solicitor and client made for the purpose of giving professional legal advice.

[59] The attachments form part of the communication from the solicitor to his client and are also protected by the privilege. In this regard, the nature of the access request and the location of the responsive record are important. Although the appellant, in his representations, has focused on particular attachments to the legal opinion (which consist of certain confidential attachments to the Auditor General's Report AG-13-09), his access request was for report CM-15-27; that is, the legal opinion itself. The responsive record is the legal opinion including attachments.

[60] Previous orders of this office addressing the applicability of section 12 of *MFIPPA* to a Crown brief are instructive in this regard. Although these orders address litigation privilege and not solicitor-client communication privilege, they demonstrate that whether section 12 applies to a given record may depend on the nature of the request and the location of the responsive record. An exemption may apply to a document in one location, but not to a copy in another location.

[61] In Order PO-2733, the issue was whether the contents of a Crown brief were exempt from disclosure pursuant to section 19 of the *Freedom of Information and Protection of Privacy Act*, the provincial equivalent to section 12 of *MFIPPA*. Senior Adjudicator John Higgins held that the contents of a Crown brief will, in general, qualify as having been prepared by or for Crown counsel for use in litigation (hence being subject to Branch 2 litigation privilege). However, Adjudicator Higgins found that Branch 2 litigation privilege does not reach back to the original records in the hands of other parties, such as the police, solely on the basis that they have been copied for inclusion in the Crown brief.

[62] Similar considerations apply in the context of this appeal. The city solicitor's legal opinion, including attachments thereto, were communicated to the city. Although the appellant claims that the inclusion of the attachments was not necessary, I note that the attachments are the very documents in respect of which the solicitor provided his opinion on disclosure. I find that the legal opinion, including attachments, in the hands of either the solicitor or his clients is subject to solicitor-client communication privilege.

[63] On the other hand, it is arguable that the confidential attachments to the Auditor General's report would not be exempt under section 12 solely on the basis that they were eventually included in the city solicitor's legal opinion. In this case, arguably, solicitor-client communication privilege would not reach back to these attachments in the city's files containing the Auditor General's report. However, that is not what the

appellant has requested. He has requested the legal opinion.<sup>11</sup>

[64] I conclude that the records at issue are exempt from disclosure under both the common law and statutory solicitor-client communication privileges.

[65] I also reject the appellant's argument that the privilege no longer applies because the land purchase is complete. Unlike common law litigation privilege, which generally comes to an end with the termination of litigation, solicitor-client communication privilege does not expire.

[66] Finally, I do not accept the appellant's argument that the legal opinion itself was criminal or that the advice was sought to facilitate the commission of a crime or fraud. I have reviewed the appellant's allegations, many of which do not have a clear connection to the legal opinion at issue. In any event, based on the evidence before me, I cannot conclude that the city solicitor or his client acted without proper regard for the rule of law in the circumstances surrounding the provision of the legal opinion at issue.<sup>12</sup>

#### *Waiver*

[67] In his sur-reply representations, the appellant argued that the city waived privilege over the records when it shared them with the investigator.

[68] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.<sup>13</sup>

[69] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.<sup>14</sup>

[70] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.<sup>15</sup> However, waiver may not apply where the record is disclosed to another

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<sup>11</sup> I also note as an aside that if the city's solicitor had *not* included the attachments with his opinion, the attachments would not have been identified as responsive to the appellant's access request.

<sup>12</sup> For a discussion of the "crime/fraud" exception to solicitor-client privilege, see for example *1784049 Ontario Limited (Alpha Care Studio 45) v. Toronto (City)*, 2010 ONSC 1204 (CanLII).

<sup>13</sup> *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

<sup>14</sup> *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

<sup>15</sup> J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).



party that has a common interest with the disclosing party.<sup>16</sup>

[71] There is no evidence before me that the city shared the legal opinion at issue with the investigator, and I do not take the appellant to be suggesting that it was. I note that the investigator delivered his final report in 2013 and the legal opinion was prepared in 2015. Rather, the appellant appears to be suggesting that the city waived any privilege over the attachments when it provided them to the investigator.

[72] I do not accept this submission. For waiver to have taken place, the holder of the privilege must know of the existence of the privilege and voluntarily demonstrate an intention to waive it. In this case, the investigator's report predates the provision of the legal opinion. The city cannot have waived a privilege that did not exist at the time.

[73] Moreover, the privilege over the records at issue arises because they all form part of the legal opinion of the city's solicitor. Providing the records in the hands of the city, outside of the legal opinion, to a third party would not constitute waiver of privilege over the documents as attachments to the legal opinion.<sup>17</sup>

[74] I conclude that the exemption at section 12 of *MFIPPA* applies to the records at issue. That being the case, I do not need to consider the city's claimed application of the exemptions at sections 6(1)(b), 7 and 14 to some of the records.

[75] The appellant has claimed the application of the public interest override found in section 16 of the *Act*, which states as follows:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[76] Section 12 is not listed as one of the exemptions that may be overridden by a compelling public interest in disclosure. However, a public interest in disclosure can be a relevant factor for an institution to take into consideration in exercising its discretion pursuant to section 12. This is discussed under Issue C below.

**Issue C: Did the city exercise its discretion under section 12 of *MFIPPA*? If so, should I uphold the city's 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. On appeal, the Commissioner may determine whether the institution failed to do so.

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<sup>16</sup> *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

<sup>17</sup> Given my finding, I do not need to consider whether for the purposes of waiver, the investigator was a third party or an agent of the city.

[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
- 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.<sup>18</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>19</sup>

### ***Relevant considerations***

[80] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>20</sup>

- the purposes of the *Act*, including the principles that
  - information should be available to the public
  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution

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<sup>18</sup> Order MO-1573.

<sup>19</sup> Section 43(2).

<sup>20</sup> Orders P-344 and MO-1573.

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

*City's representations*

[81] The city submits that it took into account relevant considerations, including

- the appellant is not seeking access to his own personal information
- other individuals' privacy interests should be protected
- there is no sympathetic or compelling need for the appellant to receive the information
- there is no known relationship between the appellant and any of the individuals affected
- whether disclosure of the records would increase public confidence in the city
- the highly confidential nature of the record, which was prepared at the direction of council, consists of solicitor-client privileged communications, and was communicated in a closed session of council.

[82] The city submits, further, that it considered the Auditor General's report and made a number of the attachments to the report public while maintaining confidentiality over the attachments identified as confidential by the Auditor General. It notes that it has also made public a number of closed reports previously treated as confidential.

[83] The city also submits that in addition to its obligations under the *Act*, it remains committed to the sanctity of solicitor-client privilege.

[84] The city submits that regardless of what public interest there might be in disclosure, there is a significant public interest in not disclosing the records. The city cites the privacy interests of third parties, and the need for council to receive free and frank advice from staff.

*Appellant's representations*

[85] The appellant submits that the record at issue is centred around his request to release confidential attachments 8, 9 and 10 of the Auditor General's report. He submits that attachments 9 and 10 consist of the Auditor General's comments on Confidential Reports CM-12-32 and CM-13-29. He submits that since these reports themselves have now been released to the public, there is no reason why the Auditor General's

comments on those reports should not be made public. He submits that the city would suffer no adverse effect from disclosure of Report CM-15-27 and attachments 8, 9 and 10.

[86] The appellant submits that the city has exercised its discretion in bad faith and for an improper reason which was to protect the reputation of the individual whom council retained to investigate the allegations contained in the Auditor General's report, as well as the reputation of members of council. He also submits that the city took into account irrelevant considerations including the fact that the attachments to the Auditor General's report were labelled confidential by the Auditor General. The appellant implies that this fact is no longer relevant now that the land acquisition is complete. He also submits that the city has ignored relevant considerations including the fact that the transaction closed in 2013, that all of the reports on the land acquisition have been released to the public, and that all of the significant issues and allegations found in the Auditor General's report have been discussed in the investigator's public report which was debated in a public session of council.

[87] The appellant has also made lengthy arguments to the effect that there is a public interest in disclosure of the records. He states that disclosure of the attachments will clear up the issue as to whether or not the city received value for money in the acquisition of the property in question, and will expose the efforts of members of council to keep the process from public scrutiny.

*City's reply*

[88] The city submits that, contrary to the appellant's suggestion, Confidential Report CM-15-27 was not centred on the appellant's own request, but rather arose out of the March 14, 2014 council direction.

*Appellant's sur reply*

[89] The appellant reiterates that the city exercised its discretion in bad faith and for an improper purpose, that it took into account irrelevant considerations, and that it failed to take into account relevant considerations.

*Analysis and findings*

[90] Having reviewed the parties' representations, I am satisfied that the city exercised its discretion in withholding the records at issue pursuant to section 12. The city was clearly aware that the section 12 exemption is discretionary and that it could choose to disclose the records despite the fact that it could withhold them under section 12.

[91] I am also satisfied that there was nothing improper about the city's exercise of discretion and that I should uphold it. The city considered relevant factors including the importance of maintaining solicitor-client privilege. The city also considered whether

there was a sympathetic or compelling need to disclose the record, and whether its release would foster public confidence in the city.

[92] I have considered the appellant's argument that the city exercised its discretion for an improper purpose, to protect the investigator. However, there is no evidence before me which leads me to conclude that this is the case. I am also satisfied that the city did not fail to take into account the fact that the land acquisition has been completed. The city states that it took into account the extent to which disclosure would increase confidence in its operations. In my view, this would include a consideration of the fact that the land acquisition is completed, to the extent that this is a relevant factor.

[93] I am also satisfied from reviewing the city's representations that in exercising its discretion, the city considered whether there was a public interest in disclosure.

[94] This office cannot substitute its discretion for that of the city. I am satisfied that the city did not exercise its discretion in bad faith or for an improper purpose, and that it did not take into account irrelevant considerations or fail to take into account relevant ones. I uphold the city's exercise of discretion in withholding the records pursuant to section 12 of the *Act*.

**ORDER:**

1. I do not uphold the city's decision with respect to the applicability of section 223.22 of the *Municipal Act* to the records at issue.
2. I uphold the city's decision to withhold the records at issue pursuant to section 12 of *MFIPPA*.

Original Signed by: \_\_\_\_\_  
Gillian Shaw  
Adjudicator

\_\_\_\_\_ November 22, 2017