Information and Privacy Commissioner,
Ontario, Canada

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

FINAL ORDER MO-3274-F

Appeal MA13-261

City of Markham

December 24, 2015

Summary: This Final Order follows Interim Order MO-3177-I. This appeal involves 17 records relating to the proposal for the construction of an arena that are subject to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The city denied the appellant access to all the records under the discretionary exemptions at sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 11 (economic and other interests) and 12 (solicitor-client privilege), and the mandatory exemption at section 10(1) (third party information) of the *Act*. Interim Order MO-3177-I found that section 10(1) did not apply to any of the records for which it was claimed and it ordered record 3 to be disclosed in part to the appellant. It also directed the city to re-exercise its discretion in deciding to withhold the remaining 16 records under sections 6(1)(b), 7(1), 11 and 12. The city re-exercised its discretion and withdrew its reliance on sections 6(1)(b) and 11, and decided to disclose records 1, 1(a), 1(b), 1(c), 2, 5 and part of 1(d). The city maintained its decision to withhold pages 2 and 3 of record 1(d) under section 7(1) and all of records 4 and 6 through 13 under section 12. The appellant continued to dispute the city's decision.

This Final Order finds that the city did not waive its privilege in record 4, and it upholds the city's exercise of discretion in deciding to withhold records 4 and 6 through 13 under the solicitor-client privilege exemption and one paragraph in record 1(d) under the advice and recommendations exemption. However, it orders the city to disclose the remaining information in pages 2 and 3 of record 1(d) which does not qualify for exemption under section 7(1) of the *Act*.

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

Orders and Investigation Reports Considered: Interim Orders MO-3177-I and MO-3253-I, and Order PO-3154.

Cases Considered: *John Doe v Ontario* (*Finance*), 2014 SCC 36.

OVERVIEW:

[1] This is the Final Order in respect of Appeal MA13-261, following Interim Order MO-3177-I. The appellant, a representative of a local ratepayers association, submitted a request to the City of Markham (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all reports relating to the Markham Sports Entertainment and Cultural Centre (GTA Centre), naming eight specific sources for the reports. The city located records responsive to the request and issued a decision denying access to all of them in their entirety, relying on the discretionary exemptions at sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 11(a), (c), (d) and (e) (economic and other interests) and 12 (solicitor-client privilege), and the mandatory exemption at section 10(1) (third party information). The appellant appealed the city's decision to this office and raised the possible application of the public interest override in section 16 as an issue in the appeal.

[2] In Interim Order MO-3177-I, I ordered the city to re-exercise its discretion to withhold records 1, 1(a), 1(b), 1(c), 1(d), 2, and 4 through 13 bearing in mind the following developments which I found had significant bearing on the appeal:

- The city decided not to proceed with the GTA Centre proposal.
- Information relating to the city's plan for the GTA Centre has been published in the media; this is in addition to the information previously disclosed by the city about the proposal.
- Information relating to this appeal and to related Appeal MA12-508 has been published in the media.
- The city informed this office that a motion before City Council (Council) to have all of the records at issue in this appeal and in related Appeal MA12-508 disclosed to the public was defeated on the basis that the *Act* prohibits disclosure.

[3] I also found that part of record 3 is exempt under the mandatory personal privacy exemption in section 14; however, the remainder of record 3 does not qualify for exemption under any of the discretionary exemptions claimed by the city or under the mandatory exemption in section 10(1), and I ordered it disclosed. In addition, I found that none of records 1, 1(a), 1(b), 1(c), 1(d) or 2 qualifies for mandatory exemption under section 10(1).

[4] Finally, I found that records 4 and 6 through 13 were solicitor-client privileged records under both branches 1 and 2 of section 12 of the Act. However, I reserved my decision on the possible waiver or loss of this solicitor-client privilege in record 4, in order to provide the city with an opportunity to address and clarify information in its confidential material in this appeal which suggested that record 4 was disclosed to outside parties.

[5] After issuing Interim Order MO-3177-I, I invited the city's representations on its re-exercise of discretion. In response, the city submitted a letter advising it required additional time to comply with my Interim Order MO-3177-I due to the voluminous nature of the records, the complexity of the issues and the numerous discretionary exemptions at issue. In its letter, the city requested a stay, variation and/or reconsideration of provisions 3 and 4 of Interim Order MO-3177-I. Before responding to the city's stay request, I sought the appellant's position on it. She took the position that the stay should not be granted.

[6] After considering the submissions of both parties, I granted the city a temporary stay of provisions 3 and 4 of the Interim Order. At the conclusion of the stay, the city submitted representations withdrawing its reliance on the discretionary exemptions in sections 6(1)(b) and 11(a), (c), (d) and (e). The city also decided to disclose records 1, 1(a), 1(b), 1(c), 2 and 5, and part of 1(d), but it maintained its decision to withhold records 4 and 6 through 13 under section 12 and part of record 1(d) under section 7(1) of the *Act*.

[7] I shared the city's representations and revised decision with the appellant, and invited her representations in response. The appellant continued to object to any of the records being withheld.

[8] In this Final Order, I find that section 7(1) applies only to one paragraph in record 1(d), and I order the city to disclose the remaining information in pages 2 and 3 of this record. I also uphold the application of section 12 to record 4, and the city's re-exercise of discretion with respect to records 4 and 6 through 13 and to the single paragraph in record 1(d) which all qualify for exemption.

RECORDS:

[9] The records at issue in this appeal are:

- pages 2 and 3 of Record 1(d) – Background Reports (deliverable 4) undated
- Record 4 – a Report / Power Point dated January 24, 2011, from Law Firm 1

- Records 6 through 13 – Legal Memos of various dates prepared by Law Firm 2

ISSUES:

A. Does the discretionary exemption at section 7(1) apply to pages 2 and 3 of record 1(d)?

B. Did the city waive or lose solicitor-client privilege in record 4?

C. Did the city properly re-exercise its discretion under sections 7(1) and 12? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the discretionary exemption at section 7(1) apply to pages 2 and 3 of record 1(d)?

[10] The city claims that pages 2 and 3 of the report in record 1(d) are exempt from disclosure under section 7(1) which states:

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

[11] The purpose of section 7 is 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.[1]

[12] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred. "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant 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.[2] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

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[1] *John Doe v Ontario (Finance)*, 2014 SCC 36, at para 43.
[2] *Ibid* at paras 26 and 47.

[13] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[3]

[14] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Examples of the types of information that have been found *not* to qualify as advice or recommendations include:

- factual or background information[4]
- a supervisor's direction to staff on how to conduct an investigation[5]
- information prepared for public dissemination.[6]

Representations

[15] The city submits that pages 2 and 3 of record 1(d) contain "advice and/or recommendations from consultants" it retained to provide Council with options as part of the GTA Centre deliberation process. It states that the specific advice in record 1(d) "includes information about projected market shares and data analysis surrounding projected ticket sales." The city argues that disclosure of the advice or recommendation contained in the record "could reasonably be expected to inhibit the free flow of advice or recommendations to the government." Finally, the city submits that the advice or recommendations contained in the record pertain to a recommended course of action for a significant commercial transaction, and it states that it relies on its previous representations on this issue.

[16] The appellant asserts that the section 7(1) exemption does not apply to record 1(d) and she argues that the city has not established its exemption claim through its representations.

Analysis and findings

[17] As noted above, the city has decided to disclose most of record 1(d) to the appellant, maintaining that only pages 2 and 3 are exempt under section 7(1). The city's revised access decision allows me to discuss the contents of record 1(d) in this Final Order in a way that I was not able to in my Interim Order MO-3177-I. Record 1(d)

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[3] Order P-1054.
[4] Order PO-3315.
[5] Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc 721/92 (Ont Div Ct).
[6] Order PO-2677.

is a six page report entitled "A review of the Operating Pro Forma provided by [a named company] – dated November 10, 2010." As can be deduced by its title, this record consists of a discussion of certain projections made in the pro forma, specifically, projections of venue attendance and market share, and financial projections based on the projected attendance, all provided by the proponent of the GTA Centre.

[18] With one exception, I agree with the appellant that the city has not established that pages 2 and 3 of record 1(d) fall within the section 7(1) exemption. On my review of pages 2 and 3, I conclude that only one paragraph qualifies as advice or recommendations as contemplated by the section 7(1) exemption. This paragraph contains a single suggestion from the consultant on a particular strategy; I accept that the suggested strategy constitutes a recommendation to the city and/or advice from the consultant to the city in relation to a decision that the city was – at the time – to make regarding the GTA Centre. I find that the paragraph containing the consultant's suggestion on page 2 of record 1(d) qualifies as advice or recommendations under section 7(1) of the *Act* in accordance with the Supreme Court of Canada's ruling in *John Doe v Ontario* (*Finance*), subject to my review of the city's exercise of discretion below.

[19] Beyond the one paragraph in page 2 of the record, I am not satisfied that any other information in pages 2 or 3 is similarly exempt. Rather, as submitted by the city, the remainder of pages 2 and 3 contains "information about projected market shares." This remaining information consists of portions of the consultant author's comments on and view of certain projections provided to the city by the proponent of the GTA Centre. It also contains information the consultant refers to as "independent" which is set out in part of page 2 and most of page 3 and includes the consultant's identification of some of his assumptions. The author's review of information provided to the city by the proponent is accompanied by a considerable amount of factual information that I note carries over into page 4, which the city has decided to disclose to the appellant. I also note that the consultant's views on this data are contained in the information that appears in other portions of record 1(d), which the city is disclosing. In addition, factual information, as set out in section 7(2)(a) of the *Act* is specifically excluded from qualifying for exemption under section 7(1). As a result, I find that none of the remaining information in pages 2 and 3 of record 1(d) qualifies for exemption under section 7(1) of the *Act*.

[20] Having found that the remaining information in pages 2 and 3 is not exempt under section 7(1) and in the absence of any other exemptions being claimed for this information by the city, I will order the city to disclose the remaining information in record 1(d) to the appellant.

B. Did the city waive or lose solicitor-client privilege in record 4?

[21] In Interim Order MO-3177-I, I deferred my decision on whether solicitor-client privilege in record 4 was waived or lost as a result of the city's apparent disclosure of

this record to third party individuals. After issuing Interim Order MO-3177-I, I invited the city's representations on whether the presentation of record 4 to the General Committee of Council on January 24, 2011, resulted in a waiver or loss of solicitor-client privilege on account of third party individuals – who were neither members of Council nor city staff – being present.

[22] Common law solicitor-client privilege may be waived expressly or implicitly. 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.[7]

[23] 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.[8]

[24] Statutory solicitor-client privilege may also be waived. Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[9] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[10]

Representations

[25] The city provides brief representations in response to my questions. It states that in addition to external legal counsel, the authors of records 1 and 2[11] in related Appeal MA12-508 were present at the January 24, 2011, closed meeting of Council. The city adds that it is clear from the content of records 1 and 2 in Appeal MA12-508 that the authors of these records "had consulted with and obtained legal advice from the city's outside legal counsel on the subject, in part, of record 4" in this appeal. The city asserts that these individuals had a "common interest" with it and that it has not waived its privilege in record 4. The city maintains that this record is exempt under section 12.

[26] In her representations, the appellant states that record 4 does not qualify for solicitor-client privilege because it is not information obtained for the purpose of obtaining legal advice. The appellant asserts that record 4 is merely information that Law Firm 1 provided to the city on the GTA Centre. She also argues that by giving a third party access to the information in record 4, the city did not maintain the confidentiality of it and thereby waived any solicitor-client privilege that may have attached to it.

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[7] *S & K Processors Ltd v Campbell Avenue Herring Producers Ltd* (1983), 45 BCLR 218 (SC).
[8] *R v Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[9] 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] OJ No 4495 (Div Ct).
[10] *General Accident Assurance Co v Chrusz* (1999), 45 OR (3d) 321 (CA); Orders MO-1678 and PO-3167.
[11] The city decided to disclose these records to the appellant and did so in October 2015.

[27] After reviewing the parties' representations, I sought clarification from the city about the presence of another third party at the closed meeting of January 24, 2011. The city had not addressed this other third party's presence in its representations. In response to my additional questions, the city advised that this other third party attended the closed meeting to present an oral update to the Council and he was only in attendance at the closed meeting for the duration of his own presentation and any subsequent questions from Council members.

Analysis and findings

[28] Having reviewed the parties' representations and record 4, as well as records 1 and 2 from related Appeal MA12-508 and the city's confidential minutes from the January 24th closed meeting, I am satisfied that the solicitor-client privilege in record 4 was not waived or lost by the city.

[29] I accept the city's representations that the third party individual whose presence at the January 24th closed meeting I sought clarification about, was not in attendance during the presentation of record 4 as he had left just prior to it. As a result of this individual's absence from the portion of the closed meeting during which record 4 was discussed, there was no disclosure of record 4 to him and the privilege was not thereby waived.

[30] Turning to the presence of the consultants who authored records 1 and 2 of related Appeal MA12-508 during the presentation of record 4 at the January 24th closed meeting, I accept the city's claim of the common interest exception to the waiver of privilege. Common interest privilege has been addressed in recent orders of this office, including PO-3154 and MO-3253-I. The test used in these orders has been the following one articulated by Adjudicator Steven Faughnan in Order PO-3154:

> ...the determination of the existence of a common interest to resist waiver of a solicitor-client privilege under Branch 1, including the sharing of a legal opinion, requires the following conditions:
>
> (a) the information at issue must be inherently privileged in that it must have arisen in such a way that it meets the definition of solicitor-client privilege under Branch 1 of section 19(a)[12] of the *Act*, and
>
> (b) the parties who share that information must have a "common interest", but not necessarily [an] identical interest.

[12] Section 19 is the provincial equivalent to section 12 of the *Act*.

[31] Applying this test to the facts of this appeal, the first part is satisfied as a result of my finding in Interim Order MO-3177-I that record 4 is solicitor-client privileged under both branches (common law and statutory) of section 12 of the *Act.*

[32] Turning to the second part of the test, I accept the city's submission that the consultants who were present during the presentation of record 4 consulted with and received legal advice from Law Firm 1 on record 4 and as a result, shared a common interest privilege in it. Record 4 was prepared by Law Firm 1 for its client, the city, and it provided legal advice on a particular topic that relates to the consultants' report. Although I am not able to discuss the subject matter of record 4, I am satisfied from my review of the consultants' report that record 4 addresses legal issues and considerations that were relevant to the consultants' report. According to their disclosed report, the consultants were retained to assess the GTA proposal. Their report analyzed the cost of completion estimates and the pro forma financials of the project, it addressed potential financing alternatives and capital structures, and it evaluated the funding sources and financial qualifications of the equity investors. The city's representations that the consultants received legal advice from and consulted with Law Firm 1 regarding the subject addressed in record 4 are reflected in the contents of the report.

[33] Given the role of the consultants in the consideration of the GTA Centre by the city and the nature of their retainer with the city, I find that the city shared a common interest with the consultants in having a common understanding of the state of the law on the particular topic addressed in record 4. I further find that the disclosure of record 4 to the consultants did not constitute a waiver or loss of the privilege that existed in the document. Accordingly, I conclude that record 4 remains subject to solicitor-client communication privilege and is exempt from disclosure under section 12 on that basis.

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

[34] In Interim Order MO-3177-I, I ordered the city to re-exercise its discretion to withhold certain records under various discretionary exemptions, taking into account the public interest in disclosure of the records and the following factors that I set out in paragraph 10 of that interim order which are reproduced in paragraph 2 above.

[35] In its representations, the city states that it re-exercised its discretion and decided to withhold records 4 and 6 through 13 under the solicitor-client privilege exemption. The city acknowledges that there has been a material change in the circumstances of the appeal, specifically, that it is no longer pursuing the GTA Centre project. It points out that it has disclosed a significant amount of information relating to the GTA Centre, including the records noted above which it had previously withheld. The city maintains that there has already been widespread debate about the GTA Centre and that this debate, along with its significant disclosure of records, is adequate

to address any public interest considerations. The city asserts that the exemption in section 12 serves an important purpose and it has applied this exemption in a limited and specific way. Finally, the city expresses its view that disclosure of records 4 and 6 through 13 would not shed any further light on the GTA Centre project.

[36] Regarding its decision to exercise its discretion to withhold part of record 1(d) under the advice and recommendations exemption, the city states: the exempt information should not be made available to the public since the advice regarding projected ticket sales for a commercial transaction that is no longer being pursued by the city would not further the public interest. The city states that any public interest in the disclosure of this information has already been addressed by its disclosure of a significant amount of information relating to the GTA Centre. The city also states that there has been widespread debate and public coverage of the GTA Centre and of the large volume of records supporting the decision made by Council; both the debate and the disclosed documents on the project are part of the public domain and can be accessed by anyone who may be interested. The city adds that it has applied the section 7(1) exemption to a limited and specific portion of record 1(d) while deciding to disclose most of the record. Finally, the city argues that if its disclosure is not sufficient to address public interest considerations and a public interest is still determined to exist, the disclosure of the withheld part of record 1(d) does not outweigh or override the significant purpose of the section 7(1) exemption.

[37] The appellant states that the city needs to be open, transparent and accountable to its residents and that the information in the records, which is now more than four years old and relates to a project that is no longer being negotiated or discussed, should be publicly available. She argues that the city has not considered the overriding public interest in having access to all the reports that were commissioned for the proposed GTA Centre which cost taxpayers over $700,000. She concludes by asserting that the GTA Centre project polarized the city – as is evidenced by residents' two years of research, attendance at meetings, and deputations – and the disclosure of all records would instil confidence and trust in municipal government.

Analysis and findings

[38] I am satisfied that the city exercised its discretion in deciding to continue to withhold records 4 and 6 through 13 under the section 12 exemption and the single paragraph on page 2 of record 1(d) which I have found is exempt under section 7(1). I am also satisfied that the city turned its mind to the relevant factors that I identified in Interim Order MO-3177-I, including the changed status of the GTA Centre project and other significant developments. While the appellant argues that the city has not adequately considered the public interest in respect of its exercise of discretion to rely on sections 7(1) and 12, I do not agree. The city's representations confirm that the city turned its mind to this factor and decided to disclose records and information that it had previously withheld under various exemptions both in this appeal and in related Appeal

MA12-508, specifically: records 1, 1(a), 1(b), 1(c), 2, 5, most of record 1(d) in this appeal, and records 1 and 2 in related Appeal MA12-508 which the city decided to disclose after I found that they were exempt under section 12. This important additional disclosure is evidence of the city's reflection on the public interest considerations in the circumstances of this appeal. The city's additional disclosure also demonstrates to me that the city did not exercise its discretion in bad faith or for an improper purpose.

[39] Insofar as the appellant's representations raise the possible application of the public interest override in section 16 of the *Act* which can only apply to section 7, I find that the override does not apply to the single withheld paragraph in record 1(d). The city's decision to disclose a significant amount of information in this appeal and in related Appeal MA12-508 is sufficient to satisfy any public interest considerations, particularly since most of record 1(d) will be disclosed as a result of the city's revised decision and this Final Order. Moreover, there has already been widespread public coverage of the GTA Centre and the single paragraph withheld under record 1(d) would not shed further light on the matter.

[40] While I agree with the appellant's view that disclosure of all of the records relating to the GTA Centre would show openness, transparency and accountability on the part of the city, it does not negate the city's valid exercise of discretion. The city is entitled to exercise its discretion to continue to withhold records that are solicitor-client privileged communications. Having concluded that the city considered relevant factors in good faith in exercising its discretion to disclose some records and information and continue to withhold only records 4 and 6 through 13 and the portion of record 1(d) which I have found exempt, I find that the city exercised its discretion appropriately. I uphold the city's re-exercise of discretion.

FINAL ORDER:

1. I uphold the city's decision to withhold the second paragraph on page 2 of record 1(d) under section 7(1) of the *Act.*

2. I order the city to disclose the remaining information in pages 2 and 3 of record 1(d) which I have found does not qualify for exemption to the appellant by **February 2, 2016** but not before **January 26, 2016.**

3. I uphold the city's exercise of discretion to withhold records 4 and 6 through 13 under section 12 and one paragraph of record 1(d) under section 7(1) of the *Act.*

December 24, 2015

Stella Ball
Adjudicator