

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-4353-F

Appeal MA20-00171

City of Stratford

March 27, 2023

Summary: The City of Stratford (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a planning report prepared by a consultant. The city denied access to the report, claiming the application of the solicitor-client privilege exemption in section 12 of the *Act*.

In the interim order, the adjudicator found that the record was exempt by reason of section 12, however, the adjudicator did not uphold the city's exercise of discretion under section 12 and ordered it to re-exercise its discretion

In this final order, the adjudicator upholds the city's re-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, section 12.

Orders Considered: Interim Order MO-4270-I.

OVERVIEW:

[1] This final order concerns whether the city properly re-exercised its discretion to withhold a consultant's draft planning report found to be exempt in the interim order as being solicitor-client privileged.

[2] This appeal arises out of an access request to the City of Stratford (the city)

under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)* for the:

[name of consultant's] Planning Justification Report [for a specified address] Nov. 2019.

[3] The city issued a decision, denying access to the report pursuant to section 12 (solicitor-client privilege) of the *Act*.

[4] The requester, now the appellant, appealed the city's decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was assigned to attempt a resolution of this appeal.

[5] As mediation did not resolve this appeal, the appellant requested that the file move to adjudication, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry, and sought representations from the parties, which were shared in accordance with the IPC's *Practice Direction 7*.

[6] I then issued Interim Order MO-4270-I (the interim order), in which I found that the report was exempt by reason of section 12. However, I did not uphold the city's exercise of discretion under section 12 and ordered it to re-exercise its discretion.

[7] The city re-exercised its discretion and continued to withhold access to the report. I then obtained representations from the parties on this re-exercise of discretion.

[8] In this order, I uphold the city's re-exercise of discretion and dismiss the appeal.

RECORD:

[9] The record at issue is the draft Planning Justification Report - November 2019, prepared by a consultant (the report or the draft report). The city applied the section 12 solicitor-client privilege exemption to deny access to this report.

DISCUSSION

Should the IPC uphold the city's re-exercise of discretion to withhold the report?

[10] The sole issue in this order is whether the city properly re-exercised its discretion deciding to withhold the report. 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, I may determine whether the institution failed to do so.

[11] In addition, I 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.

[12] In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations.¹ I may not, however, substitute my own discretion for that of the institution.²

[13] In this case, in the interim order I did order the city to re-exercise its discretion. I found that the city had not taken into account the following five relevant considerations in exercising its discretion as to whether to disclose the report, in whole or in part, to the appellant:

1. whether the appellant, as an adjoining landowner to the annexed lands to which the report pertains, has a sympathetic or compelling need to receive the information;
2. whether disclosure of the report, which contains information about the costs to the city of servicing the annexed lands, will increase public confidence in the operation of the city;
3. the report, although privileged, is not a direct communication between a solicitor and a client;
4. the extent to which the costs of servicing the annexed lands is significant to the appellant or to any other affected person; and,
5. the historic practice of the city with respect to disclosing similar information, such as its disclosure of several other reports related to the annexation of the land.

[14] I found that the city had not taken into account the actual information in the report about the costs to the city of servicing the annexed land, the appellant's interest in the report, or how the public's knowledge of the information in the report will increase public confidence in the city as to the financial viability of its annexation of the land and, therefore, is information that should be made available to the public. Accordingly, I ordered the city to re-exercise its discretion concerning its application of section 12 to the record.

[15] The city re-exercised its discretion and decided to continue to withhold access to

¹ Order MO-1573.

² Section 43(2).

the report.

The city's representations

[16] The city provided representations in support of its re-exercise of discretion to continue to withhold access to the report, taking into account the five relevant considerations listed above. I have summarized these representations as follows.

1. Whether the appellant, as an adjoining landowner to the annexed lands to which the report pertains, has a sympathetic or compelling need to receive the information.

2. Whether disclosure of the report, which contains information about the costs to the city of servicing the annexed lands, will increase public confidence in the operation of the city.

[17] The city acknowledges that all members of the public, including any adjoining landowners to the area subject to the boundary adjustment, could argue that they have a need to receive information related to a proposed municipal restructuring being considered by a municipal council.

[18] The city states that the information relied upon by Stratford City Council (Council) to approve the boundary adjustment was made available to the public and currently remains on the city's website.

[19] The city states that the public information is the same information that was provided to the Minister of Municipal Affairs and Housing in support of Council's request that the Minister approve the boundary adjustment. It states:

The draft report [the report at issue] is a draft document that is not final and not a complete document. Any commentary or additional information the appellant, or any other member of the public, is seeking from the draft document is incomplete and may not be set out in the draft document. The release of the draft report will not increase public confidence in the operation of the City as the actual final Planning Justification Report [the public report] before Stratford City Council during the boundary adjustment process has been and continues to be available to members of the public. The release of the draft report would result in confidential information subject to solicitor-client privilege being released in the public realm. The draft report was relied upon for the purposes of providing legal advice to Stratford City Council, which advice was given in confidence and as a result is subject to the privileges attaching to those communications.

3. The report, although privileged, is not a direct communication between a solicitor and a client.

[20] The city states that the report was used by the city's legal counsel for the purpose of giving legal advice to the city in confidence which advice was expressly communicated in a confidential manner to the city's legal counsel and was relied upon by legal counsel to formulate and provide legal advice to the city.

[21] The city submits that the release of the privileged report at issue would have a negative effect on the city's ability to carry out its role and function and engage in open and frank discussions with its legal counsel as it could not know in advance whether or not the privileged material would be subject to disclosure.

4. The extent to which the costs of servicing the annexed lands is significant to the appellant or to any other affected person.

[22] The city states that the costs of servicing the annexed lands is not significant to the appellant or to any other affected person and that information related to the servicing of the annexed lands was set out in the public report, which was released to the public prior to Stratford City Council making its decision on the annexation.

[23] The city further states the public report contains information that that the lands subject to the boundary adjustment are situated adjacent to the existing industrial area and the annexation promotes a cost effective development pattern by minimizing servicing costs.

5. The historic practice of the city with respect to disclosing similar information, such as its disclosure of several other reports related to the annexation of the land.

[24] The city states that the publishing of reports that are currently available on the city's website that were considered during the municipal restructuring process is not a historic practice, but rather a requirement of this process as governed by the *Municipal Act, 2001*. As the draft report subject to this appeal was not used or relied upon by Council in making its decision in terms of the annexation and is solicitor-client privileged, it submits that it would be inappropriate to post such a draft report that was never before Council on the city's website.

The appellant's representations

[25] The appellant states that the reasons identified as justification for the annexation at the time the annexation was being considered by the city included a shortage of industrial land available to meet the requirements of the Provincial Policy Statement and in particular a shortage of one to three acre industrial lots. He states that the public report did not contain sufficient information to justify why the annexation was required to resolve either of these issues as it did not contain mapping of the existing vacant designated and zoned industrial lands. He submits that such mapping was fundamental to understanding whether such needs exist.

[26] The appellant states that he was provided by the city mapping information of the existing vacant designated and zoned industrial lands, which was never posted on the city's website nor was it ever provided generally to the public. He states that this mapping information did not include the land at issue in the report and that presumably, the basis for the exclusion of these lands was available in the report, which is where the mapping he obtained was identified by the city as coming from.

[27] The appellant disputes the classification of the report at issue as "draft," as the public report was also referred to as a "draft report" until after Council voted on the annexation request and was only finalized after three municipal councils had already voted on the proposed annexation.

[28] The appellant submits that the public report was the only planning justification made available to Council at the time it made its decision on the annexation, then Council was clearly not properly informed in making its decision, as justification for the annexation could only be established through review of the information contained in mapping information. He reiterates that he was informed by the city that mapping was available from in the report at issue in this appeal.

[29] The appellant further states that information from the report at issue was made public by the city in a 99 page Employment Land Justification report, which was sent by the city to the Ministry of Municipal Affairs and Housing as justification for the annexation

The city's reply representations

[30] In reply, the city refers in detail to the public report that it states clearly provided the justification for the additional land and quoted from that report. The report provided, in essence, that the land was required as the current availability of industrial land within the city boundaries was limited, particularly for large industrial users and the proposed boundary adjustment represented a logical direction of growth to incorporate additional industrial employment uses.

[31] The city states that the documentation, report and information before Council when making a decision on the annexation of the additional lands was and is available to the public (through its posting on the city's website). The version of the draft report in the custody of the city does not contain any mapping or figures.

[32] The city states that the Employment Land Justification report referred to by the appellant contains graphics and was dated February 19, 2020, which was after the municipal boundary adjustment was approved. This report was used to provide justification for the application of a Minister's Zoning Order on the proposed Annexation Lands in Stratford. It states that copies of the Employment Land Justification Report have been provided to members of the public upon request.

[33] The city submits that as the report that is the subject to this appeal was not

used or relied upon by Council in making its decision in terms of the annexation and is solicitor- client privileged, it would be inappropriate to post such a draft report on the city's website.

The appellant's sur-reply representations

[34] In sur-reply, the appellant states that either the report played no role in Council's decision (because no legal advice arising from the report was provided to it); or legal advice was provided to Council using information from the report (in which case the report played a role in Counsel's consideration of the annexation). He does not understand how both these statements by the city can be true.

Findings

[35] As noted above, in the interim order, I determined that the city had not taken into account the five relevant considerations in exercising its discretion as to whether to disclose the report, in whole or in part, to the appellant.

[36] Because the city had not taken into account these relevant considerations, I found that the city had not exercised its discretion in a proper manner when it decided not to disclose the report.

[37] I was not satisfied that the city had balanced the appellant's (or the public's) interests in the disclosure of the report with the importance of the section 12 solicitor-client privilege exemption. Therefore, I ordered the city re-exercise its discretion. As explained above, it is not the role of the IPC to substitute the city's decision but rather to ensure that the city considered whether to disclose the report although it qualified for a discretionary exemption under the *Act*.

[38] Based on my review of the parties' representations following the interim order, I find that the city has now exercised its discretion in a proper manner. In particular, I find that the city took into account the five relevant considerations listed above and in the interim order.

[39] I am satisfied that the city took into account the competing interests that could weigh in favour of disclosure of the report. In so doing, the city has elaborated on what information was relied on by Council in approving the annexation of the land, including what information was and is publicly available.

[40] It is clear that the city considered and weighed whether the information in the report would increase public confidence in the operation of the city. It has explained why it is of the view that the public information already available is sufficient to encourage public confidence in the decision.

[41] As stated throughout the city's representations and as acknowledged in the interim order, I accept that the report (the record at issue) was not given, used, or

relied upon by Stratford City Council. I also accept that the documentation and report before Stratford City Council when deciding on the annexation was and has been made available to the public by the city.

[42] Accordingly, I find that the city has now exercised its discretion in a proper manner, taking into account relevant considerations, including those set out in the interim order.

[43] I note that the city has not only addressed the considerations set out in the interim order, but has also addressed those set out in the appellant's representations made in response to the interim order.

[44] As the city has properly re-exercised its discretion, I will uphold its re-exercise of discretion and dismiss the appeal.

ORDER:

I uphold the city's re-exercise of discretion and dismiss the appeal.

Original Signed by: _____
Diane Smith
Adjudicator

_____ March 27, 2023