Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4105

Appeal MA19-00221

City of Vaughan

September 22, 2021

Summary: This order deals with records relating to a named City of Vaughan (the city) councillor's outstanding debt to the city. The city located records responsive to the appellant's request and denied access in full, claiming the application of the discretionary exemptions in section 6(1)(b) (closed meeting), 12 (solicitor-client privilege) and 15(a) (information published or available to the public). In this order, the adjudicator upholds the city's access decision as well as its exercise of discretion and 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 (definition of personal information), 6(1)(b), 12 and 15(1); *Municipal Act, 2001*, S.O. 2001, c. 25, as amended, section 239(2).

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the City of Vaughan (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for records relating to a named councillor's outstanding debt to the city, including the amount, any interest charged, any penalty or late payment fees charged, the terms of the repayment agreement, any garnishment of wages, attempts the city made to collect the funds over the past decade and the identity of the city staff who negotiated the repayment agreement.

[2] In response, the city located several responsive records and denied access to

them in full. The city claimed the application of the discretionary exemptions in sections 15 (information published or available to the public), 6(1)(b) (closed meeting), 12 (solicitor- client privilege), and the mandatory exemption in section 14(1) (personal privacy)[1] of the *Act*.

[3] The requester, now the appellant, appealed the city's decision to the Office of the Information and Privacy Commissioner/Ontario (the IPC).

[4] During the mediation of the appeal, the mediator wrote to a third party (the affected party), but did not receive a response. The city maintained that no records may be disclosed, and the appellant confirmed that he continues to seek access to all of the withheld records.

[5] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. I sought and received representations from the city, the appellant and the affected party. Portions of the representations were withheld from the other parties, as they meet this office's confidentiality criteria set out in *Practice Direction 7*, but I have taken them into consideration.

[6] For the reasons that follow, I uphold the city's access decision and its exercise of discretion, and dismiss the appeal.

RECORDS:

[7] The records consist of Court of Appeal and Superior Court of Justice documents, a closed session report and email correspondence between city staff, its in-house legal counsel and external legal counsel.

ISSUES:

A. Does the discretionary exemption at section 6(1)(b) apply to the closed session report?

B. Does the discretionary exemption at section 12 apply to the email correspondence?

C. Does the discretionary exemption at section 15(a) apply to the Court of Appeal and Superior Court of Justice records?

D. Did the city exercise its discretion under sections 6(1)(b), 12 and 15? If so, should this office uphold the exercise of discretion?

[1] The city's section 12 and 14(1) claims are applied to the same batch of records, as described in Issue B.

DISCUSSION:

Issue A: Does the discretionary exemption at section 6(1)(b) apply to the closed session report?

[8] The city is claiming the application of section 6(1)(b) to a closed session report. Section 6(1)(b) reads:

> A head may refuse to disclose a record,
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> > that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[9] For this exemption to apply, the institution must establish that:

1. a council, board, commission or other body, or a committee of one of them, held a meeting
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.[2]

[10] Previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision,[3] and
- "substance" generally means more than just the subject of the meeting.[4]

[11] Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings.[5]

[12] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera*.[6]

[13] With respect to the third requirement set out above, the wording of the provision

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[2] Orders M-64, M-102 and MO-1248.
[3] Order M-184.
[4] Orders M-703 and MO-1344.
[5] Order MO-1344.
[6] Order M-102.

and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution's *in camera* meeting, not merely the subject of the deliberations.[7]

[14] Section 6(2) of the *Act* sets out exceptions to section 6(1)(b). The applicable provisions state:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,
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> > (b) in the case of a record under clause (1)(b), the subject matter of the deliberations has been considered in a meeting open to the public; or
> >
> > (c) the record is more than twenty years old.

Representations

[15] The city submits that a closed meeting of council took place on a specified date and that the record for this meeting meets the requirements set out in the three-part test. It goes on to argue that section 239(2) of the *Municipal Act* authorizes the holding of a closed session meeting and that, in this case subsections (b), (e) and (f) apply, which state:

> A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
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> > (b) personal matters about an identifiable individual, including municipal or local board employees;
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> > (e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
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> > (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

[16] Further, the city submits that its By-law number 7-2011[8] contains various sections regarding closed meeting requirements that align with the provincial legislation. Section 2.1(4) of the by-law states in part that a meeting may be closed to the public if the subject matter being considered relates to litigation or potential

[7] Orders MO-1344, MO-2389 and MO-2499-I.
[8] The city provided a copy of By-law number 7-2011 to the IPC.

litigation. The meeting that was the subject matter of the record at issue was marked as a closed meeting for consideration of "litigation or potential litigation" on the agenda, which was provided by the city to Council and posted on the city's website.[9]

[17] The city goes on to argue that disclosing the record would reveal the actual substance of the deliberations that took place in the closed meeting, including discussions about the affected party's personal finances as well as information provided to council that is solicitor-client privileged.

[18] Lastly, the city submits that none of the exceptions in section 6(2) applies.

[19] The appellant's position is that based on an email he received from the city in response to his inquiry about the affected party's repayment of the debt, a meeting took place between the affected party and city staff, but that it was not a closed meeting and there is no indication that the affected party had legal representation present at the meeting.

Analysis and findings

[20] As set out above, in order for an institution to make a successful claim under section 6(1)(b), all components of a three-part test must be met. First, it must establish that a council, board, commission or other body, or a committee of one of them, held a meeting and, second, that a statute authorizes the holding of the meeting in the absence of the public. I accept the city's representations and on my review of the record find that a closed meeting of council took place on the date indicated by the city. I am also satisfied that given the subject matter of the closed meeting, sections 239(2)(e) and (f) of the *Municipal Act* authorized the holding of a closed meeting, as well as section 2.1(4) of the city's By-law number 7-2011.

[21] The third requirement of the three-part test for the application of section 6(1)(b) is that the institution must establish that disclosure of the record would reveal the actual substance of the deliberations of the meeting[10] and not merely the subject of the deliberations. I have reviewed the record at issue, which is in two parts. The first part of the record clearly documents the legal advice given to council. The second part of the record documents the actual substance of the deliberations that took place at the meeting.

[22] Regarding the appellant's position that a meeting took place between the affected party and city staff and that the affected party was not represented by legal counsel, I reiterate that there is evidence that a closed meeting of council took place and that legal advice was provided to council as a whole, all of which is reflected in the record at issue for which the city claimed section 6(1)(b).

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[9] The city provided a copy of the agenda to the IPC.
[10] Orders M-64, M-102 and MO-1248.

[23] Turning to the exceptions to section 6(1)(b) set out in section 6(2), I have no evidence to suggest that the subject matter of the deliberations carried out in the closed meeting was considered in a meeting open to the public. In addition, in reviewing the record it is clear that it is not more than twenty years old. Therefore, I find that the exceptions in section 6(2) do not apply.

[24] As a result and subject to my findings regarding the city's exercise of discretion, I find that the three-part test has been met and the record is exempt from disclosure under section 6(1)(b).

Issue B: Does the discretionary exemption at section 12 apply to the email correspondence?

[25] The city is claiming the application of the discretionary exemption in section 12 to 148 pages of email communications. 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.

[26] 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.

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

[28] 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.[11] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[12] 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.[13]

[29] 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.[14] The privilege does not cover communications between a

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[11] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[12] Orders PO-2441, MO-1925 and MO-2166.
[13] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[14] *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.[15]

[30] 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.[16] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[17] The litigation must be ongoing or reasonably contemplated.[18]

[31] 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.[19] 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.[20]

[32] 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.

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

[34] The litigation privilege applies to records prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation." 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.[21] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.[22]

Representations

[35] The city submits that the records for which it is claiming section 12 are legal

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[15] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).
[16] *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).
[17] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).
[18] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.
[19] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[20] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[21] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.
[22] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

correspondence involving communications of a confidential nature between a solicitor and client made for the purpose of obtaining or giving professional legal advice. The city further submits that the records are subject to both branches of section 12 and that they are subject to both solicitor-client communication privilege and litigation privilege because they consist of communications between the city's in-house legal counsel and its external legal counsel where legal advice was sought and given regarding a litigation process. The city's position is that the disclosure of these records would reveal solicitor-client privileged communications because they contain detailed narrations of the legal work undertaken by the city's external legal counsel. In addition, the city submits that it has not waived either privilege.

[36] The appellant's position is that there is a public interest in the disclosure of the records, namely that the affected party's debt is with the city's taxpayers, and that it is reasonable and fair for any taxpayer to want to know and understand what the details of the debt are and why it has remained unpaid for over a decade.

Analysis and findings

[37] Having reviewed the records for which section 12 has been claimed, which are all email communications, some with attachments, I note that there is considerable duplication of the content of these records.

[38] The records can be best described as falling into two categories. The first category consists of email communications between city staff, the city's in-house legal counsel and the city's external counsel in which information is provided to both sets of counsel for the purpose of seeking legal advice. In return, external legal counsel provides legal advice to both city staff and in-house counsel.

[39] I find that this first category of records is subject to solicitor-client communication privilege under both branches of section 12. The first branch of section 12 – "subject to solicitor-client privilege" – is based on the common law, while the second – "prepared by or for counsel employed or retained by an institution…" – is a statutory privilege. I find that in this case, the legal advice sought and given was done so by either the city's in- house legal counsel or its external counsel, both of whom were employed or retained by the city.

[40] As previously stated, the 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.[23] The rationale for this privilege is to ensure that a client may freely confide in her lawyer on a legal matter.[24] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and

[23] *Descôteaux v Mierzwinski* (1982), 141 DLR (3d) 590 (SCC).
[24] Orders PO-2441, MO-2166 and MO-1925.

client aimed at keeping both informed so that advice can be sought and given.[25] I accept the city's evidence regarding these records, which are all direct communications between city staff, in-house counsel and external counsel, were for use in seeking and giving legal advice. I also find that on their face, all of these pages of the records consist of solicitor-client privileged communications.

[41] The second category of records are email communications between city staff, the city's in-house counsel and the city's external counsel in which information is prepared by or for counsel employed or retained by the city "in contemplation of or for use in litigation."

[42] I find that this second category of records is subject to the litigation privilege in Branch 2 of section 12. As previously stated, litigation privilege protects records created for the dominant purpose of litigation or contemplated 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.[26] In this case, based on the city's representations and my review of the records, I agree with the city that disclosure of this category of records would reveal the legal work undertaken by the city's external legal counsel in relation to a specific litigation matter involving the city.

[43] Further, I find that I have been provided with no evidence that the city has either explicitly or implicitly waived its privilege with regard to both the solicitor-client communication and litigation privilege in Branch 2.

[44] Consequently, subject to my findings regarding the city's exercise of discretion, I find that all of these records are subject to solicitor-client privilege and are exempt from disclosure under Branch 2 of section 12. Having found that these records are exempt from disclosure under section 12, it is not necessary for me to consider whether they are exempt under section 14(1).

Issue C: Does the discretionary exemption at section 15(a) apply to the Court of Appeal and Superior Court of Justice records?

[45] The city is claiming the application of section 15(a) to official documents filed in the court files at the Court of Appeal for Ontario and Ontario Superior Court of Justice.. Section 15(a) states:

> A head may refuse to disclose a record if,
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> > the record or the information contained in the record has been published or is currently available to the public;

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[25] *Balabel v Air India*, [1988] 2 WLR 1036 at 1046 (Eng CA).
[26] *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).

[46] For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre.[27] To show that a "regularized system of access" exists, the institution must demonstrate that a system exists, the record is available to everyone, and there is a pricing structure that is applied to all who wish to obtain the information.[28]

[47] In order to rely on the section 15(a) exemption, the institution must take adequate steps to ensure that the record that they allege is publicly available is the record that is responsive to the request.[29]

[48] Examples of the types of records and circumstances that have been found to qualify as a "regularized system of access" include unreported court decisions.[30]

Representations

[49] The city submits that in order for it to rely on section 15(a), it must take adequate steps to ensure that the record it claims is publicly available is responsive to the request. In addition, the record must be identified and the requester must be informed as to where it may be obtained. In doing so, the city submits that its Access and Privacy Officer consulted with in-house counsel to confirm that the court documents were responsive to the request. In addition, the city advises that in its access decision issued to the appellant, it provided details as to where the court documents could be obtained, along with each of the court document's corresponding file numbers. The appellant's position is that the public should be able to determine whether the original debt is being repaid or whether a newly negotiated debt has been established.

Analysis and findings

[50] I find that the appellant's representations are not relevant to the issue at hand, which is whether the records for which section 15(a) was claimed are exempt from disclosure. Conversely, I find that the city has established that the official court records for which the city claim section 15(a) are currently available to the public through a regularized system of access, namely, through the system of access provided by the courts in the province. As required by section 15(a) of the *Act*, the city has demonstrated that a system exists whereby the records are available to everyone. I find that the city has referred the appellant to a publicly available source of information in response to his access request, as an alternative to the process under the *Act*. As a result, subject to my findings regarding the city's exercise of discretion, I find that these records are exempt from disclosure under section 15(a).

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[27] Orders P-327, P-1387 and MO-1881.
[28] Order MO-1881.
[29] Order MO-2263.
[30] Order P-159.

Issue D: Did the city exercise its discretion under sections 6(1)(b), 12 and 15(a)? If so, should this office uphold the exercise of discretion?

[51] The sections 6(1)(b), 12 and 15(a) exemptions are discretionary, and permit 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.

[52] 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 or it fails to take into account relevant considerations.

[53] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[31] This office may not, however, substitute its own discretion for that of the institution.[32]

[54] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[33]

- 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, and 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,

[31] Order MO-1573.
[32] Section 43(2).
[33] Orders P-344 and MO-1573.

- the age of the information, and
- the historic practice of the institution with respect to similar information.

Representations

[55] The city's position is that it properly exercised its discretion under sections 6(1)(b), 12 and 15(a), taking into account relevant factors and not taking into account irrelevant factors. It submits that in exercising its discretion it considered the following relevant factors:

- the highly confidential nature of the closed meeting records, which were prepared for the purpose of seeking council's direction;
- the importance of the solicitor-client relationship, and of preserving the confidentiality of privileged communications in the course of seeking and giving legal advice; and
- there is no sympathetic or compelling need for the appellant to obtain this information.

[56] The appellant reiterates his position that the disclosure of the records is in the public interest. In reply, the city submits that the public interest override in section 16 cannot be applied to the discretionary exemptions in sections 6(1)(b), 12 and 15(a).

Analysis and findings

[57] Sections 6(1)(b), 12 and 15(a) are discretionary exemptions, not mandatory exemptions. Even though the records at issue are exempt from disclosure under these exemptions, the *Act* clearly allows the city to exercise its discretion to disclose the records after considering all relevant factors, including any public interest in disclosure. However, in this case, the city has chosen to exercise its discretion in favour of withholding the records, which it is entitled to do, as long as it exercises its discretion appropriately. I cannot substitute my own discretion for that of the city.[34]

[58] Based on the city's representations, I am satisfied that it exercised its discretion and did so properly in deciding to withhold the records under sections 6(1)(b), 12 and 15(a) of the *Act.* It took into account relevant considerations, including any public interest in disclosure, as well as the importance of solicitor-client communication privilege, litigation privilege and the protection of the actual substance of deliberations in closed meetings. There is no evidence before me to suggest that the city took into account irrelevant considerations or that it exercised its discretion in bad faith or for an improper purpose. As a result, I uphold the city's exercise of discretion under sections 6(1)(b), 12 and 15(a).

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[34] *Supra* note 9.

ORDER:

I uphold the city's access decision and its exercise of discretion. The appeal is dismissed.

Original signed by | September 22, 2021

Cathy Hamilton
Adjudicator