

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3702

Appeal MA17-379

City of Vaughan

November 30, 2018

Summary: The city of Vaughan received a request for information under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to charges laid under the municipal building code regarding a specific property. The city identified responsive records and granted partial access to them, relying on section 38(a) (discretion to refuse requester's own information), in conjunction with section 12 (solicitor-client privilege) to withhold five records. In this order, the adjudicator finds that the information at issue qualifies for exemption under section 38(a) in conjunction with section 12, and upholds the city's exercise of discretion to deny access. She dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 12 and 38(a)

Orders Considered: Orders MO-2433, MO-2929, and PO-2719.

Cases Considered: *S & K Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.); *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

OVERVIEW:

[1] The City of Vaughan (the city) received a request for information under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for records related to charges laid under the municipal *Building Code* in 1996 against the appellant regarding property located at a specific address. The individual specifically sought access to the following:

- i. information relating to municipal charges laid against him under the *Building Code Act* in 1996 for failing to comply with orders numbered [six specified order numbers] and issued in relation to a property (the property) located within the city; and,
- ii. all building permits issued with respect to the property.

[2] The city identified 103 records as responsive to the request. It initially issued a decision denying access to all of the records pursuant to section 52(2.1), stating that the *Act* does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

[3] The requester, now the appellant, appealed the city's decision.

[4] The city then issued a revised decision, in which it decided to grant partial access to the records. It withheld some records under section 12 of the *Act*, claiming that they were solicitor-client privileged.

[5] After the city disclosed the records pursuant to its revised decision, the appellant appealed, challenging the city's claim that the withheld documents were solicitor-client privileged.

[6] During mediation, the city issued another revised decision, releasing additional records to the appellant and providing a revised document index highlighting the remaining records under appeal. By this time, the city had disclosed all but five of the responsive records to the appellant.

[7] When mediation could not resolve the remaining issues, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator conducts a written inquiry. In my review of the records, it appeared that the records contained the appellant's personal information. As a result, I sought representations from the parties on the application of section 38(a), in conjunction with section 12, and the parties made representations on this issue. Because the appellant raised the issue of waiver in his representations, I invited the city to submit reply representations on the appellant's assertion that it had waived privilege over the records.

[8] For the reasons that follow, I find that the records at issue contain privileged solicitor-client communications that qualify for exemption under section 38(a), in conjunction with section 12, and I dismiss the appeal.

RECORDS:

[9] There are five records that remain at issue that the city numbered as records 17, 20, 21, 22 and 78. These include three internal memoranda, handwritten notes and a "prosecutor's notes form."

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the information at issue?
- C. Did the city exercise its discretion under section 12 and if so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[10] In order to determine which sections of the *Act* may apply, it is necessary to first decide whether the record contains "personal information" and, if so, whose. The relevant portions of section 2(1) define "personal information" as recorded information about an individual, including:

(d) the address, telephone number, symbol or other particular assigned to the individual,

...

(h) the individual's name if it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal information about the individual,

[11] The city denies that the records at issue contain the appellant's personal information. It says that the specified property consists of commercial buildings and not a private residence, so that the inclusion of this address in records does not constitute the appellant's personal information.

[12] The city concedes that the information in the records identifies the appellant, but says it does so in a professional capacity, as a presumed representative for the named investment company and commercial address. The city's view is that the information therefore does not reveal something of a personal nature about the appellant. The city relies on the exception in section 2(2.1), which states that personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[13] The city also relies on Order M-175, in which the adjudicator found that information about a property owned by an individual does not itself constitute personal information about that individual because it is information about the property, not the individual.

[14] The appellant submits that the information contained in the subject records concerns *Building Code* charges laid against him in his personal capacity and that the records reveal information related to his municipal offence record. In this regard, I agree with the appellant's submissions.

[15] As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.¹ However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.²

[16] I have reviewed the records and find that they contain the appellant's personal information. Specifically, I find that the records contain the appellant's name, the property address, and information about the city's prosecution of the appellant under the *Building Code*. As a result, I am satisfied that the records contain the appellant's personal information as defined in paragraphs (d) and (h) of the definition of "personal information" in section 2(1) of the *Act*.

Issue B: Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the information at issue?

[17] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38, however, provides a number of exemptions from this right.

[18] In this case, the city relies on the exemption in section 38(a), in conjunction with the exemption at section 12, to withhold the records in issue. Section 38(a) applies where the record contains the personal information of the appellant, as I have found is the case in this appeal.

[19] Section 38(a) recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.³ It states:

A head may refuse to disclose to the individual to whom the information relates personal information,

(a) if section 6, 7, 8, 8.1, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[20] Section 12 of the *Act* allows an institution to refuse to disclose a record that is subject to solicitor-client privilege.

[21] Section 12 reads:

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

² Orders P-1409, R-980015, PO-2225 and MO-2344.

³ Order M-352.

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.

[22] The section 12 exemption is discretionary, allowing an institution to disclose information despite the fact that it could withhold it.

[23] 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.

[24] At common law, solicitor-client privilege encompasses two types of privilege: solicitor-client communication privilege and litigation privilege.

[25] 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.

Solicitor-client communication privilege

[26] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.⁴ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.⁵ 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.⁶

[27] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating, or giving legal advice.⁷

[28] 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.⁸ Solicitor-client communication is protected in recognition of the important public interest in ensuring that a client may confide in his or her lawyer on a legal matter without reservation.⁹

⁴ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁵ Orders PO-2441, MO-2166 and MO-1925.

⁶ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

⁷ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁸ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁹ Order P-1551 at page 5.

Litigation privilege

[29] 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 for trial.¹⁰ Litigation privilege protects a lawyer’s work product and covers material going beyond solicitor-client communications.¹¹ 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.¹²

Representations

[30] The city submits that the records are subject to both branches of solicitor-client communication privilege because:

- they contain both direct and indirect communications between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice; and
- they were prepared either directly or indirectly for use in giving or seeking legal advice, contain written communications that are of a confidential nature, and were communications between city staff and a solicitor related to the seeking, formulating and giving of legal advice.

[31] The city submits that the records in dispute are very specific in their intent, meant to serve as solicitor-client communication and/or advice. The city submits that some of the records, such as Records 20 and 21, contain a legal opinion prepared by counsel and shared between city staff to give direction on legal action.

[32] The appellant is currently facing charges relating to the same property. He says that the records should be disclosed to prevent the city from re-litigating the 1996 charges, which would thereby prevent an abuse of process. The appellant submits that the records are not privileged and he claims that even if litigation privilege once applied, it ended when any related prosecution of him ended in or around 1996.

[33] The appellant also argues that if the records are subject to solicitor-client communication privilege, the city waived privilege over the records in 1996 when it discussed a withdrawal of charges against him with his lawyer at that time. The appellant submits that the records contain information regarding the withdrawal of charges against him in 1996 that must have been communicated to his then-lawyer, thereby waiving privilege. He has included with his representations a short letter from 1996 (the 1996 letter) in which his lawyer confirmed the city’s advice at that time that

¹⁰ *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).

¹¹ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

¹² *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

certain charges against the appellant would be withdrawn. He argues that from the letter, it can be inferred that privilege "may" or "must have been" waived.

[34] The city submits that it treated the records confidentially at all times and did not waive privilege over them, either implicitly or explicitly. The city also submits that it is not clear from the 1996 letter that it relates to the records at issue, as some of the records are from 1995 and 1998.

Analysis and findings

[35] In order for me to find that a record is subject to common law solicitor-client communication privilege, I must be satisfied that the record is a written or oral communication of a confidential nature between a client and a legal advisor that is directly related to seeking, formulating, or giving advice.¹³

[36] The records date back to 1995 and are more particularly described as follows:

- Record 17 is a September 1995 internal memorandum to the city's solicitor from a city employee;
- Record 20 is a handwritten note from July 1998 documenting a discussion between the city's solicitor and a city employee;
- Record 21 is an August 1998 internal memorandum regarding legal action relating to the property;
- Record 22 is an undated prosecutor's notes form; and,
- Record 78 is a July 26, 1996 internal memorandum from the city's solicitor to a councillor.

[37] From my review of the records, all of which date back to the years surrounding the past prosecution, I am satisfied that their disclosure would reveal the nature of legal advice sought and received by city staff from the city's solicitor about the appellant's *Building Code* matters. Based on their content, and for the reasons outlined below, I am satisfied that the records were prepared by or for counsel employed or retained by the city for use in giving or seeking legal advice, contain written communications that are of a confidential nature, and reflect communication between city staff and/or its agents and the city's solicitor related to the seeking, formulating or giving of legal advice.

[38] Records 17, 21 and 78 are internal memoranda. I find that they contain information passed between a client and lawyer aimed at keeping both informed so that advice may be sought and given.

[39] Record 20 is an internal, handwritten document that records a discussion with

¹³ *Descoteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

legal counsel as well as the advice received. I find that this is clearly a solicitor-client privileged communication that records legal advice received during a conversation between a solicitor and client.

[40] Record 22 is a form that is filled out by hand and contains a prosecutor's notes. In *Susan Hosiery Ltd. v. Minister of National Revenue*, the court held that solicitor-client communication privilege may also apply to a legal advisor's working papers directly related to seeking, formulating or giving legal advice. From my review of the note, I am satisfied that its content reveals the formulation of legal advice by the city's prosecutor. Here, I observe that the court in *Balabel v. Air India* held that legal advice is not confined to telling a client the law, but that "it must include advice as to what should prudently be done in the relevant context."¹⁴

[41] Additionally, past orders of this office have held that records need only constitute part of the "continuum of communications" between counsel and client for the purpose of keeping both parties informed so that advice may be sought and received, to be covered by the solicitor-client privilege.¹⁵

[42] Having reviewed the records, I find that they clearly fall within the continuum of communications between lawyer and client because they all contain legal advice or strategy, even where not expressly marked as confidential or privileged. As I find that all of the records relate directly to the formulation, discussion or exchange of legal advice, these records constitute common law solicitor-client privileged communications under Branch 1 of section 12.¹⁶ Given my finding, it is not necessary for me to decide whether the records are also exempt under common-law litigation privilege, or the statutory or litigation privileges.

[43] I will continue by reviewing the appellant's waiver arguments.

Loss of privilege: waiver

[44] Solicitor-client privilege may be waived at common law. 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.¹⁷

[45] 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.¹⁸

[46] Although disclosure to outsiders of privileged information generally constitutes

¹⁴ [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

¹⁵ Orders MO-116, MO-3535, MO-1938.

¹⁶ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

¹⁷ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)

¹⁸ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

waiver of privilege,¹⁹ waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.²⁰

[47] The intention to waive privilege need not be express. Waiver may be implied, and implied waiver does not turn on the subjective intention of the disclosing party.²¹ In *S & K Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, the decision setting out the common law test for waiver of privilege, the court recognized that “waiver may also occur in the absence of an intention to waive, where fairness and consistency so require.”²² The court referred to the proposition that:

... double elements are predicate in every waiver – implied intention and the element of fairness and consistency. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to wave the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived.²³

[48] The 1996 letter provided to me by the appellant confirms only that the city agreed to withdraw certain charges against him at that time. Most of the records at issue in this appeal, however, are not dated in 1996. Record 22 is undated, while records 17, 20 and 21 are dated in 1995 and 1998, leading me to conclude that they do not necessarily relate to the charges discussed in the 1996 letter.

[49] In any event, I do not find that this letter referring to withdrawal of certain charges against the appellant provides sufficient evidence to support a finding of implicit or explicit waiver of solicitor-client privilege over the city’s communications with its legal counsel. Counsel discuss ongoing matters with opposing counsel as a matter of course, and, in my view, the 1996 letter confirms only that counsel had a discussion to withdraw charges in 1996. It does not alter my conclusion that the records at issue are confidential; nor does it support a finding that the city implicitly waived privilege over its solicitor-client communications when it told the appellant’s then-lawyer that it would withdraw certain charges. The records at issue are very specific in their content, as internal documents meant to convey solicitor-client communication and/or advice.

[50] Respecting the appellant’s fairness argument, I note that although he argues that the records should be disclosed to prevent an abuse of process in re-litigating charges from 1996, he goes on to concede that the 1996 charges are distinct from the current charges against him.

[51] As a result, I find that the records at issue are subject to solicitor-client communication privilege under the first branch of section 12. I find that the city did not

¹⁹ 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.).

²⁰ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

²¹ *Peach v. Nova Scotia (Transportation and Infrastructure Renewal)*, 2010 NSSC 91, at para. 21.

²² (1983), 45 B.C.L.R. 218 (S.C.). Assistant Commissioner Sherry Liang affirmed the relevance of this principle in the context of reviewing section 12 of the *Act* in Order MO-2929.

²³ Set out in *Wigmore on Evidence* and cited in *S & K Processors Ltd.*, *supra*.

waive privilege in them by communicating its intention to withdraw certain charges to the appellant's then-lawyer. Therefore, subject to my review of the city's exercise of discretion, below, I find that the records are exempt from disclosure under section 38(a) in conjunction with section 12 of the *Act*.

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

[52] 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.

[53] 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.

[54] While this office may send the matter back to the institution for an exercise of discretion based on proper considerations,²⁴ it may not, however, substitute its own discretion for that of the institution.²⁵

Relevant considerations

[55] Relevant considerations may include, but are not limited to, those listed below:²⁶

- the purposes of the *Act*, including the principles that information should be available to the public
- exemptions from the right of access should be limited and specific
- the wording of the exemption and the interests it seeks to protect
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- whether disclosure will increase public confidence in the operation of the institution

²⁴ Order MO-1573.

²⁵ Section 43(2).

²⁶ 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

[56] In denying access to the records, I find that the city properly exercised its discretion pursuant to section 38(a) read in conjunction with section 12.

[57] In its representations, the city set out a list of the factors it considered in withholding the records. The city submitted that it considered the need to be transparent and to release as many records as possible. The city also wrote that, although it initially decided to withhold the records,²⁷ it re-exercised its discretion and disclosed all but a few.

[58] The appellant submits that the city failed to exercise its discretion to disclose the records despite any alleged solicitor-client privilege. In the alternative, the appellant submits that the city erred in its discretion by failing to take into account relevant considerations such as the fact that the information related to municipal charges against the appellant and that he should have a right of access to his own personal information, and that the appellant needs the information to respond to current charges against him.

[59] I find that the city took into account relevant considerations, including that the appellant was seeking his own personal information, and the nature and age of the information. I am also mindful that ultimately, the exemption relied on by the city was applied to very few of the records, was limited in scope, and that the five withheld records contain minimal personal information about the appellant.

[60] In withholding only five of 103 records, I am satisfied that the city considered the need to be transparent and the right of the appellant to a transparent process, and balanced those considerations with its own right to confide in its lawyer and discuss legal issues without reservation. I find that the city did not act in bad faith or for an improper purpose. I therefore uphold the city's exercise of discretion to withhold the remaining five records under section 38(a) read with section 12 of the *Act*.

ORDER:

I uphold the city's decision to deny access to the five records and dismiss the appeal.

Original Signed by: _____

Jessica Kowalski
Adjudicator

November 30, 2018

²⁷ On the basis of section 52(2.1).