Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4534

Appeal MA21-00689

City of Vaughan

June 18, 2024

Summary: The City of Vaughan received a request under the *Act* for access to records relating to development applications for a particular condominium project. The city granted partial access to the responsive records, relying on the exemptions at sections 7(1) (advice or recommendation) and 12 (solicitor-client privilege). In this order, the adjudicator upholds the city's decision, in part. She finds that section 7(1) applies to the record for which it was claimed and that the public interest override does not apply to permit its disclosure. She also finds that section 12 applies to all but one of the records for which it was claimed and orders the city to disclose that record to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 7(1), 12 and 16.

Orders Considered: Orders MO-2945-I and PO-4326.

Cases Considered: *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd*. (1983), 45 B.C.L.R. 218 (S.C.)*; Liquor Control Board of Ontario v. Magnotta Winery* Corporation, 2010 ONCA 681.

OVERVIEW:

[1] Prior to 2018, a developer paid the City of Vaughan (the city) $11 million as a condition of approval for a particular condominium development. It also gave the city an adjoining parcel of land, which was to be turned into a city park.

[2] In 2018, the city decided to refund more than $11 million to the developer (which the appellant refers to as a "gift" from the city to the developer). According to the appellant, the city refused to publicly explain why it decided to refund the monies to the developer.

[3] In that context, the appellant submitted a multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the development applications for the condominium project.

[4] The city granted partial access to the responsive records. Some records were denied pursuant to sections 6(1)(b) (closed meeting), 7(1) (advice or recommendation) and 12 (solicitor-client privilege) of the *Act*.[1]

[5] Due to the appellant's belief that additional records should exist, the city agreed to conduct an additional search and located additional records. The city granted access to some of these records but withheld other records based on section 12.

[6] The appellant appealed both of the city's decisions to the Information and Privacy Commissioner of Ontario (the IPC).

[7] During mediation, the appellant raised the possible application of the public interest override at section 16 of the *Act*, and it was added to the scope of the appeal.

[8] As further mediation was not possible, the appeal was transferred to the adjudication stage of the appeal process where, as the adjudicator, I decided to conduct an inquiry under the *Act*. I invited and received representations from the city and the appellant.[2]

[9] For the reasons that follow, I uphold the city's decision, in part. I find that section 7(1) applies to the record for which it was claimed and that the public interest override at section 16 does not apply to permit its disclosure. I also find that section 12 applies to all but one of the records for which it was claimed and order the city to disclose that record to the appellant.

RECORDS:

[10] There are 7 records remaining at issue:[3]

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[1] The city also relied on section 10(1) to withhold certain information. During mediation, the appellant advised that he was not pursuing access to information withheld under section 10(1). Section 10(1) is therefore not at issue in this appeal.

[2] The parties' representations were shared in accordance with the confidentiality criteria in the IPC's *Code of Procedure*.

[3] Record 3, the Factum of the Applicant (Court File CV-17-131289-00), is no longer at issue in this appeal due to the city's Revised Decision of February 29, 2024, which stated that it no longer relied on section 12

- Record 1 is a closed session report with attachments.
- Record 2 is the city's notice of response to a motion at the Local Planning Appeal Tribunal (LPAT).
- Record 4 are the minutes of settlement regarding matters before the LPAT.
- Record 5 to 8 are email chains.

[11] The city claims that both sections 6(1)(b)[4] and 12 applies to records 1 and 4 while only section 12 applies to records 2, 5, 6, and 8. The city claims that only section 7(1) applies to record 7.

[12] Except for record 7, the city did not provide the IPC with a copy of the records at issue in this appeal. As a result, I requested that the city provide me with a detailed affidavit to support its claim that section 6(1)(b) and 12 apply to records 1, 2, 4, 5, 6, and 8. With its representations, the city provided an affidavit setting out information about each record including the exemption(s) claimed, the title of the record, a description of the content of the record and the individual who prepared the record including the senders and recipients of the emails in records 5 to 8.

ISSUES

A. Does the discretionary solicitor-client privilege exemption at section of the Act apply to records 1, 2, 4, 5, 6, and 8?

B. Does the discretionary exemption at section 7(1) for advice or recommendations given to an institution apply to the email chain in record 7?

C. Is there a compelling public interest in disclosure of record 7 that clearly outweighs the purpose of the section 7(1) exemption?

D. Did the city exercise its discretion under sections 7(1) and 12? If so, should I uphold the exercise of discretion?

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to withhold record 3, but instead relied on section 15(a) (information published or available to the public). The appellant did not appeal this decision. As a result, this record is not at issue in this appeal.

[4] Below I find that records 1 and 4 are exempt under section 12. As such, I did not consider the exemption at section 6(1)(b) as it was not necessary.

DISCUSSION:

Issue A: Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to records 1, 2, 4, 5, 6 and 8?

[13] The city claims that section 12 applies to records 1, 2, 4, 5, 6 and 8.

[14] 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.

[15] 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. The second branch ("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") is a statutory privilege created by the *Act*. The statutory and common law privileges, although not identical, exist for similar reasons. The institution must establish that at least one branch applies.

[16] The city submits that both solicitor-client communication privilege and litigation privilege at common law applies to the records. It also submits that the statutory litigation privilege applies to the records.

Branch 1: common law privilege

[17] At common law, solicitor-client privilege encompasses two types of privilege:

- solicitor-client communication privilege, and
- litigation privilege.

Common law solicitor-client communication privilege

[18] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.[5] This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.[6] The privilege covers not only the legal advice itself and the request for advice, but also

[5] Orders PO-2441, MO-2166 and MO-1925.
[6] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.[7]

[19] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.[8] The privilege does not cover communications between a lawyer and a party on the other side of a transaction.[9]

Common law litigation privilege

[20] Common law litigation privilege is based on the need to protect the adversarial process by ensuring that legal counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[10] The litigation must be ongoing or reasonably contemplated for the common law litigation privilege to apply.[11]

[21] This privilege protects records created for the dominant purpose of litigation. It protects a lawyer's work product and covers material going beyond communications between lawyer and client.[12]

[22] Litigation privilege 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.[13]

Representations

[23] The city submits that records 1, 2, 4, 5, 6 and 8 are subject to common law solicitor-client communication privilege because they contain communications directly from the city's internal and external legal counsel wherein legal advice was given. The city submits that disclosure of these records would reveal privileged communications because the correspondence contains detailed narrations of the legal work undertaken by the city's internal and external legal counsel.

[24] The city submits that as the advice sought and given revolves around a litigation matter, common law litigation privilege also applies to these records.

[25] The appellant's representations focus on his argument that the records are not

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[7] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.
[8] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[9] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)
[10] *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).
[11] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.
[12] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).
[13] *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

subject to litigation privilege. He explains that the nature of the information being sought is not specifically tied to litigation as a portion of the subject development lands was a "gift" to the developer. The appellant explains that this gift was initially opposed by the city's external legal counsel and council.

[26] The appellant also submits that litigation privilege does not apply outside of the zone of privacy" intended to protect litigation privilege. He submits that correspondence, notes, minutes, communication, emails, and other documents that were prepared by city staff or city counsel in preparation of this communication and settlement should be disclosed. The appellant submits that litigation privilege does not cover confidential records issued by the city's finance and payroll departments relating to the settlement with the developer. He further submits that communication between the city's counsel and the developer's counsel should be disclosed as litigation privilege does not cover it.

Analysis and findings on common law solicitor-client privilege

[27] For the reasons below, I find that the city has established that records 1, 5, 6 and 8 are subject to common law solicitor-client communication privilege in section 12 of the *Act*. However, I find that the city has not established that record 2 and 4 are subject to either common law solicitor-client communication privilege or common law litigation privilege.

Record 2

[28] As mentioned above, record 2 is the city's notice of response to the motion brought by the developer to the LPAT (now part of the Ontario Land Tribunal (OLT)).

[29] The city argues that record 2 is the city's submissions in response to the motion brought by the developer and is not currently available through the Courts. When the city was asked to explain why this record would not be available for anyone to request from the OLT, the city's response was that the OLT is a separate institution and if it is determined that they are available directly through the OLT then that is how they should be obtained.

[30] Based on the affidavit evidence provided by the city, record 2 does not contain communications of a confidential nature between lawyer and client made for the purpose of obtaining or giving legal advice. Additionally, although it was created for the dominant purpose of litigation, it was created outside of the "zone of privacy" because it is clearly a document filed for the purpose of the LPAT hearing and provided to opposing counsel. As such, I find it is not covered by either common law communication privilege or litigation privilege. Below I will consider whether it is subject to the statutory solicitor-client privilege in Branch 2.

[31] As the city has not taken the position that record 2 is not under its custody or control or that it is publicly available under section 15(1)(a), whether or not a copy of record 2 can also be obtained directly through the OLT is not relevant to my determination

of whether the city is to disclose record 2 to the appellant under the *Act*.[14]

Record 4

[32] As mentioned above, record 4 is described by the city in its affidavit as minutes of settlement for several LPAT appeals between itself and the developer.

[33] Based on the affidavit evidence provided by the city, record 4 does not contain communications of a confidential nature between lawyer and client made for the purpose of obtaining or giving legal advice. Additionally, although it was created for the dominant purpose of litigation, it was created outside of the "zone of privacy" because it is clearly a document between the city and opposing counsel to resolve the LPAT appeals. As such, I find it is not covered by either common law communication privilege or litigation privilege. Below I will consider whether it is subject to the statutory solicitor-client privilege in Branch 2.

Record 1

[34] The city describes record 1 as a closed session report with attachments containing legal advice and an update by the city solicitor. Based on the city's affidavit evidence, the closed session report was prepared by city legal counsel and contains legal advice regarding the proceedings related to appeals before the Ontario Municipal Board (OMB).[15] The attachments include a report regarding a prior closed session which also contains legal advice provided at an earlier date.

[35] Based on my review of the city's affidavit evidence and representations, I am satisfied that record 1 contains legal advice from the city legal counsel, or they were created to keep council informed so that legal advice may be sought and provided as required on matters before the OMB.

[36] I find, therefore, that record 1 is subject to solicitor-client communication privilege and exempt under section 12.

[37] Although section 6(1)(b) has also been claimed for record 1, as I have found that record 1 is subject to section 12, it is not necessary for me to consider whether it is exempt under section 6(1)(b).

Records 5, 6 and 8

[38] The city claims that records 5, 6 and 8 are exempt under common law solicitor-client communication privilege. Records 5 and 6 are email chains exchanged between the city's legal counsel to city staff. Record 8 is an email chain from the city solicitor to city

[14] I note that the OLT's website indicates that all documents filed with it and all communications to and from it are part of the public record and are available for reasonable access by the public (unless the OLT orders otherwise). See Document Requests | Ontario Land Tribunal (gov.on.ca)
[15] The predecessor of the LPAT.

financial services staff which forwards an email from the developer's legal counsel.

[39] I accept the city's affidavit evidence and find that all these email chains contain information that relates to the seeking or providing of legal advice on the matters involving the city's appearance before the LPAT (previously the OMB) or the Ontario Superior Court of Justice. In most cases, the recipients of the email chains were city staff while the sender was city legal counsel. Based on my review of the city's affidavit evidence and representations, I am satisfied that these records contain legal advice from the city legal counsel, or they were created to keep both city staff and city legal counsel informed so that legal advice may be sought and provided as required. I find that records 5, 6 and 8 are confidential communications between the city legal counsel and their client regarding legal matters, and therefore fall within the ambit of the common law solicitor-client communication privilege in Branch 1.

[40] I acknowledge the appellant's arguments that solicitor-client privilege does not cover confidential records issued by the city's finance department and payroll department relating to the settlement with the developer.

[41] The appellant appears to be referring to record 6 which is described by the city in its affidavit as an email chain sent by legal counsel to the city's finance department. Similarly, record 5 is an email chain described by the city as having been sent by legal counsel to the city's Director of Parks and Development.

[42] Based on the city's affidavit evidence, these are communications originating from the city's legal counsel to various city departments that contain updates on the legal matter about the lands related to the condominium development. As such, I find that the email chains that are records 5 and 6 form part of the continuum of communications between a solicitor and their client related to the giving of legal advice.

[43] I also note that the appellant argues that communication between the city's counsel and the developer's counsel should be disclosed as solicitor-client privilege does not cover it. In making this argument, the appellant appears to be referring to record 8 which is described in the city's affidavit as an email chain from the city solicitor to the city's Financial Services Department that begins with a forwarded message from opposing legal counsel.

[44] From my review of the city's affidavit evidence with respect to record 8, I accept that the email chain as a whole is part of a continuum of communications between the city legal counsel to the city financial services staff that, if disclosed, would reveal legal advice provided by counsel with respect to the information contained in the email sent to the city by the developer's legal counsel.

Branch 2: statutory privilege

[45] The branch 2 exemption 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.

Statutory solicitor-client communication privilege

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

Statutory litigation privilege

[47] This 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.[16]

[48] The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.[17]

[49] In contrast to the common law privilege, termination of litigation does **not** end the statutory litigation privilege in section 12.[18]

Representations, analysis and findings on statutory solicitor-client privilege

[50] The city submits that records 1, 2, 4, 5, 6 and 8 are also subject to the statutory communication privilege as they were prepared by the city's legal counsel, in consultation with external legal counsel employed by the city. It submits that the records contain legal advice to counsel and make detailed references to the city's position on the OMB/LPAT appeals.

[51] Above, I have found that records 1, 5, 6 and 8 are subject to the common law solicitor-client communication privilege. For the same reasons as set out above, I find that these records are also subject to the statutory solicitor-client communication privilege set out in section 12.

[52] Above, I have found that record 2 is not subject to either of the common law heads of solicitor-client privilege. For similar reasons, I find that record 2 is not subject to the statutory solicitor-client privilege. Specifically, based on the affidavit evidence provided by the city, record 2 does not contain communications of a confidential nature between lawyer and client made for the purpose of obtaining or giving legal advice. I also find that although it was created for the dominant purpose of litigation, it was created outside of the "zone of privacy" because it is clearly a document filed and provided to opposing

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[16] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.
[17] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.
[18] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

counsel.

[53] As I have found that record 2 is not exempt under the common law privileges or the statutory privileges, I will order the city to disclose it.

Record 4

[54] The city describes record 4 as the minutes of settlement between it and the developer with respect to the LPAT appeals. It claims that it is subject to statutory litigation privilege.

[55] In *Liquor Control Board of Ontario v. Magnotta Winery Corporation* (*Magnotta)*, the Ontario Court of Appeal found that the statutory litigation privilege in section 19 of *Freedom of Information and Protection of Privacy Act* (*FIPPA*) protects records prepared for use in the mediation or settlement of litigation, including the end products of such mediation or settlement discussions, such as settlement agreements and minutes of settlement.[19]

[56] IPC decisions since *Magnotta* have found that records prepared for use in the settlement of contemplated litigation, including settlement agreements and minutes of settlement, are exempt from disclosure under the statutory litigation privilege in section 19 of *FIPPA* and section 12 of the *Act*.[20]

[57] Record 4 is minutes of settlement entered into between the city and the developer. I am satisfied that this record was created as a result of negotiation between the city's external legal counsel and the developer's legal counsel, relating to the LPAT appeals. From my review of the parties' representations and the affidavit evidence on record 4, I am also satisfied that there was clearly litigation between the city and the developer as demonstrated by the number of LPAT appeals, and that the city and the developer entered into the minutes of settlement to resolve the LPAT appeals. I find, therefore, that the minutes of settlement was prepared by or for the city's external legal counsel for use in litigation, as required by the statutory litigation privilege in Branch 2 of section 12 of the *Act*.

[58] I note that the appellant argues that record 4 should be disclosed as it was prepared outside of the "zone of privacy". Although record 4 was negotiated and prepared between opposing counsel, *Magnotta* recognizes that records prepared for use in mediation or settlement of litigation is protected under the statutory litigation privilege in section 12. As such, I am not persuaded by the appellant's argument.

[59] Although section 6(1)(b) has also been claimed for record 4, as I have found that record 4 is subject to section 12, it is not necessary for me to also consider whether it is

[19] 2010 ONCA 681 at paras 43-44 (*Magnotta*).
[20] Orders PO-3627, PO-3651, MO-3597 and MO-3924-I.

exempt under section 6(1)(b).

Waiver of solicitor-client privilege

[60] 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.[21]

[61] 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.[22]

[62] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[23] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[24]

[63] The city submits that at no point did it waive common law or statutory privilege.

[64] The appellant argues that there is an implied waiver of solicitor-client privilege by the city as the matter of the condominium development was argued before the court.

[65] The appellant argues that "fairness" dictates that an implied waiver be found to permit disclosure of the records as the monies refunded and the benefits gained to the developer was taxpayer's money and the public has a right to know why the city settled the matter.

[66] As noted above, waiver of privilege can be either express or implied.

[67] In this case, I accept the city's submissions that it has not waived the statutory solicitor-client privilege either explicitly or implicitly. There is no evidence before me of an express intention to waive. As such, I find that the city has not expressly waived privilege.

[68] The question remains whether there has been an implied waiver of privilege. In *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd*. (1983),[25] the decision setting out the common law test for waiver of privilege, the court recognized that "waiver may also occur in the absence of an intention to waive, where fairness and consistency so require."[26] The court referred to the proposition that "double elements are predicated

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[21] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[22] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[23] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[24] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.
[25] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd*. (1983), 45 B.C.L.R. 218 (S.C.) (*S & K Processors*).
[26] *S & K Processors*, above, at para. 6

in every waiver — implied intention and the element of fairness and consistency. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived."[27]

[69] Thus, where there is no evidence of an express intention to waive, the question is whether "fairness and consistency" requires a finding of implied, or implicit, waiver.

[70] In Order MO-2945-I, former Assistant Commissioner Sherry Liang stated the following about implied waiver:

> Courts have considered the notion of fairness as between parties to litigation in considering whether implied waiver has been established. This office has considered this question in the context of access to information appeals and not only where the parties in an inquiry are also litigants in court proceedings.

[71] In Order PO-4326, the adjudicator found the fact that the OPP was willing to facilitate a discussion between the Crown who prepared the legal opinion (the record at issue) and the appellant in that appeal does not necessarily mean that the OPP implicitly conveyed an intention to waive privilege of the entirety of the legal advice set out in the legal opinion.

[72] I agree and adopt the reasoning in both orders cited above for the purpose of this appeal.

[73] In this case, the appellant argues that there is an implied waiver of solicitor-client privilege of the records at issue in this appeal as the matter of the specific lands relating to the condominium development was argued before the court. However, in my view, the fact that a party argued about the subject matter in court does not necessarily mean that the party has waived solicitor-client privilege to all records relating to that matter. To accept the appellant's argument would mean that waiver of solicitor-client privilege occurs over all records related to a matter simply because they litigated the subject matter before the court. In any event, in this case, there is no evidence before me that the specific information at issue in records 1, 4, 5, 6 and 8 found to be subject to solicitor-client privilege was disclosed in court.

[74] The appellant also argues that fairness requires a finding of an implied waiver by the city. As stated above, where fairness has been held to require an implied waiver, there is always some manifestation of a voluntary intention to waive privilege to some extent. On the facts of this appeal, I find that there is no evidence before me to suggest a voluntary intention on the part of the city to waive solicitor-client privilege over these specific records.

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[27] Set out in Wigmore on Evidence, cited in *S & K Processors* at para. 10

[75] In sum, on the evidence before me, I find that it has not been established that there is an express or implied waiver of privilege on the part of the city over records 1, 4, 5, 6 and 8. Accordingly, I find that these records are exempt under the discretionary solicitor-client privilege exemption at section 12 of the *Act.*

Issue B: Does the discretionary exemption at section 7(1) for advice or recommendations given to an institution apply to record 7?

[76] Section 7(1) of the *Act* exempts certain records containing advice or recommendations given to an institution. This exemption aims to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[28]

[77] Section 7(1) states:

> A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[78] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to a suggested course of action that will ultimately be accepted or rejected by the person being advised. Recommendations can be express or inferred.

[79] "Advice" has a broader meaning than "recommendations." It includes "policy options," which are the public servant or consultant's identification of alternative possible courses of action. "Advice" includes the views or opinions of a public servant or consultant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.[29]

[80] "Advice" involves an evaluative analysis of information. Neither "advice" nor "recommendations" include "objective information" or factual material.

[81] Section 7(1) applies if disclosure would "reveal" advice or recommendations, either because the information itself consists of advice or recommendations or the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[30]

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[28] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[29] See above at paras. 26 and 47.
[30] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

Representations

[82] The city submits that record 7 is exempt under section 7(1). It submits that record 7 contains a recommendation from one city staff member to another. The city submits that the recommendation refers directly to the direction being contemplated by the city's legal team.

[83] The city also submits that the exceptions at section 7(2) and 7(3) to the exemption at section 7(1) do not apply.

[84] The appellant's representations do not address whether record 7 contains advice or recommendations.

Findings

[85] As described by the city, record 7 is an email chain from one city staff member to another. On my review, I find that this one-page email chain contains a suggested course of action from one of the staff and invites the other city staff to either accept or reject the action. Additionally, I find that there is no information in the record that is separate and distinct from the recommendation. As such, I find that record 7 contains a "recommendation" within the meaning of section 7(1).

[86] I have considered and find that none of the exceptions to section 7(1) in sections 7(2) and (3) apply.[31]

[87] Therefore, I find that record 7 is exempt from disclosure, subject to my consideration of the application of the public interest override and the city's exercise of discretion which I will discuss below.

Issue C: Is there a compelling public interest in disclosure of record 7 that clearly outweighs the purpose of the section 7(1) exemption?

[88] Section 16 of the *Act* is the "public interest override" that provides for the disclosure of records that would otherwise be exempt under another section of the *Act*. It states:

> An exemption from disclosure of a record under sections 7, 9, 9.1, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [Emphasis added]

[89] For section 16 to apply, two requirements must be met:

[31] Sections 7(2) and (3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7(1).

- there must be a compelling public interest in disclosure of the records; and
- this interest must clearly outweigh the purpose of the exemption.

[90] The *Act* does not state who bears the onus to show that section 16 applies. The IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure that clearly outweighs the purpose of the exemption.[32]

[91] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[33] In previous orders, the IPC has stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[34]

[92] A "public interest" does not exist where the interests being advanced are essentially private in nature.[35] However, if a private interest raises issues of more general application, the IPC may find that there is a public interest in disclosure.[36]

[93] The appellant submits that record 7 should be disclosed because there is public interest in the city refunding, forgiving, or not charging the developer for the relevant lands as it involves public funds. He submits that the city, who is entrusted to act in the public interest, did not provide an explanation for its actions. The appellant also submits that the land in question was given to the developer without an explanation to tax payers and not subject to public tender.

[94] The appellant explains that, in an earlier OMB decision, the OMB ruled that the city would only get parkland from the previous developer as a condition of development. As such, he submits that there is public interest in why the lands reserved as parkland was returned under the settlement agreement to the developer without charge.

[95] The city submits that that the threshold of "compelling public interest" has not been met. It submits that the appellant is the only individual who has requested information related to this subject matter and, therefore, there is a lack of evidence of wider public interest in this subject matter.

[96] As noted above, I have upheld as exempt under section 7(1) record 7, which is a

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[32] Order P-244.
[33] Orders P-984 and PO-2607.
[34] Orders P-984 and PO-2556.
[35] Orders P-12, P-347 and P-1439.
[36] Order MO-1564.

one-page email chain containing information that refers to a suggested course of action by a city staff member and invites the other city staff member to either accept or reject the action.

[97] On my review of this email chain, I find that disclosure of the specific information that it contains would not serve the purpose of informing or shedding light on the operations of the city regarding the $11 million refund to the developer. Although I accept the appellant's argument that there may be a compelling public interest in the reasoning behind why the city decided to refund $11 million to the developer, I find that the information in the email chain in question would not shed light on the city's decision to refund the money. I am also not persuaded that the disclosure of the email chain would help members of the public to express opinions or to make political choices in a more meaningful manner.

[98] As a result, I find that it has not been established that there is a public interest, compelling or otherwise, in the disclosure of the specific information at issue in record 7. As the first requirement of the test for the application of the public interest override is not met, I find that section 16 does not apply. As both requirements must apply, it is not necessary for me to consider whether any public interest outweighs the purpose of the section 7(1) exemption.

Issue D: Did the city exercise its discretion under sections 7(1) and 12? If so, should I uphold the exercise of discretion?

[99] Sections 7(1) and 12 are discretionary exemptions. Therefore, they permit an institution to disclose the information subject to those exemptions despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[100] The IPC may find 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 fails to take into account relevant considerations. In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[37] However, the IPC may not substitute its own discretion for that of the institution.[38]

[101] The city submits that it properly exercised its discretion under sections 7(1) and 12. The city submits that it took into account all relevant considerations and established that the records at issue properly fall under sections 7(1) and 12 based on the contents of these records. The city further submits that it did not act in "bad faith" or for an improper purpose when exercising its discretion. Finally, the city submits that the appellant has received approximately 900 pages of records that address his request.

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[37] Order MO-1573.
[38] Section 43(2) of the *Act*.

[102] Although the appellant provided representations, he did not address this issue.

[103] Based on the city's representations and the nature and content of the records at issue, I find that the city properly exercised its discretion to withhold the records at issue pursuant to the discretionary exemption at sections 7(1) and 12 of the *Act*. I am satisfied that the city took into account relevant considerations in exercising its discretion. I am also satisfied that the city did not consider any irrelevant considerations or act in bad faith or for an improper purpose. Accordingly, I uphold the city's exercise of discretion in deciding to withhold the records at issue pursuant to the sections 7(1) and 12 exemptions.

ORDER:

1. I uphold the city's decision not to disclose records 1, 4, 5, 6, 7 and 8.
2. I order the city to disclose record 2 to the appellant by July 18, 2024.
3. In order to verify compliance with Order Provision 2, I reserve the right to require the city to provide me with a copy of the records disclosed to the appellant upon request.

Original Signed By: June 18, 2024

Lan An
Adjudicator