

Arbitrator Order on Application by the City of Ottawa for Privilege

Counsel for the moving party: Peter Wardle, Sharon Vogel, Betsy Segal, and Catherine Gleason-Mercier, Singleton Urquhart Reynolds Vogel LLP

Overview

The moving party, the City of Ottawa (the “**City**”), seeks to redact text messages from two WhatsApp conversation chains that STV Inc. intends to produce for the Ottawa Light Rail Transit Public Inquiry (the “**Inquiry**”). The City relies on ss. 10(4) and 14(3) of the *Public Inquiries Act, 2009*, S.O. 2009, c. 33, Sched. 6 (the “**Act**”), and Procedural Order 2 made under the Act, to bring its application.

The first chain of Whatsapp messages (STV0002026) is between Scott Krieger of STV Inc. and Brandon Richards, a former Director at the City of Ottawa.

The second chain of Whatsapp messages (STV0002030) is a group chat with numerous participants, including Scott Krieger and Larry Gaul of STV Inc., John Manconi and Phil Laundry of OC Transpo, and Brandon Richards, Michael Morgan, and Duane Duquette from the City, as well as others.¹

The City, through its counsel, proposes redactions to these two Whatsapp chains on the basis of four categories:

- Personal telephone numbers;
- Personal information and/or medical information;
- Solicitor-client privilege; and
- Litigation privilege.

Commission counsel does not oppose the City’s requested redactions of the telephone numbers and the personal or medical information, but rejects any claim of solicitor-client privilege and litigation privilege over the text messages.

For the following reasons, I allow the City’s application in part. The City will be permitted to redact the Whatsapp messages related to the telephone numbers and other personal or medical information. However, the City’s assertions of privilege are not persuasive. I order the City to produce, unredacted, all relevant text messages for the Inquiry’s review.

City’s Position

The City made its submissions in a chart format.

¹ I attach as Appendix A the names, positions, and numbers of the participants to the Whatsapp messages.

For ease of reference and sake of completeness, I attach an additional column to the City's chart with my reasons rejecting each privilege claim.

Framework & Applicable Law

(a) Public Inquiries and the Open Court Principle

Public inquiries are conducted in accordance with the open court principle. The Supreme Court of Canada and the Court of Appeal for Ontario have emphasized the heightened importance of open hearings in a public inquiry as opposed to other legal proceedings.²

Section 10(1) of the Act provides the Commission with broad powers to compel witnesses and disclosure of information. Under s. 10(3) of the Act, the Commission may even require the production of information that is considered confidential or otherwise inadmissible. To protect the confidentiality of any such information, the Commission can invoke s. 10(4) of the Act to impose conditions on its disclosure.

Pursuant to s. 10(4), the Commission has set out the Privilege and Confidentiality Claims Process applicable to this Inquiry in Procedural Order 2.

(b) Solicitor-Client Privilege

The City submits that certain Whatsapp messages are subject to solicitor-client privilege, and therefore must be redacted before its disclosure in the Inquiry.

Solicitor-client privilege is fundamental to the operation of our justice system. It ensures that individuals are able to speak with their lawyers candidly, so their interests can be fully represented. Any documents or communications found to be solicitor-client privileged are *prima facie* inadmissible, except for a few limited exceptions. The privilege is permanent, and will remain in force after the termination of the solicitor-client relationship.

In order to prove solicitor-client privilege, a party will have to establish three elements:

- (1) That there is a communication between a solicitor and their client;
- (2) That the communication entails the seeking or giving of legal advice; and
- (3) That the parties intended the communication to be confidential.³

² *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] 3 S.C.R. 44, at para. 30; *Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry*, 2007 ONCA 20, 278 D.L.R. (4th) 550, at paras. 42, 48-49.

³ *Solosky v. The Queen*, [1980] 1 S.C.R. 821, p. 837.

(c) Litigation privilege

The City also submits that some of the Whatsapp messages should be redacted due to litigation privilege.

Unlike solicitor-client privilege, litigation privilege does not depend on the involvement of counsel. A party can assert this privilege if the documents or communications in issue were made for the dominant purpose of obtaining legal advice for, or preparing for, any existing, reasonably contemplated, or anticipated litigation.⁴

As Nordheimer J. (as he was then) described in *R. v. Assessment Direct Inc.*, 2017 ONSC 5686, at para. 14, litigation privilege “protect[s] the lawyer’s work product, that is, his/her theories and strategy. It is not intended to shield facts from disclosure.”

Frank Marrocco, Arbitrator

⁴ *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 SCR 521, at para. 19.

Date	Msg #	From	Unredacted text	Basis for Redactions	City's Submissions	Decision on Privilege Claim
9/07/19	959	[REDACTED] -7834	[REDACTED] [REDACTED] [REDACTED]	Personal Information	N/A	Allowed. No dispute between counsel for the City and Commission counsel.
9/07/19	971	[REDACTED] -8458	[REDACTED] [REDACTED]	Personal Information	N/A	Allowed. No dispute between counsel for the City and Commission counsel.
9/24/19	1418	[REDACTED] -4457	[REDACTED] [REDACTED] [REDACTED] [REDACTED]	Personal Medical Information	N/A	Allowed. No dispute between counsel for the City and Commission counsel.
	1419	[REDACTED] -1729	[REDACTED] [REDACTED]			
10/27/19	2232	[REDACTED] -8322	Ok Michael you need to connect with me when you can today. Major developments and also the mayor has ordered zero money goes to rtg or rtm. The tap is officially off and the mayor has full authority. Also remind me now how much we held back and by groupings . le xxx million for vehicles etc	Litigation Privilege	The redacted texts exchanged between John Manconi and Michael Morgan concerning an ongoing legal dispute to which the City of Ottawa is a party and a legal position to be taken by the City of Ottawa in that dispute.	Denied. The text messages do not meet the dominant purpose test. They discuss next steps with respect to the Mayor's decision to withhold funds. The text messages convey facts, and do not reveal any theory or strategy related to existing, reasonably contemplated, or anticipated litigation.
	2233	[REDACTED] -1133	Okay. I can touch base later this evening if that works. 16M vehicles, 2M doors, 2M on board cameras			
	2234	[REDACTED] -8322	What's the total holdback? All items? 38 M?			
	2235	[REDACTED] -1133	20M hold back as noted above. Other monies we withheld and			

			don't plan to return: 30.5M for mobility matters, 4M damages, 1M hydro, 3M scope changes, and 3M lands			
	2236	██████████ -1133	~62M total set off which includes 20M in hold back.			
	2237	██████████ -4557	They suspect that the train tracer application that is installed is creating the TCMS issues. We are going to run an out of service train with it disconnected shortly to confirm it does not have unanticipated consequences. If confirmed ok, will be shutting this down on entire fleet overnight.			
11/11/19	2803	██████████ -8322	Saw that thanks. We should not be sharing that. Tell Jim Babe his Scu do not share that information as the only people permitted to do that legally are doctor and police. Next of kin can sue us. TOCC comms just put that out and shouldn't of.	Solicitor-Client Privilege	In this redacted text, John Manconi asks that Chief Special Constable James Babe, detailed to OC Transpo, be advised of the City of Ottawa's understanding of its legal obligations concerning the public disclosure of information of a private or	Denied. The communication is not between a solicitor and their client.

					confidential nature.	
11/15/19	3034	██████████ -8322	Serge was asking do you need a motion to Reinstate detours. I need answer today please	Solicitor-Client Privilege	In these redacted texts, John Manconi and Phil Landry discuss obtaining legal advice from internal or external counsel for the City of Ottawa and the matter in respect of which such advice will be sought.	Denied. The communication is not between a solicitor and their client.
	3035	██████████ -8322	And a full timeline on what has to be done to reinstate all the detours with province etc			
	3036	██████████ -1729	I dont think so as I beleive we have delegated authority for city roads. For 417, I think letter from mayor to minister asking mto to allow bus lanes on 417. Will check with legal.			
	3037	██████████ -8322	Yes and make it a hurry up offence. City manager and mayor are asking for it .			
	3038	██████████ -1729	Ok, we will prepare letter for mayor to send to mto			
11/15/19	3040	██████████ -8322	Phil no need for letter I just need to know process timelines and approvals today please	Solicitor-Client Privilege	See immediately above	Denied. The communication is not between a solicitor and their client.
11/15/19	3042	██████████ -1729	Ok will get info on process and timelines this morning	Solicitor-Client Privilege	See immediately above	Denied. The communication is not between a solicitor and their client.
1/30/20	4739	██████████ -3756	████████████████████ ████████████████████ ████████████████████ ████████████████████	Personal Medical Information	N/A	Allowed. No dispute between counsel for the City and Commission counsel.

1/30/20	4741	[REDACTED] -8322	[REDACTED]	Personal Medical Information	N/A	Allowed. No dispute between counsel for the City and Commission counsel.
2/18/20	5335	[REDACTED] -4557	[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]	Personal Medical Information	N/A	Allowed. No dispute between counsel for the City and Commission counsel.
3/09/20	5951	[REDACTED] -8322	Kim I asked Andrea to manage all inquiries about default Notice to RTG. I do not want us taking any media calls on this . I will explain at our 7 pm conference call. Nobody is to comment as it could lead to serious legal implications	Litigation Privilege	The redacted text sent by John Manconi concerns an ongoing legal dispute to which the City of Ottawa is a party.	Denied. The text messages do not meet the dominant purpose test. They discuss next steps with respect to the default Notice. The text do not reveal any theory or strategy related to existing, reasonably contemplated, or anticipated litigation.
	5952	[REDACTED] -7834	Ok			
3/16/20	6070	[REDACTED] -1133	Public response from RTG: https://ottawacitizen.com/news/local-news/rtgblasts-city-for-releasing-letter-with-erroneous-allegations-during-publichealth-crisis	Solicitor-Client Privilege	The redacted texts contain a discussion between John Manconi and Michael Morgan concerning OC Transpo's	Denied. The communication is not between a solicitor and their client.
	6071	[REDACTED] -8322	Yes. Saw it thanks. Get it to Sharron please			

					intention to seek advice from counsel at Singleton Urquhart Reynolds Vogel LLP and the matter in respect of which such advice will be sought.	
3/18/20	6081	██████████-3756	████████████████████ ████████████████████ ████████████████████ ████████████████████ ██████████	Personal Medical Information	N/A	Allowed. No dispute between counsel for the City and Commission counsel.
3/20/20	6088	██████████-4336	████████████████████ ████████████████████ ██████████	Passenger Medical Information	N/A	Allowed. No dispute between counsel for the City and Commission counsel.
5/27/20	6418	Scott Krieger	████████████████████ ██████████	Phone Number	N/A	Allowed. No dispute between counsel for the City and Commission counsel.
8/09/20	6998	██████████-6965	████████████████████ ████████████████████ ████████████████████ ████████████████████	Employee Medical Information	N/A	Allowed. No dispute between counsel for the City and Commission counsel.
8/09/20	6999	██████████-6965	████████████████████ ████████████████████ ████████████████████ ████████████████████	Employee Medical Information	N/A	Allowed. No dispute between counsel for the City and Commission counsel.

8/09/20	7004	██████████ -7244	████████████████████ ████████████████████	Employee Medical Information	N/A	Allowed. No dispute between counsel for the City and Commission counsel.
8/09/20	7005	██████████ -6965	████████████████████ ████████████████████ ██████████	Employee Medical Information	N/A	Allowed. No dispute between counsel for the City and Commission counsel.
8/10/20	7008	██████████ -6965	████████████████████ ████████████████████ ████████████████████ ████████████████████	Employee Medical Information	N/A	Allowed. No dispute between counsel for the City and Commission counsel.
8/18/20	7051	██████████ -4557	Ok. I am prepared to give some movement on the weekends. Will work it out.	Solicitor-Client Privilege	The redacted texts contain a discussion between John Manconi and Troy Charter concerning OC Transpo's intention to seek advice from counsel at Singleton Urquhart Reynolds Vogel LLP and the matter in respect of which such advice will be sought.	Denied. The communication is not between a solicitor and their client.
	7052	██████████ -8322	Careful need it done on a without prejudice basis and only because of Covid. We should ask Sharon			
	7053	██████████ -4557	K. Will connect with Michael and Sharon, but difficult to separate Covid from wheel cracks.			
	7054	██████████ -4557	Fyi. Advised no weekend relief. Will continue to work with RTM on reduction times etc. But no weekend relief from the 11 trains.			

APPENDIX A

PHONE NUMBERS	NAMES
[REDACTED] -8458	Larry Gaul (STV Inc.)
[REDACTED] -4557	Troy Charter (Director, Transit Operations, OC Transpo)
[REDACTED] -8322	John Manconi (General Manager, Transportation Services, OC Transpo)
[REDACTED] -4336	Jim Hopkins (formerly Chief Safety Officer, OC Transpo)
[REDACTED] -1133	Michael Morgan (Director, Rail Construction Program, City of Ottawa)
[REDACTED] -7834	Kim MacEwan (acting Manager, Business and Tech Support, OC Transpo)
[REDACTED] -1729	Phil Landry (Director, Traffic Services, City of Ottawa)
[REDACTED] -3756	Duane Duquette (Director, Rail Operations, City of Ottawa)
[REDACTED] -7244	Brandon Richards (formerly Director, City of Ottawa)
[REDACTED] -6965	Derek Moran (Director, Rail Operations, City of Ottawa)
[REDACTED] -4457	Unidentified