

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3538

Appeal MA16-308

Town of Collingwood

December 13, 2017

Summary: The Town of Collingwood received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to information pertaining to the sale of the town's shareholding interest in a utility. The town identified responsive records and granted partial access to them, relying on sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 11(c), (d) and (e) (economic and other interests) and 12 (solicitor-client privilege) to deny access to the portions it withheld. In this order the Adjudicator finds that the information at issue qualifies for exemption under 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, section 12.

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

OVERVIEW:

[1] The Town of Collingwood (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to the following information:

Emails to and from the clerk's and/or CAO's office including [two town employees], July 25 - August 3 inclusive, with regard to "the direction provided to [named external legal counsel] with respect to his exploration

of our potential share sale” including responses to/from the CAO, council, mayor and deputy mayor to this request, and including correspondence about said responses not sent to general circulation.

[2] The town located responsive records and granted partial access to them, relying on sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 11(c), (d) and (e) (economic and other interests) and 12 (solicitor-client privilege) to deny access to the portion it withheld. Accompanying the decision letter was an index of records describing the records and the exemptions claimed.

[3] The requester, now appellant, appealed the town’s access decision.

[4] During mediation, the appellant took the position that it was in the public interest that the withheld information be disclosed. Accordingly, the possible application of the public interest override at section 16 of the *Act* was added as an issue in the appeal.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[6] During my inquiry into the appeal, I sought and received representations from the town and the appellant. Representations were shared in accordance with section 7 of the IPC’s *Code of Procedure and Practice Direction 7*.

[7] In this order I find that the information at issue qualifies for exemption under section 12 and dismiss the appeal.

RECORDS:

[8] At issue in this appeal are the withheld portions of email correspondence listed as Records 6, 7, 8 and 9 in the town’s index of records.

ISSUES:

- A. Does the discretionary exemption at section 12 apply to the information at issue?
- B. Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the discretionary exemption at section 12 apply to the information at issue?

[9] 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.

[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.

Branch 1: common law privilege

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

Solicitor-client communication privilege

[12] 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.¹ 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

[13] 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.⁴

[14] 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.⁵

[15] 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

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

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

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

⁴ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁵ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

finding of an implied or objective intention to waive it.⁶

[16] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.⁷ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.⁸

The town's representations

[17] The town explains in its representations that it holds a 50% interest in a utility and "[f]or a number of reasons, the town investigated its options and entered into a process designed to sell some or all of its shares in the utility."

[18] The town explains that the information at issue in this appeal consists of parts of three emails. It states that two of the emails are from two named town councillors and that the withheld portions of these two emails contain the opinion of each councillor regarding terms and conditions that should be included in the town's request for proposals for the transaction (the RFP). The town submits that:

... The RFP establishes the terms and conditions that need to be met for the transaction to proceed. The intended recipient of the two emails was the town's external legal counsel, although the emails were relayed to counsel through the town's staff. More specifically, the town's CAO [Chief Administrative Officer] was charged with collecting the input of councillors and communicating it to legal counsel for use in drafting the RFP. Legal counsel's role included ensuring that the RFP, (including any provisions recommended by councillors), complied with all applicable law. The councillors' emails had two purposes: to communicate terms and conditions that the councillors, as officers of the town, were recommending; and to obtain legal advice about whether those terms and conditions could be included either with or without some revision.

The third email is external counsel's legal advice to [named councillor] regarding the terms and conditions she recommended.

[19] In its reply representations the town submitted that at the time of its initial representations a proposal had not been accepted, but that changed when the town accepted the negotiated proposal of a corporation which required the issuance of a shot gun notice to the other 50% shareholder. However, the town maintained its position and submitted that:

⁶ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

⁷ 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.).

⁸ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

... The information redacted [consisted of] privileged communications gathered for the solicitor about the RFP document that included "positions, criteria, instruction" to be applied in the RFP negotiations being carried on, on behalf of the institution. ...

The appellant's representations

[20] The appellant's representations both in response to the town's initial submissions and in sur-reply do not specifically address the potential application of the section 12 exemption nor address the legal tests. Instead, his representations focus on media coverage of the matter, that a corporation negotiating for the purchase of the shares had proposed a services arrangement to operate the town's water and waste water system, that as of the date of his sur-reply representations the entirety of the utility was being sold to a corporation and that concerns were raised regarding negotiations not following proper procedure. Finally, the appellant submitted that it was in the public interest that the requested information be disclosed.

Analysis and finding

[21] The communications in the emails at issue arose as a result of a request by the town CAO for councillors to suggest certain terms to be forwarded to the town's external counsel for review and possible inclusion in the RFP materials. The withheld portion of Record 6 is part of an email containing items to be considered sent by a town councillor to the CAO who then forwarded it to external counsel. The withheld portion of Record 7 consists of a duplicate of the portion withheld from Record 6 as well as part of an email sent from external counsel to the town councillor who sent the email in Record 6. The withheld portion of Record 8 is part of an email containing items to be considered from another town councillor sent to the CAO who forwarded it to external counsel. Record 9 is a duplicate of record 8 with a confirmation that it was sent to external counsel.

[22] I find that the withheld information at issue falls within the scope of section 12 because disclosure of this information would reveal 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 and aimed at keeping both informed so that advice can be sought and given. I am satisfied that no waiver of privilege has occurred with respect to this information. Accordingly, I find that this information qualifies for exemption under section 12 of the *Act*. As I have found that section 12 applies to the information at issue it is not necessary for me to consider whether the other exemptions claimed by the town may also apply.

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

[23] 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.

[24] 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.

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

The town's representations

[26] The town submits that it carefully reviewed the responsive records and disclosed most of them in their entirety withholding only a portion of the emails at issue in this appeal.

[27] The town submits in reply that it:

... is familiar with its obligations under *MFIPPA* and with the IPC's interpretation of the scope of the various exemptions it has claimed. It had a second opportunity to review the application of the exemptions it has relied upon in the course of the IPC mediation. The town has had yet another opportunity to consider its exercise of discretion in preparing these representations and confirms that it has not done so in bad faith or for an improper purpose, has not relied on irrelevant considerations nor failed to take into account relevant considerations including the progress of the RFP process since the request was originally submitted.

[28] The appellant submits in sur-reply that:

... the utility is still owned by the public and it is in the public interest to know what was asked of potential buyers. In three years, neither the council nor the administration have once stated publicly why they wanted to sell our public asset, not what they wanted to get from such a sale. There is simply no precedent for such secrecy.

⁹ Order MO-1573.

¹⁰ Section 43(2).

[29] The appellant submits that there was a single in-camera meeting where the RFP's were opened and:

... All the rest of the discussion was held in public, and covered in great detail by the local media. This term there have been at least 37 in-camera meetings about the hydro sale, possibly 40 or more ... Yet there has not been a single public discussion as to why this council and administration wanted to sell the utility. There is nothing in the shareholders' agreement to justify such secrecy.

...

... In January, 2017, the municipality itself issued a press release stating it had entered negotiations with the Alberta-based company [named corporation], which also put forward a proposal to operate the town's water and waste-water system.

At no time prior to that, did the town announce publicly that our public water and wastewater services were being discussed for privatization. Part of my concern is how and why the for-profit [named corporation] would make an offer for control of our water utility when it had not been mentioned in public before. Unless, of course, it was included in the RFP and the town was again deceiving the public as to its intentions. ...

...

For more than a year, the town has hedged and dissembled and blocked access to records about the sale of a publicly-owned asset and retreated behind closed doors for every discussion. The culture of secrecy in Collingwood's town hall is injurious to the public interest and betrays the public's trust that its elected officials and its taxpayer-funded bureaucracy will act openly and transparently in the best interests of the residents and their municipality.

For the past three years, the public has been conned and deceived by these actions and this secrecy. We deserve answers. Many residents are now calling for a full judicial inquiry and even a police investigation - of this process because at no time has any public input been allowed.

Please do not aid the town in their culture of secrecy and misinformation. The public has the right to know what is happening with our own assets and our utilities.

Analysis and finding

[30] An institution's exercise of discretion must be made in full appreciation of the

facts of the case, and upon proper application of the applicable principles of law. It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.

[31] I am satisfied overall that the town properly exercised its discretion under section 12 of the *Act*. It should be noted that the Supreme Court of Canada has stressed the categorical nature of the privilege when discussing the exercise of discretion in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*¹¹.

[32] I find that there is insufficient evidence before me to establish that the town exercised its discretion in bad faith, or for an improper purpose, or took into account irrelevant considerations or that the town was withholding the information for a collateral or improper purpose. I note that a great deal of information was disclosed to the appellant and only a limited portion of the emails at issue which contained suggestions from certain councillors as to what they believed should be included in the RFP documents that were forwarded to external counsel, and a response from external counsel, being withheld.

[33] With respect to other relevant considerations, I am satisfied that the town was aware of the reason for the request, why the appellant wished to obtain the information, and the appellant's arguments as to why it should disclose the information. I am satisfied that in proceeding as it did, and based on all the circumstances, the town considered why the appellant sought access to the information, whether the appellant had a sympathetic or compelling need to receive the information as well as the nature of the information. In addition, the town considered whether the appellant was an individual or an organization. In all the circumstances and for the reasons set out above, I uphold the town's exercise of discretion.

[34] Although I have considered the arguments of the appellant that disclosing the information would be in the public interest and that the town should be open and transparent in the context of its exercise of discretion, I note that in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* the Supreme Court of Canada held that the legislature's decision not to make documents found to be exempt under section 19 of the *Freedom of Information and Protection of Privacy Act (FIPPA)* subject to the section 23 public interest override does not violate the right to free expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*.¹² As section 12 of *MFIPPA* is analogous to section 19 of *FIPPA*, the same analysis applies and the public interest override at section 16 of *MFIPPA* does not apply to section 12.

¹¹ 2010 SCC 23, [2010] 1 S.C.R. 815, a case dealing with the provincial equivalent to section 12.

¹² Part 1 of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

ORDER:

I uphold the town's decision and dismiss the appeal.

Original Signed by: _____
Steven Faughnan
Adjudicator

_____ December 13, 2017