

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER MO-3853

Appeal MA18-136

City of Toronto

October 25, 2019

**Summary:** The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of the city's Municipal Standards and Licensing application file in relation to a specified business. The city issued a decision granting partial access with severances pursuant to section 12 (solicitor-client privilege) of the *Act*. The requester, now the appellant, appealed the city's decision to this office. In this order, the adjudicator upholds the city's decision, and dismisses the appeal.

**Statutes Considered:** The *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 12.

**Orders Considered:** MO-3326.

### OVERVIEW:

[1] The City of Toronto (the city) received a multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of the city's Municipal Standards and Licensing (ML&S) application file in relation to a specified business, including supporting documentation and consultation with other city divisions regarding the application file.

[2] In response, the city issued a decision, which summarized the request as follows:

You have requested access to a copy of the ML&S application [specified file number] in relation to [specified corporation]; a copy of meeting room logs for any consultations pursuant to this process, as well as copies of

communication at the internal level within ML&S and those with third parties. In addition, all computerized query searches and external consultation with other City divisions concerning aforementioned application file.

[3] The city granted partial access to the records. Access to the withheld information was denied pursuant to sections 12 (solicitor-client privilege) and 14(1) (personal privacy) of the *Act*. Some information was also withheld on the basis that it was non-responsive to the request.

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

[5] The appellant confirmed that the request as described in the city's decision captures the information that he is seeking.

[6] During the course of mediation, the appellant advised that he is not seeking the severances identified as "not responsive" to the request nor is he seeking the personal privacy severances. However, he is still seeking the information severed pursuant to section 12. Accordingly, the information deemed by the city as "not responsive" and the information severed pursuant to section 14(1) of the *Act* are no longer at issue in this appeal.

[7] As a mediated resolution was not possible, the appeal proceeded to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. Representations were invited and received from both parties, and shared in accordance with the IPC's *Practice Direction Number 7*.

[8] I have reviewed and considered all of the representations in this appeal. However, I have only summarized those portions I found relevant to my determination below. In this order, I uphold the city's decision to withhold the information at issue under the section 12 exemption, and dismiss the appeal.

## **RECORDS:**

[9] The information at issue consists of the severances from a series of emails on pages 1, 3, 4, 10, 12, 16, 17, 18, 20, 22, 23, 26, 32-35, 38, 54, 55, 56, 58, 59, 63, 66, 70, 75, 79, 84, 85, 89, 91-97 of the records.

## **ISSUES:**

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

## **DISCUSSION:**

### **A. Does the discretionary exemption at section 12 apply to the information at issue?**

[10] Section 12 states as follows:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[11] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution...") is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

#### **Branch 1: common law privilege**

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

#### ***Solicitor-client communication privilege***

[13] 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>1</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>2</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>3</sup>

[14] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.<sup>4</sup>

[15] 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>5</sup> The privilege does not cover communications between a

---

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

<sup>2</sup> Orders PO-2441, MO-2166 and MO-1925.

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

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

<sup>5</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

solicitor and a party on the other side of a transaction.<sup>6</sup>

## **Branch 2: statutory privilege**

[16] 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.

### ***Representations of the City***

[17] The city submits that although there are 37 pages at issue in this appeal, there are a large number of duplicates, so there are only approximately 20 substantively different portions of the records at issue. The city submits that there are two categories of records for which access has been withheld:

- Group A - Emails involving ML&S staff directly to and from the City's "internal" solicitors in the Legal Services Division ("City Legal"); and,
- Group B - Emails which are "internal communications" between ML&S staff, do not directly include a solicitor in the communication, but would directly or indirectly reveal the content of solicitor-client communications.

[18] With respect to the Group A records, the city argues that both the common-law and statutory solicitor-client privilege apply, because these records are portions of emails containing communications between ML&S staff and solicitors in City Legal, seeking and providing advice in relation to the business licensing application. The city submits that the appellant is involved with a specified numbered company, which undertook efforts to obtain municipal licences with respect to a proposed business operation, including filing an application for certain business licences. The city submits that various elements of the proposed business operations were relatively unique, and complications respecting the tenancy of the proposed business operation arose while the application was being evaluated, which raised matters of concern for ML&S staff.

[19] The city argues that both the common-law and statutory solicitor-client privilege also apply to the Group B records, which contain "internal communications" that are not directly to or from a solicitor, but would directly or indirectly reveal the content of solicitor-client communications. The city argues that disclosure of the various Group B records, even though not in themselves direct communications between the ML&S staff and City Legal, would still disclose information to which the section 12 exemption applies. The city further argues that disclosure of Group B records would provide the appellant with access to documents indicating topics (including relevant facts) identified

---

<sup>6</sup> *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

by staff as being the subject of communications with City Legal, or documents which when compared to the content of publicly available documents (including the documents released in response to the Access Request) would indicate to an "assiduous investigator" the topics and nature of discussions with City Legal.

[20] The city submits that the Group B records also contain documentation in which information was forwarded between ML&S staff for the purpose of being presented to City Legal to keep both parties (solicitor and client) advised of relevant considerations for the purposes of giving legal advice. The city argues that this sort of communication has been recognized by both the court and this office<sup>7</sup>, as part of the solicitor-client communications continuum, and as such the section 12 exemption applies.

[21] The city argues that the Group A and B records represent a continuum of correspondence in which a variety of legal advice, opinions, and suggestions were either requested or provided in relation to a myriad of developments regarding the business licence application. As such, the city argues that these documents are at the "core" of the solicitor-client relationship sought to be protected by the section 12 exemption. The city argues that the importance of solicitor-client privilege is a general principle of law, which the courts have closely protected and only set aside in very limited exceptions. The city further argues that privilege recognizes that a client is entitled to confidentially obtain legal advice, and this is recognized as a principle of fundamental justice.

[22] In conclusion, the city argues that the Group A records contain communications between client and solicitor, seeking or receiving legal advice and the Group B records contain information that would directly or indirectly reveal the content of solicitor-client communications, and the IPC has repeatedly determined that these type of records are properly within the scope of the statutory and common-law branches of the section 12 exemption. The city therefore argues that the information at issue was properly withheld under section 12 of the *Act*.

### ***Representations of the Appellant***

[23] The appellant submits that he is not trying to bypass or nullify the application of the section 12 provision, but he questions the validity of its use by the city's licensing department. The appellant further submits that the context and information within the records do not seem to reveal any sort of legal advice derived from consultation with City Legal and therefore, should not qualify for exemption under section 12.

[24] The appellant submits that he is only seeking access to the communication that

---

<sup>7</sup> *Canadian Pacific Ltd. V. Canada (Director of Investigation and Research)*, [1995] O.J. No. 1867, and Order PO-3111.

took place amongst individuals that do not hold a legal designation. The appellant further submits that he does not want any information and/or records that have been prepared by or for counsel employed or retained by the city. However, the appellant argues that none of the information at issue contains correspondence with a solicitor, or any legal designation that would qualify for the section 12 exemption, nor was it prepared to use in giving or seeking legal advice. The appellant further argues that in the detailed index of correspondents attached to the city's representations, there is no one mentioned that is a solicitor.

[25] The appellant submits that the discussions held within the information at issue do not contain anything that would require the engagement of legal counsel, either directly or indirectly. The appellant further submits that there was no indication that the application in question was subject to a criminal or civil investigation that would require legal oversight. The appellant argues that the city has not demonstrated the need to seek legal advice with respect to the business licence application, nor has the city provided a rationale for doing so. Therefore, the appellant argues that legal advice was sought for reasons that do not pertain to the business licence application. The appellant argues that external factors outside the scope of the business licence application and beyond the jurisdiction of licensing is what created the need for legal consultation, and in so doing created a sense of confidentiality with respect to what otherwise should have remained an open and transparent process.

[26] The appellant argues that withholding the information at issue would impede fair evaluation and the appellant's understanding of why the application was not approved. The appellant further argues that the information at issue should be disclosed in full, because it would allow the appellant to revise the application to solve any deficiencies.

[27] The appellant argues that the "unique set of factors that arose during the application process" or even "the concerns for ML&S regarding the tenancy complications" mentioned by the city do not constitute grounds to reclassify the documents pertaining to the business licence application as "highly confidential", especially since these factors and complications were not brought forward during the application process. The appellant further argues that there is nothing unique about the application, because there are current operating businesses in the city that function the same manner.

[28] The appellant submits that ML&S did not inform him of any challenges pertaining to the business licence application and did not provide him with adequate information to justify the extensive delays. The appellant further submits that ML&S engaged in questionable actions that went beyond the scope of their functions as an impartial institution tasked with the processing of applications for licensing.

[29] The appellant submits that he is not questioning the approval or denial of a licence, but he wants to know all the factors that were considered during the application, all the interactions that determined the efficiency of the process and its impartiality, and the reason why certain aspects of the application are not available for

review. The appellant submits that through this appeal, he intends to ensure that the application process was fair and unbiased.

### ***Reply Representations of the City***

[30] The city submits that the appellant is mistaken in his representations with respect to his argument that none of the correspondents in the information at issue is a lawyer. The city further submits that the appellant's allegation that legal advice was sought for reasons that do not pertain to the application is factually incorrect and not logically supported by the information at issue.

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

[31] It is clear from his representations that the appellant has several questions about how his application was processed and evaluated, and he is concerned about "the efficiency of the process and its impartiality". However, these questions and concerns are not relevant to this appeal. The only issue in this appeal is whether or not the discretionary exemption at section 12 applies to the information at issue. Therefore, I will not comment further on the appellant's allegations about the application process and the conduct of ML&S staff.

[32] After reviewing the records and the representations of the parties, I agree with the city's description and categorization of the records and will adopt it for my analysis. I find that the records can be divided into two groups: records that contain communications between ML&S staff and the city's solicitor will be referred to as Group A records, and the rest of the records will be referred to as Group B records. Group A records include pages 3, 4, 10, 16, 20, 22, 35, 38, 54, 55, 58, 59, 63, 66, 70, 75, 79, 84, 85, 89, 91-97 of the records. Group B records include pages 1, 12, 17, 18, 23, 26, 32-34, 56 of the records.

#### ***Group A Records***

[33] With respect to the Group A records, I find that they contain communications between ML&S staff and a city solicitor seeking and providing advice with respect to the business licence application. In the appellant's representations, he is clear that he is not seeking access to communication between any individuals with a legal designation, nor is he seeking access to information and/or records that have been prepared by or for counsel employed or retained by the city. However, the appellant argues in his representations, that none of the correspondents in the information at issue have a legal designation.

[34] From my review of the records, including Table 1 of the city's Appendix, which outlines the name and position of each person that appears in the records, I find that in all of the Group A records, one of the correspondents is a solicitor hired by the city in its Legal Services Division. Therefore, disclosure of these records would reveal to the appellant confidential communications between a city lawyer and his institutional

clients, which is precisely what the section 12 exemption aims to protect. As a result, I am satisfied that disclosure of the information at issue in the Group A records would directly reveal the content of solicitor-client communications. Accordingly, subject to my findings on the city's exercise of discretion, below, I find that the information at issue in the Group A records is exempt from disclosure pursuant to section 12 of the *Act*.

### *Group B Records*

[35] With respect to the Group B records, I find that they contain internal communications between ML&S staff which would directly or indirectly reveal the content of solicitor-client communications, if they were disclosed. Previous orders of this office have found that the section 12 exemption can apply to internal communications of an institution, even if they do not contain direct communication to or from a lawyer. For example, in Order MO-3326, Senior Adjudicator DeVries summarized several past orders of this office dealing with this issue:

While I acknowledge that the Group 2 records do not contain direct communications between city staff and city lawyers, I note that this office has previously applied section 12 to internal communications not involving a lawyer where disclosure would reveal the content of communications between a solicitor and client. For example, in Order PO-2087-I, Adjudicator Cropley considered whether briefing papers prepared by non-legal staff at the Ministry of Finance would qualify for solicitor-client privilege under section 19 of the Freedom of Information and Protection of Privacy Act, which is equivalent to section 12 under the *Act*. In doing so, she stated the following:

These records were prepared by non-legal staff in the Ministry. However, large portions of them refer to or reflect the legal advice that is contained in the other records at issue in these discussions. In my view, disclosure of this information would reveal the legal advice that was provided and should, therefore, be protected under section 19.

Moreover, in Order M-1112 Adjudicator Hale found that documents passing between employees of a client can be subject to solicitor-client privilege if they transmit or comment on communications with lawyers that are connected with legal advice or contemplated litigation. Similarly, in Order PO-1631, the adjudicator concluded that internal communications containing instructions to seek legal advice on a particular issue should qualify for exemption. Based on the analysis found in these orders, the solicitor-client privilege may apply to the Group 2 records, even though they are not direct communications with legal counsel. Rather, each record must be examined to determine whether its disclosure would reveal the content of solicitor-client communications.



[36] I agree with this reasoning, and I find that it is relevant to the information at issue in the Group B records. As a result, I am satisfied that disclosure of the information at issue in the Group B records would directly or indirectly reveal the content of solicitor-client communications. Accordingly, subject to my findings on the city's exercise of discretion, below, I find that the information at issue in the Group B records is also exempt pursuant to section 12 of the *Act*.

**B. Did the city exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?**

[37] 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.

[38] 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.

[39] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>8</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>9</sup>

[40] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>10</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

---

<sup>8</sup> Order MO-1573.

<sup>9</sup> Section 54(2) of the *Act*.

<sup>10</sup> Orders P-344 and MO-1573.

- 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
- 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.

### ***Representations of the Parties***

[41] The city submits that in considering how to respond to the request, the city consulted with staff knowledgeable with the relevant issues, and the city exercised its discretion in good faith and took into account all of relevant considerations with respect to the application of section 12. These considerations included the following:

- the purposes and principles of the *Act* including that the information should be available to the public, exemptions to access should reflect the specific and limited circumstances where non-disclosure is necessary for the proper operation of municipal institutions;
- the wording of the relevant exemptions;
- the fundamental importance to Canadian society of the interest sought to be protected by the section 12 exemption;
- the lack of any sympathetic or compelling need to receive the specific information withheld; disclosure will not have any impact on increasing public confidence in the operation of the city;
- the requested information (for which section 12 has been applied) is of a highly sensitive nature; and,
- the recent nature of the requested information.

[42] The city submits that it thoroughly deliberated these matters in considering the current request and used the discretionary exemption exceptionally sparingly to deny access in a specific and limited fashion. The city submits that it severed only limited portions of solicitor-client privileged communication in an effort to maximize transparency while still protecting the important fundamental aspects of this privilege. In conclusion, the city submits that in considering all relevant factors, including the ones listed above, it exercised its discretion properly and in good faith under the *Act*.

[43] The appellant submits that the discretion exercised under section 12 needs to be re-examined, as the considerations do not appear relevant and might not have been applied properly, in which case the matter might be sent back to the institution for an exercise of discretion based on proper considerations.

[44] The appellant submits that the relevant considerations are:

- as the applicant should have access to all aspects of the application, these include but are not limited to all relevant records created during the application process along with interactions that determine the consideration for license;
- all aspects of the application have not been fully disclosed, and not only have they been not disclosed, but the rationale behind these actions has not been properly supported;
- all aspects of the information that is at issue do not involve a particular individual nor is it intended for anyone to be exposed or identified;
- the requester is an individual who simply seeks to understand the way the application was processed along with the reason why the application was scrutinized by licensing and enforcement without an apparent reason; and,
- the applicant represents the public interest in ensuring that information submitted to licensing is shared and processed by the respective parties ONLY and the impartial and fair decision without bias or prejudice.

[45] The appellant argues that the section 12 exemption was applied without taking into consideration relevant factors, and that not all the information subject to this application was disclosed. The appellant further argues that this office should order the disclosure of all documents which may be found not to be subject to an exemption, in order to determine the fairness, efficiency and transparency of the application process within ML&S.

[46] The city submits that the appellant alleges it erred in its determination of the impact of disclosure of this information on public confidence, because the appellant submits that there are no situations which can exist where public disclosure of any information would not increase public confidence with respect to an institution's operations. The city argues that this office has held that disclosure of information

cannot be assumed to automatically increase public confidence. Furthermore, the city submits that in applying the section 12 exemption, it balanced the need for transparency and the increase in public confidence with the harms to the city's interests if the information at issue were disclosed.

[47] The city submits that the appellant alleges that it did not consider his desire for further information concerning the business licence application as a relevant factor. The city submits that it appears the appellant is suggesting that this desire is a sympathetic or compelling need to receive the withheld information. However, the city argues that the appellant has not provided any sympathetic or compelling need for the withheld information and has only stated that everything concerning the application must be disclosed.

[48] The city submits that while the appellant would have preferred that the city exercised its discretion differently, the appellant has not proven any of the errors alleged. Therefore, the city argues that the appellant's representations are simply a request for a different result and provide no basis to support that the city erred in its exercise of discretion under the *Act*.

### **Analysis and findings**

[49] After considering the representations of the parties and the circumstances of this appeal, I find that the city did not err in its exercise of discretion with respect to its application of section 12 of the *Act*. I am satisfied that it did not exercise its discretion in bad faith or for an improper purpose. I am also satisfied that the city took into account relevant factors, and did not take into account irrelevant factors in the exercise of its discretion. In particular, I am satisfied that the city considered whether or not there is sympathetic or compelling need for the appellant to receive the specific withheld information, and whether or not there would be an increase in public confidence if the information at issue was disclosed. Finally, I am satisfied that the city provided the appellant access to as much information as possible by applying the exemptions in a limited and specific manner.

[50] Accordingly, I find that the city exercised its discretion in an appropriate manner in this appeal, and I uphold it.

### **ORDER:**

I uphold the city's decision to withhold the information at issue under the section 12 exemption, and dismiss the appeal.

Original Signed By: \_\_\_\_\_

Anna Truong  
Adjudicator

October 25, 2019 \_\_\_\_\_