



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

# **ORDER M-2**

**Appeal M-910005**

**Town of Ancaster**



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**O R D E R**

On January 8, 1991, the appellant requested two legal opinions supplied to the Town of Ancaster (the "institution") relating to the noise impact of the Hamilton Airport on surrounding residents. In response, the institution sent two opinions to the appellant on January 16, 1991: the first, dated June 3, 1988 by Raymond Plant of the firm of Ross & McBride, and the second, dated February 1, 1991, by Lee Pinelli of the firm of Evans, Philp. The opinions were in the form of letters.

The appellant then requested access to a further opinion by Mr. Plant, relating to the same issue, dated April 20, 1988. The institution denied access to this record on the basis that it was subject to solicitor-client privilege and exempt from disclosure under section 12 of the Municipal Freedom of Information and Protection of Privacy Act, 1989 (the "Act").

Pursuant to section 39 of the Act, the appellant filed an appeal of the institution's decision. Notice of the appeal was sent to the appellant and the institution. The record was obtained and examined by the Appeals Officer. The Appeals Officer attempted mediation but a settlement was not achieved and the matter proceeded to an inquiry.

A Notice of Inquiry was sent to the appellant and the institution, enclosing a report prepared by the Appeals Officer. This report was prepared in order to assist the parties in making their representations to this office concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. The Appeals Officer's Report indicates that the parties, in making their representations, need not limit themselves to the questions set out in the report.

Representations were received from both the institution and the appellant and I have considered them in making this Order.

Section 42 of the Act provides that the burden of proof that a record, or part thereof, falls within one of the specified exemptions in the Act lies with the head of the institution. Therefore, in this appeal, the institution must prove that the record falls within the exemption provided for in section 12 of the Act.

The wording of section 12 is as follows:

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.

I note that section 12 is similar in wording to section 19 of the provincial Freedom of Information and Protection of Privacy Act, 1987. Orders which have been issued concerning section 19 may therefore provide guidance in interpreting and applying section 12 of the municipal Act.

Section 12 provides an institution with the discretion to refuse to disclose:

1. A record that is subject to the common law solicitor-client privilege; or
  2. A record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in
- [IPC Order M-2/August 15, 1991]**

contemplation of or for use in litigation.

A record can be exempt under the second part of section 12 regardless of whether the common law criteria relating to the first part of the exemption are satisfied. [See Order 49, dated April 10, 1989.]

The institution has claimed that the first part of this exemption, the common law solicitor-client privilege, applies to the record at issue. With regard to the common law solicitor-client privilege, the case of Susan Hosiery Limited v. Minister of National Revenue [1969] 2 Ex. C.R. 27, identifies what appears to be two branches of this privilege. They are:

1. all communications, verbal or written, of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers directly related thereto) are privileged; and
2. papers and materials created or obtained especially for the lawyer's brief for litigation, whether existing or contemplated are privileged. ("litigation privilege")

[See Order 49 supra.]

The first branch of the common law solicitor-client privilege applies to confidential communications between a client and legal adviser, and is established whenever a client seeks advice from the solicitor, whether or not litigation is involved. The rationale for the privilege is to provide all persons with full and ready access to legal advice. The privilege may only be waived by the client.

Recently, in Order 210, dated December 19, 1990, at page 14, I reiterated the criteria which must be satisfied in order for the common law solicitor-client privilege to apply:

1. there must be a written or oral communication;
2. the communication must be of a confidential nature;
3. the communication must be between a client (or his agent) and a legal adviser; and
4. the communication must be directly related to seeking, formulating or giving legal advice.

The position of the institution is that Mr. Plant was retained through one of its officers to provide legal advice. An opinion was provided, firstly, on April 20, 1988, and, in a finalized version, on June 3, 1988. The institution states that the first version was merely a draft.

Furthermore, the institution contends that it, as the client, never waived the privilege in relation to this first opinion. The opinion was seen only by officers of the institution, and by Mr. Pinelli, who was subsequently retained by the institution and was supplied with the opinion in order to provide further legal advice. The institution waived its privilege regarding the opinion of June 3, 1988.

It is the appellant's position that the opinions of April and June 1988, are two parts of a response to a single line of inquiry by or on behalf of the institution. This line of inquiry was initiated in response to a delegation of citizens attending a meeting of the Town Council, and was therefore made on behalf of that group of citizens. The appellant further argues that, even if solicitor-client privilege attaches to the opinion, the privilege was waived by releasing the June 3, 1988 opinion. His contention is that the institution cannot exercise its discretion to release only a part of the

response to the inquiry.

It is my view that a solicitor-client relationship was formed when the institution retained Mr. Plant, through one of its officers, for the purpose of obtaining legal advice. Mr. Plant was not

retained by the group of citizens which attended a Council meeting. No solicitor-client relationship was established between them. On April 20, 1988 Mr. Plant supplied to the institution a written communication, explicitly stated to be confidential, which was directly related to seeking, formulating or giving legal advice. In my opinion, that communication fits squarely within the common law solicitor-client privilege.

I do not agree with the appellant's contention that the opinion of June 3, 1988, represented only part of a response to an inquiry, or that, by disclosing it, the institution waived its privilege concerning the earlier opinion. The two opinions constitute separate responses, produced at different times, the second being provided by the solicitor after consultation with his client. I am of the view that the section 12 exemption applies to the April 20, 1988 opinion.

Section 12 of the Act is a discretionary exemption; that is, it provides the head with the discretion to disclose the record even if the record meets the test for exemption. I have reviewed the representations of the institution which outline the factors considered in the exercise of discretion and I find nothing improper in the way in which discretion was exercised by the head.

I uphold the institution's decision to deny access to the legal opinion of April 20, 1988.

Original signed by:  
Tom Wright  
Commissioner

August 15, 1991  
Date