

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4413

Appeal MA21-00439

City of Toronto

July 14, 2023

**Summary:** The city received a request under the *Act* for all documentation sent and received by a specified employee relating to a specified numbered company. The city issued a decision granting partial access to the information and withholding some information pursuant to the solicitor-client privilege exemption at section 12. In this order, the adjudicator finds that section 12 applies to exempt the withheld information 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.

### OVERVIEW:

[1] The City of Toronto (the city) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

All documentation (digital and paper) notes, documents, reports, information, correspondence, including all emails sent and received by ML&S inspector [named individual], referencing or relating to [a specified numbered company] carrying on a business as [a specified business name] Time-frame: [specified].

[2] The city issued a decision, granting partial access to the records requested, with severances made pursuant to section 12 (solicitor-client privilege) of the *Act*. The city disclosed nine pages of records and advised the requester that pages 10 to 24 inclusive

were being withheld in full pursuant to section 12.

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

[4] The mediator had discussions with the appellant and the city in order to attempt settlement of the issues under appeal.

[5] As mediation did not resolve the appeal, the file was transferred to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*. As the adjudicator assigned to this appeal, I sought representations from the city and the appellant. Representations were received and shared in accordance with the IPC's *Code of Procedure*.

[6] In this order, I find that section 12 applies to exempt the withheld information and dismiss the appeal.

## **RECORDS:**

[7] The records consist of 15 pages of email communications (numbered as pages 10 to 24 of the responsive record) some with attachments.<sup>1</sup>

## **DISCUSSION:**

[8] The sole issue to be determined in this appeal is whether the discretionary solicitor-client privilege exemption at section 12 of the *Act* applies to the email communications that were withheld, and if so, whether the city properly exercised its discretion under that section not to disclose them.

[9] Section 12 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It states:

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.

[10] Section 12 contains two different exemptions, referred to in previous IPC decisions as "branches." The first branch ("subject to solicitor-client privilege") is based on common law and encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. The second branch ("prepared by

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<sup>1</sup> Many of the emails are duplicated in chains.

or for counsel employed or retained by an institution or in contemplation of or for use in litigation”) is a statutory privilege created by the *Act* that is similar but not identical to the common law privilege in branch 1. The institution must establish that at least one branch applies.

[11] The city submits that the withheld emails fall within both branches of section 12.

[12] Section 42 of the *Act* establishes that where an institution refuses access to information, the burden of proof that the information falls within one of the specified exemptions in the *Act* lies upon the institution. Therefore, in this case, the city bears the burden of proof in establishing that section 12 applies to the withheld emails.

### **Representations**

[13] The city submits that for an extended period of time there have been business operations associated with the appellant who has had interactions with the city’s municipal services, in particular the city’s municipal licensing and standards division (ML&S) dealing with business licensing and property standards. The city submits that these interactions have not always been to the satisfaction of the appellant (or his associates), leading to various legal proceedings.

[14] The city submits that the email communications at issue involved its staff in ML&S and the city solicitors and concern legal advice being sought and given. The city notes that although there are 15 pages in total, there are a large number of duplicate emails within the pages. The city submits that an examination of the records clearly establishes that they are exempt by solicitor-client privilege under section 12 of the *Act*.

[15] The city submits that solicitor-client communication privilege and litigation privilege both apply to the records. The city submits that the records are clearly communications between city staff and city solicitors requesting or providing legal advice. The city submits that solicitor-client communication applies on the basis that it covers not only legal advice itself and the request for legal advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.

[16] The appellant submits that the city has not provided evidence that the emails are subject to solicitor-client privilege. The appellant submits that the city has failed to meet its burden with regards to solicitor-client communication privilege and just stating that privilege applies is not sufficient proof.

[17] The appellant also submits that it is not possible to tell if privilege was waived because it has not provided sufficient proof to justify the use of section 12. The appellant submits that while some information might be privileged, other information, such as names, dates and parties involved could be disclosed. The appellant also submits that some of the information may be found in a statement of defence and privilege would no longer apply.

## **Analysis and finding**

[18] For the reasons below, I find that the emails are exempt from disclosure under section 12, as a result of the application of the common law solicitor-client communication privilege at branch 1.

[19] The common law privilege in branch 1 includes solicitor-client communication privilege, which 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>2</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>3</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>4</sup>

[20] Based on my review of the parties' representations and the records themselves, I accept the city's claim that solicitor-client communication privilege applies to the withheld emails and attachments.

[21] The information at issue clearly consists of communications between city staff and a city solicitor requesting or providing legal advice. I find that the withheld information qualifies for solicitor-client privilege because it consists of communications of a confidential nature between lawyer and client made for the purpose of obtaining or giving legal advice and/or aimed at keeping both informed so that advice can be sought and given.

[22] I also do not accept the appellant's argument that the city's privilege has been waived. The appellant has not submitted and I am aware of no authority to suggest that solicitor-client privileged communications are no longer privileged if some of that information appears in a statement of defence.

[23] Although the city has claimed that more than one privilege applies to the records at issue, since I have found that solicitor-client communication privilege applies to the information, there is no need to discuss if they are also privileged under the other branches under section 12.

[24] The section 12 exemption is discretionary, meaning that an institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether it failed to do so.

[25] The IPC may find that the institution erred in its exercise of discretion where, for example, it does so in bad faith or an improper purpose, takes into account irrelevant

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

<sup>3</sup> Orders PO-2441, MO-2166 and MO-1925.

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

considerations, or fails to take into account relevant ones.

[26] The appellant did not address the city's exercise of discretion in his representations.

[27] There is no evidence before me that the city failed to exercise its discretion under section 12. Based on the material before me, including the records, I find that, in exercising its discretion under section 12, the city took into account relevant considerations regarding the purpose of solicitor-client privilege.

[28] I find that the city did not take into account irrelevant considerations in exercising its discretion, and that the factors it did consider were relevant in the circumstances. Accordingly, I uphold the city's exercise of discretion in denying access to record on the basis of solicitor-client communication privilege as contemplated by section 12 of the *Act*.

[29] The appellant submits that parts of the record that do not contain privileged information can be disclosed. I have considered whether any portions of the records can be severed and partially disclosed and have concluded that it is not possible in this appeal. As Ontario's Divisional Court stated in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*<sup>5</sup>:

Once it is established that a record constitutes a communication to legal counsel for advice, it is my view that the communication in its entirety is subject to privilege.

[30] Clearly, this would also be the case with respect to the lawyer's response containing the advice. I therefore conclude that the records, all of which are direct solicitor-client communications that relate to the city seeking or receiving legal advice, are not able to be severed.

## **ORDER:**

The appeal is dismissed.

Original signed by: \_\_\_\_\_

Alec Fadel  
Adjudicator

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July 14, 2023

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<sup>5</sup> (1997) 102 O.A.C. 71, 46 Admin L.R. (2d) 115, [1997] O.J. No. 1465 (Div. Ct.).