



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-11

Appeal M-910407

Wentworth County Board of Education



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O R D E R

The Wentworth County Board of Education (the "institution") received a request under the Municipal Freedom of Information and Protection of Privacy Act (the "Act") for access to "a copy of the Lawyer's reply with regards to the validity of noon hour bible clubs in the Wentworth County."

The institution informed the requester that access was denied to the record pursuant to section 12 of the Act. The requester appealed the institution's decision, claiming that a solicitor-client relationship did not exist and that the issue considered in the legal opinion was a matter of public interest.

A copy of the record was obtained and reviewed by the Appeals Officer. It consists of two letters, one four pages in length and the other three pages in length and both dated August 15, 1991. Both letters were prepared by legal counsel.

Attempts to mediate this appeal were not successful. Accordingly, notice that an inquiry was being conducted to review the decision of the head was sent to the appellant and the institution. The notice also contained a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal.

Representations were received from both the institution and the appellant and I have considered these representations in reaching my decision.

The sole issue arising in this appeal is whether the record qualifies for exemption under section 12 of the Act.

Section 12 of the Act provides 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.

Section 12 consists of two branches, which provide a head with discretion to refuse to disclose:

- (1) a record that is subject to the common law solicitor-client privilege (Branch 1); and
- (2) a record which 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 (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

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

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[See Orders 49 and M-2]

The first part of the common law solicitor-client privilege applies to confidential communications between a client and a legal adviser, and is established when a client seeks legal advice from the legal adviser, 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.

The position of the institution is that legal counsel was retained at the institution's request to provide a legal opinion in respect of the legality of the operation of bible clubs in the institution's elementary school system during the noon hour break. This opinion, in the form of two separate letters, was provided on August 15, 1991. Furthermore, the institution contends that this opinion was given in confidence and that it, as the client, never waived the solicitor-client privilege.

It is the appellant's position that a solicitor-client privilege did not exist as the institution is publicly funded and the issue involved is of general interest and not restricted to a private individual. Therefore, in the appellant's opinion, the legal opinion should be available to the public.

It is my view that a solicitor-client relationship was formed when the institution retained legal counsel for the purpose of obtaining legal advice. On August 15, 1991 this advice was supplied to the institution in a confidential written communication, 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 and the section 12 exemption applies to the record.

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

[IPC Order M-11/April 22, 1992]

discretion and I find nothing improper in the way in which discretion was exercised by the head.

Although not specifically referred to in the representations, the appellant made a number of submissions which were of a nature and kind that would relate to section 16 of the Act. Section 16 applies to a number of exemptions under the Act, however it does not apply to section 12.

I uphold the head's decision.

Original signed by: _____
Tom Wright
Commissioner

_____ April 22, 1992