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

ORDER M-19

Appeal M-910088

Municipality of the Township of Tiny

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O R D E R

BACKGROUND:

The appellant submitted a request to the Municipality of the Township of Tiny (the "institution") under the Municipal Freedom of Information and Protection of Privacy Act (the "Act") for a copy of a legal opinion. The opinion, which was prepared at the request of the institution, dealt with a conflict of interest which might exist if [a named individual] was appointed to a committee which was to study land use (the "Shoreline Study Steering Committee").

The institution responded to the request by denying access to the legal opinion pursuant to section 12 of the Act. The requester appealed the institution's decision. Notice of the appeal was given to the institution and the appellant. A copy of the record was obtained and reviewed by the Appeals Officer assigned to the case.

The record consists of a four-page letter, dated February 15, 1990, addressed to the attention of the Clerk of the institution and written by a lawyer acting for the institution. The letter is marked "Personal and Confidential".

As settlement of this appeal could not be effected, notice that an inquiry was being conducted to review the decision of the head was sent to the appellant, the institution, and the lawyer who prepared the opinion. As the Appeals Officer identified that the record contained information which might be considered to be the personal information of the individual whose appointment was the subject of the letter, this individual (the "affected party") was also informed of the appeal and sent notice of the inquiry. Enclosed with each notice letter was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. Written representations were received from the institution, the appellant, and the lawyer. The affected party indicated by telephone that he wished to rely on the representations made by the institution.

ISSUES:

The issues arising in this appeal are as follows:

A. Whether the record qualifies for exemption under section 12 of the Act.

B. Whether any of the information contained in the record qualifies

as "personal information", as defined in section 2(1) of the Act.

C. If the answer to Issue B is yes, whether the mandatory exemption provided by section 14 of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the record qualifies for exemption under section 12 of the Act.

Section 12 of the Act reads 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.

In Order M-2, dated August 15, 1991, I stated that 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 contemplation of or for use in litigation.

In Order M-2, I also stated that for the first branch (common law solicitor-client privilege) of the section 12 exemption to apply, four criteria must be satisfied and they are as follows:

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 advisor; and

4. the communication must be directly related to seeking, formulating or giving legal advice.

The institution states that the record was prepared by a lawyer retained by the institution for the purpose of giving legal advice.
In his representations, the appellant states that the legal opinion was prepared in response to a request made by members of the public at a Township Council meeting and should be a "public document".

In Order M-2, I also dealt with the question of whether a legal opinion, obtained by an institution in response to concerns raised by members of the public, was subject to solicitor-client privilege. For the same reasons which I expressed in that Order, I find that the application of the exemption to the record at issue in this appeal is not affected by the fact that a group of citizens attending a Council meeting had requested that the opinion be obtained.

Having reviewed the record, I am satisfied that it is subject to the common law solicitor-client privilege. It is a written communication of a confidential nature between a client and a legal advisor directly related to giving legal advice. However, the appellant submits the solicitor-client privilege was waived by the institution when it released a copy of the record to the affected party whose appointment is the subject of the legal opinion.

There is no dispute among the parties that a copy of the record was given to the affected party. This is confirmed by "Minutes of a Regular Meeting of the Municipal Council of the Corporation of the

Township of Tiny" held on February 28, 1990. The minutes indicate that the record at issue was given by the then Reeve of the Township to the affected party.

I must now determine whether the release to the affected party constituted waiver of solicitor-client privilege. Only the client may waive this privilege. In my view, the circumstances surrounding the release must be considered in order to determine whether there has been waiver.

It is the institution's position that, although the record was released to the affected party, it was not otherwise made public. The institution submits that the record was released to the affected party because the then Reeve of the institution considered the information in it to be the affected party's personal information and thought that he should be advised of the content of the record.

The institution claims that the confidentiality of the record was not

otherwise compromised, and that the privilege that existed was not waived. However, the institution has not provided me with any evidence to suggest that the affected party was restricted in the use he could make of the record. As well, there is no suggestion that the release was unintentional or without full awareness of the nature of the record which was being released.

After reviewing the circumstances related to the release of the record to the affected party, I am of the view that the release constituted a waiver of the solicitor-client privilege by the institution. As the institution has waived this privilege, it cannot rely on the exemption found in section 12 of the Act.

Issue B: Whether any of the information contained in the record qualifies as "personal information", as defined in section 2(1) of the Act.

Having found that the exemption in section 12 of the Act does not apply to the record, I will consider whether the information in the record, or any part thereof, qualifies as "personal information".

The institution takes the position that the information contained in the record is the personal information of the affected party because it fits within sections (g) and (h) of the definition of "personal information" found in section 2(1) of the Act. Those portions of the Act read as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> ...
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

Having considered the record in issue, I am satisfied that some of the information in the record could be considered the personal information

of the affected party. To reach a conclusion regarding a possible conflict of interest, the lawyer who prepared the record, of necessity, had to identify certain activities of the affected party. This information could be considered to be the personal information of the affected party. However, most of the record contains the views and opinions of the lawyer about whether the proposed appointment of the affected party by the institution would result in a conflict of interest. I am of the view that the lawyer's legal opinion regarding the appointment primarily relates to the actions of the institution and its process for appointing individuals to committees. It is not information about the affected party and, accordingly, it is not his personal information.

Therefore, it is my view that only that information which relates to the affected party's activities qualifies as his personal information.

Issue C: If the answer to Issue B is yes, whether the mandatory exemption provided by section 14 of the Act applies.

Section 14 of the Act provides that personal information shall not be disclosed to any person other than the individual to whom the information relates except under certain circumstances. One of those circumstances is found in section 14(1)(f) of the Act which reads as follows:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

In making the determination of whether the disclosure of the personal information contained in the record would constitute an unjustified invasion of personal privacy, sections 14(2) and 14(3) of the Act provide guidance. Section 14(3) of the Act identifies those types of personal information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(2) identifies factors which are to be considered in determining whether the disclosure of information constitutes an unjustified invasion of personal privacy.

The affected party was sent a copy of the Appeals Officer's Report and invited to make representations. Although no written representations were received, the affected party did contact the Appeals Officer and

indicate that he did not consent to the disclosure of the record, and that he would be relying on the representations made by the institution.

The institution submits that sections 14(3)(g) and (h) apply to the record and that the disclosure of the personal information contained in the record is presumed to constitute an unjustified invasion of personal privacy. Sections 14(3)(g) and (h) read as follows:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or
>
> (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

I am of the view that the personal information contained in the record does not constitute the sort of information contemplated by section 14(3)(g). The record is a legal opinion concerning whether the appointment of an individual to a committee may result in a conflict of interest. In that regard, it does not constitute "personal recommendations or evaluations, character references or personal evaluations."

Turning to section 14(3)(h), it appears that some of the information included in the record may indicate the affected party's "political associations". However, this information is confined to the identification of his involvement in a particular ratepayer's association and is clearly well-known. The affected party's involvement in this association was one of the reasons why the request for a legal opinion was made to the Township Council by certain members of the public in the first place. In my view, section 14(3)(h) does not apply to this information. There is no other information in the record which I consider to be the type of information identified in section 14(3)(h).

Having found that the presumptions referred to by the institution do not apply, I now turn to section 14(2). The personal information contained in the record is of a general nature regarding the affected party's involvement in certain local associations. This information is well-known. It is my view that the disclosure of this personal information would not constitute an unjustified invasion of the personal privacy of

the affected party and, therefore, section 14 of the Act does not apply to it.

ORDER:

1. I order the institution to disclose the record to the appellant.

2. I order that the institution not disclose the record in issue until thirty (30) days following the date of the issuance of this Order. This time delay is necessary to give any party to the appeal sufficient opportunity to apply for judicial review of my decision before the record is actually disclosed. Provided notice of an application for judicial review has not been served on the Information and Privacy Commissioner/ Ontario and/or the institution within this thirty (30) day period, I order that the record in issue be disclosed within thirty-five (35) days of the date of this Order.

3. The institution is further ordered to advise me in writing within five (5) days of the date on which disclosure was made. This notice should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

4. In order to verify compliance with the provisions of this Order, I order the head to provide me with a copy of the record which is disclosed to the appellant pursuant to provision 1, upon request only.

Original signed by: June 5, 1992
Tom Wright
Commissioner