



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1742

Appeal MA-030105-1

City of Toronto



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NATURE OF THE APPEAL:

This appeal concerns a decision of the City of Toronto (the City) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had sought access to a copy of a legal opinion provided to the City from [a named law firm]. The appellant indicates in his request that he was informed at a meeting held by the City Planning Department on a specified date that "...[this] opinion [had] been delivered to the City Solicitor for review."

By way of background the opinion relates to a proposed residential and commercial development at the northwest corner of Church Street and Adelaide Street East in Toronto, currently the site of a commercial parking lot. The site forms part of a block of land between King and Adelaide Streets with Church Street to the west, which contains the St. James Cathedral, the Parish House and the Diocesan Centre (the Cathedral Lands). The Cathedral Lands have been the subject of a long-standing and acrimonious land use and developmental rights dispute.

The City issued a decision denying access to a responsive record pursuant section 12 (solicitor-client privilege) of the *Act*.

The appellant appealed the City's decision.

I first sent a Notice of Inquiry to the City seeking representations. The Ministry submitted representations and agreed to share the non-confidential portions with the appellant. I then sought and received representations from the appellant. In addition to making submissions on the application of the solicitor-client privilege exemption, the appellant appears to have raised section 16 (public interest override) as a basis for justifying the disclosure of the record. I note that section 16 cannot apply to override the application of section 12. Accordingly, I will not address its application in the circumstances of this appeal. The appellant's representations raised issues regarding the characterization of the record at issue so I invited the City to submit reply representations, which it did.

RECORD:

There are 10 pages of records at issue consisting of a memo requesting a legal opinion, related correspondence and a legal opinion.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

General principles

The City claims that the record at issue qualifies for exemption under section 12 of the *Act*, which reads:

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.

Section 12 contains two branches: the common law solicitor-client privilege, which includes both solicitor-client communication privilege and litigation privilege, and two analogous statutory privileges. The institution must establish that one or the other (or both) branches apply. The City appears to be relying on both the communication privilege and litigation privilege aspects of branch 1 and 2.

I will first consider the application of the branch 1 solicitor-client communication privilege to the records.

Solicitor-client communication privilege under branch 1

General principles

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 [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (Order P-1551).

The privilege applies to “a continuum of communications” between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

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 [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Representations

The City submits:

The record is a confidential communication between an Urban Development Services senior planner and the City Solicitor. This communication consisted of a memo marked confidential together with attachments also marked confidential and/or privileged.

In the memo, the employee is specifically requesting legal advice from the City Solicitor concerning an outside legal opinion with respect to the title for the cathedral lands which had been drafted by one of the two law firms retained by the Cathedral and provided to the City by the other firm.

The staff member specifically obtained the legal opinion from the Cathedral's solicitor so that he could forward this document to the City Solicitor in order to obtain her opinion on the matter of the Crown Patent and title rights and her advice as to how the department should proceed. The City Solicitor used the information provided to her in order to give her advice to the employee and to the department.

. . . [T]he memo together with its attachments was information provided to the City Solicitor in order to obtain legal advice and constitutes her "working papers for the purpose directly related to the seeking, formulating or giving of the legal advice."

Therefore, solicitor-client communication privilege applies to the record.

The appellant states in response:

[The record] is a legal opinion filed by the applicant (The Rector and Churchwardens of St. James' Cathedral, Toronto) in support of an application for an amendment to the Toronto Official Plan and Zoning By-Laws.

The record is not a memo from an Urban Development Services senior planner to the City Solicitor with 'attachments'. That record was not requested. It is only through the City's representation in these proceedings that the appellant has even become aware of any memo sent by an Urban Development Services senior planner to the City Solicitor (from one institution employee to another).

The appellant's request is for a part of an application for re-zoning, a public record, and we are therefore entitled to view it. Clearly the Planner asked for an opinion on the document in question (the record we seek, not the memo the city claims we are seeking) and wrote to the City solicitor asking for an opinion. We agree that the memo to the City solicitor may be privileged. However, the document we seek exists independently of that memo and is part of The Rector and Churchwardens of St. James' Cathedral, Toronto's application for rezoning.

The legal opinion (the record) is then referred to in the Toronto East York Community Council Report 7 Clause No. 14 dated June 18, 2003, Heading: Crown Patent. - Copy attached hereto. The record is an outside legal opinion tendered in support of the application.

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As we properly define the record you can see that the record is part of The Rector and Churchwardens of St. James' Cathedral, Toronto's application. If the staff member asked for this record as additional supporting material to be included with the application as stated in the City's submissions, then when received by the city, the record becomes part of the application (presumably to address the issue of the ownership of the lands in question).

We take it from the City's representations that The Urban Development Services senior planner is the Client and The City Solicitor must then be the Solicitor.

[Named law firm] was acting for the applicant, when the record was created. The record provided by [named law firm] was tendered by the applicant in support of its application for rezoning. The solicitor is [named law firm] and the client is the applicant. The privilege belongs to the applicant who clearly waived that privilege when they tendered the document as part of their application. Unless the City Planner and the City and the Applicant are partners and have jointly retained [named law firm], then the City cannot claim privilege regarding this document. The City is not the client.

. . . [S]olicitor-client or litigation privilege cannot apply to any part of an application placed before the City. Otherwise it would be possible to cherry pick those portions of the application that may reveal malfeasance on the part of the applicant while bringing the application, or for that matter malfeasance on the part of the City in its approval of the application. To find that any part of an application may be deemed privileged would completely circumvent the democratic process.

The City reiterates in reply that communication privilege applies because the legal opinion was part of a confidential communication between the City and its solicitor for the purpose of seeking legal advice regarding the validity of the legal opinion.

Findings

On my review of the record and the parties' representations, I find that it forms part of a "continuum of communications" between a City employee and the City Solicitor regarding issues related to the development of the Cathedral Lands. I concur with the City's characterization that the employee is requesting legal advice from the City Solicitor concerning an outside legal opinion with respect to the title of the Cathedral Lands. This outside legal opinion was prepared by legal counsel for the Rector and Churchwardens of St. James Cathedral. I agree that this communication together with its attachments, including the outside legal opinion, was information provided to the City Solicitor in order to obtain legal advice and constitutes her "working papers directly related to seeking, formulating or giving legal advice". I

also note that the communication between the City employee and the City Solicitor is marked "confidential".

I find this exchange of communication to be privileged. I acknowledge that the legal opinion, on its own or in another context, may not be privileged. However, once it is attached to the privileged communication between the City employee and the City Solicitor the legal opinion becomes privileged. The fact that the legal opinion was not originally prepared for the City or that it may have formed part of an application submitted to the City is irrelevant.

Accordingly, I find that the record qualifies for exemption pursuant to branch 1 of the solicitor-client communication privilege exemption under section 12 of the *Act*.

ORDER:

I uphold the City's decision to deny access to the record.

Original signed by: _____
Bernard Morrow
Adjudicator

January 19, 2004