

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3725

Appeal MA15-384

City of Greater Sudbury

January 28, 2019

Summary: The appellants submitted a request for access to records pertaining to themselves and/or a specified address. The City of Greater Sudbury (the city) granted the request in part. Access to certain information was resolved at mediation and the city relied on section 12 (solicitor-client information) of the *Municipal Freedom of Information and Protection of Privacy Act*, either alone, or in conjunction with section 38(a) (discretion to refuse requester's own information) to deny access to the information remaining at issue in the appeal. In this order, the adjudicator upholds the decision of the city that the information at issue is subject to the solicitor-client privilege at section 12 and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, as amended, sections 12 and 38(a).

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

OVERVIEW:

[1] The appellants submitted a request to the City of Greater Sudbury (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to the following information:

...any files/documentation/emails/internal memos/log books, etc. related to [the appellants] and/or [specified address] from January 1, 2014 to present.

We are looking for everything pertaining to Planning Department, Building Department, Financial Department, and the Mayor's Office.

[2] The city granted partial access to the responsive records with severances pursuant to sections 12 (solicitor-client privilege) and 14(1) (personal privacy) of the *Act*. The city subsequently granted access to additional records following third party notification. With the decision, the city included an index of records containing a description of the responsive records and exemptions claimed where records were withheld in full or in part.

[3] The appellants filed an appeal of the decision to deny access to the withheld information.

[4] During mediation, the appellants agreed not to pursue access to information that the city relied on section 14(1) of the *Act* to withhold.

[5] The appeal proceeded to the adjudication stage of the appeal process, where Adjudicator John Higgins commenced an inquiry under the *Act*. Adjudicator Higgins commenced his inquiry by seeking representations from the city on the facts and issues set out in a Notice of Inquiry. The city provided responding representations, with an accompanying affidavit. Adjudicator Higgins then sent a supplementary Notice of Inquiry to the city for two reasons:

(1) to clarify the city's representations concerning section 12 of the *Act*; and

(2) as it appears that the records may contain the appellants' personal information, to invite the city to provide representations on whether or not this is the case, and if so, to provide representations on the application of section 38(a) of the *Act* (discretion to refuse requester's own personal information), and on the exercise of discretion in relation to section 38(a).

[6] The city provided responding representations to the supplementary Notice of Inquiry. Adjudicator Higgins then sent correspondence to the city seeking additional information. The city provided responding correspondence.

[7] The appeal file was subsequently reassigned to me. I sent a Notice of Inquiry as well as the city's representations and its responding correspondence to the appellants. The appellants responded as follows:

We would like to pursue this appeal in regards to receiving a copy [of the records remaining at issue].

We continue to question the [city's] claiming the application of the section 12 exemption for the 11 records. How do we know this is correct?

[8] In this order, I uphold the decision of the city that the information at issue is

subject to the solicitor-client privilege at section 12 and dismiss the appeal.

RECORDS:

[9] All or portions of the following records remain at issue in this appeal: 8 to 10, 23, 27, 32, 39, 66, 74, 75 and 134.

BURDEN OF PROOF:

[10] Under section 42 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution.

DISCUSSION:

Does section 12 either alone, or in conjunction with section 38(a), apply to the records?

[11] The legislative scheme established by the *Act* contains different entitlements to information, depending on whether the request is for an individual's own personal information, or for general records. In the former situation, requests would be processed under Part II of the *Act* as the right of access is found in Part II. In the latter case, requests would be treated under Part I of the *Act*.¹

[12] Section 38(a) applies if a record contains the requester's own personal information. If it does, the analysis is conducted under Part II of the *Act*. If a record does not contain the requester's own information the analysis is conducted under Part I of the *Act*, and, in the circumstances of this appeal, only section 12 of the *Act* is considered.

[13] In its supplementary representations, the city explains that some of the records mention the appellants and their address and that the potential disclosure of some records would enable identification of the appellants. However, the city takes the position that all the records are subject to section 12 alone, or in the alternative in conjunction with section 38(a), and would be exempt in their entirety whether they do or do not contain the appellants' personal information. Since I find below that the information at issue qualifies for exemption under section 12 whether alone, or in conjunction with section 38(a), and since I am satisfied that the city's exercise of discretion should be upheld, assuming that all the records contain the appellants

¹ M-352.

personal information, it is not necessary for me to make a definitive finding on this issue.

[14] Section 38(a) provides a number of exemptions from an individual's rights of access to their own personal information and it reads:

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

if section 6, 7, 8, 8.1, 8.2, 9, 9.1, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[15] 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.

[16] 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

[17] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. Here, the city claims the application of the solicitor-client communication privilege.

Solicitor-client communication privilege

[18] 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.² The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.³ 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.⁴

² *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

³ Orders MO-1925, MO-2166 and PO-2441.

⁴ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

[19] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.⁵

[20] 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.⁶

Loss of privilege

[21] 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.⁷

[22] 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.⁸

[23] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.⁹ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.¹⁰

Branch 2: statutory privileges

[24] 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 exemption and common law privileges, although not identical, exist for similar reasons.

The city's representations

[25] The city's Assistant City Solicitor prepared its initial representations. The city submits that the information at issue is subject to the common law solicitor-client privilege and/or the statutory privilege.

⁵ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁷ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

⁸ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

⁹ Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

¹⁰ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

[26] The city submits that the records form part of a confidential continuum of communication between solicitor and client, either of a direct or indirect nature, as well as being solicitor "working papers" relating to the formulation of legal advice.

[27] The city explains that:

The records at issue include emails and communications to and from legal counsel that contain legal advice and discussions relating to matters arising therefrom and legal advice sought by the various departments for the preparation of documentation relating to [the address specified in the request]. As described in the affidavit of [the city's Deputy City Clerk]¹¹ the records are privileged communications as between a city solicitor and client and contain confidential legal advice. Solicitor-client advice is confidential and treated as such by the city. The city takes extreme precaution to ensure such records are not improperly disclosed.

Legal advice directly sought from solicitors is reflected in communications of a direct nature between city in-house counsel and city employees regarding the legal issues relating to [the address specified in the request] and matters arising therefrom. These records are exempt as they are privileged solicitor-client communications.

Other communications represent a "continuum of communication" between city employees and legal counsel. Solicitors are kept informed of the ongoing issues relating to [the address specified in the request] in the event their advice is needed. The city solicitors are kept apprised of ongoing events as their advice is often sought urgently. Records of this nature form part of the continuum of communication between the city solicitors and employees and the city submits they are privileged solicitor-client communications under Branch 1.

[28] The city also submits that hand-written notes on the records qualify as solicitor "working papers". The city submits:

The records at issue contain hand-written notes relating to [the address specified in the request] recording phone discussions between the solicitor and the city employees, notes which were prepared for the purpose of the solicitor formulating advice for the city generally.

[29] An Assistant City Solicitor also prepared the city's representations responding to the supplementary Notice of Inquiry. In its supplementary representations, the city sets

¹¹ Which accompanied the city's initial representations.

out in detail a description of each record at issue and whether Branch 1 or 2 is claimed to be applicable.

[30] The city asserts that it has not waived privilege in the information at issue.

Analysis and finding

[31] I find that the information in the records remaining at issue falls within the scope of section 12. This is 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, or would reveal the substance of the confidential communication or legal opinion provided, or would qualify as a legal advisor's working papers and/or would qualify as a record "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".

[32] On the facts before me, I am satisfied that no waiver of privilege has occurred with respect to the information at issue in this appeal. Accordingly, I find that this information qualifies for exemption under section 12 alone, or in conjunction with section 38(a), as the case may be.

[33] Finally, I have considered the representations provided by the city on its exercise of discretion, which I have not reproduced in this order. I am satisfied that in all the circumstances, the city properly exercised its discretion under sections 12 or 38(a) of the *Act*, as the case may be. 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*.¹²

[34] Therefore, I find that the withheld information is solicitor-client privileged information and qualifies for exemption under section 12 alone, or in conjunction with section 38(a), as the case may be.

ORDER:

I uphold the decision of the city that the information at issue is subject to solicitor-client privilege and dismiss the appeal.

Original signed by: _____

Steven Faughnan
Adjudicator

January 28, 2019

¹² 2010 SCC 23, [2010] 1 S.C.R. 815 at paragraph 75.

