



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-213

Appeal M-9300109

Board of Education for the Borough of East York



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ORDER

BACKGROUND:

The Board of Education for the Borough of East York (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to five categories of records respecting the payment of honoraria to Board Trustees. The Board provided the requester with documents which responded to two aspects of the request, indicated that responsive records did not exist for the third and denied access to the fourth and fifth groupings under section 12 of the Act. The Board also provided the requester with the total amount of funds that it had expended for legal advice respecting the subject of honoraria. The requester felt that further disclosure was warranted and appealed the denial of access.

The mediation of this appeal was not successful and notice that an inquiry was being conducted to review the Board's decision was sent to the appellant and to the Board. Representations were received from both parties.

Following the provision of his representations, the appellant withdrew his request for one of the remaining categories of documents. On this basis, the only record at issue in this appeal is a legal account issued to the Board by its solicitors respecting the subject of trustee honoraria.

SUBMISSIONS/CONCLUSIONS:

The sole issue in this appeal is whether the discretionary exemption provided by section 12 of the Act applies to the legal account. This provision 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.

Section 12 consists of two branches, which provide an institution with the 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).

The Board has claimed that the legal account is exempt from disclosure under the first branch of the section 12 exemption.

In order to qualify for exemption under this branch, the Board must provide evidence that the record satisfies either of the following tests:

1. (a) there is 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 advisor; **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.

[Order 49]

In its representations, the Board supports its reliance on section 12 in the following fashion:

The Board submits that the record, which is the subject of this appeal, is exempt from being released under Branch 1 of the common law solicitor client privilege. In taking this position, the Board relies upon the decision of Southey J. in [the case of The Mutual Life Assurance Company of Canada v. the Deputy [Attorney] General of Canada, [1984] C.T.C. 155 (S.C.O. Motions Court)] and the decision of Commissioner Linden in Order 126 where both Justice Southey and Commissioner Linden specifically consider the effect of the privilege on a solicitor's Statements of Account.

Relying upon these decisions, the Board submits that the record in question is clearly a confidential communication between the Board and its solicitors. The record indicates when, by whom and with whom the Board sought legal advice from its solicitors. The record also sets out the names of individuals with whom the Board's solicitor discussed certain aspects of this particular case.

The Board submits that the four criteria, set out in Order 49 and above, are satisfied with respect to this record and therefore it is covered by the first branch of the solicitor-client privilege and as such falls within section 12 of the Act ...

In his representations, the appellant provides some background to his request for the records. He states that, after the Board's Trustees had purported to raise their honoraria by a sizeable figure, a group of

citizens voiced opposition to the increase at the next public meeting of the Board. As a result of the concerns expressed, the trustees appointed a citizens' committee to study the question of trustee honoraria. The committee ultimately recommended that the honoraria should not be increased and the trustees accepted this recommendation. The appellant then learned, however, that the trustees had spent public funds in relation to this issue. This concern then led to a further inquiry regarding the expenditure by the trustees on legal fees concerning the honoraria.

The appellant then addresses the application of section 12 to the legal account in the following fashion:

Regarding the general aspect of solicitor-client privilege, a solicitor's account should be contrasted with a letter of opinion or other written or verbal legal advice provided by the solicitor to the client, which would be covered by privilege. The account is a mere tally of work done, hours spent and fees generated and is not a method by which legal advice is transmitted to the client. (Re Ontario Securities Commission and Greymac Credit Corporation, [1983] 41 O.R. (2d) (Ont. Div. Court) ...

The extension of the doctrine of solicitor-client privilege to a solicitor's account would be broadening an exclusionary rule beyond what is reasonable. Exclusionary rules should be and generally are narrowly construed so that, pursuant [to] the purposes and principles embodied in the Act, the most disclosure can be made.

The appellant then goes on to argue that:

The Trustees are ... using the solicitor-client privilege to attempt to prevent the public from seeing how this portion of public funds were expended. The mere dollar amount is insufficient as it does not demonstrate, as the statement of accounts would demonstrate, whether the Trustees again failed to act in the public interest, or rather if they did act in the public interest.

In order to resolve this appeal, it will be necessary for me to review two orders which were previously issued by the Commissioner's office.

In Order 126, former Commissioner Sidney B. Linden was called upon to determine whether 11 legal accounts provided by an institution's external legal counsel fell within the ambit of section 19 of the Freedom of Information and Protection of Privacy Act, (the provincial Act) (which is similar to section 12 of the municipal Act). Based on the contents of this order, it would appear that these accounts related, at least in part, to a substantial law suit commenced by the institution against the appellant and other parties. Commissioner Linden approached the issue in the following manner:

In considering the application of section 19 to these records, I have reviewed the decision in the case of The Mutual Life Assurance Company of Canada v. The Deputy [Attorney]

General of Canada [1984] C.T.C. 155, Supreme Court of Ontario (Toronto Motions Court). In this case, an application was made by the Mutual Life Assurance Company of Canada under section 232 of the Income Tax Act, for orders respecting a number of documents seized and placed in the custody of the Deputy Sheriff ... In particular one document was a photocopy of a letter from a law firm to the Assistant General Counsel of Mutual Life enclosing a statement of account of the law firm ... The document did not contain legal advice itself but referred to professional services rendered by a number of lawyers associated with the law firm in advising Mutual Life about a particular project. The services referred to in the account included those of articling students and title searchers, consideration given by lawyers to the zoning by-laws, a site control agreement, a site plan agreement and a lease, consideration given to income tax aspects and work done in negotiating the transaction and settling the documents with the solicitors for other interested parties. The account included a statement of the number of hours worked and an itemized list of disbursements made by the law firm.

The question before the court was whether this document was one to which solicitor-client privilege attached under paragraph 232(1)(e) of the Income Tax Act. That subsection defines solicitor-client privilege as follows:

- (e) "solicitor-client privilege" means the right, if any, that a person has ... to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between him and his lawyer in professional confidence, except that for the purposes of this section an accounting record of a lawyer ... shall be deemed not to be such a communication.

In addressing the application of this section of the Income Tax Act, Southey, J. of the Supreme Court of Ontario, at pages 156-157, states as follows:

Were it not for the concluding exception in the definition ... I would have no difficulty in deciding that the statement of account ... is ordinarily a document to which the solicitor-client privilege attaches. In a recently decided case Re Ontario Securities Commission and Greymac Credit Corporation, [1983] 41 OR (2d) 328, I had occasion to state the general scope of the solicitor-client privilege and used that adopted from **Wigmore on Evidence** by the Supreme Court of Canada in a recent case:

Where legal advice of any kind is sought from a professional legal advisor in his capacity as such the

communications relating to that purpose made in confidence by the client are at his instance permanently protected from disclosure by himself or by the legal advisor except the protection be waived.

The privilege attaches not only to communications made by the client but obviously to communications made by the solicitor to the client as well and generally speaking covers all communications relating to the obtaining of legal advice. That general rule in my view would cover a statement of account.

I have reviewed each legal account and I am satisfied that the accounts reflect communications of a confidential character directly related to the seeking, formulating or giving of legal advice between a client and its legal adviser. Therefore, in my view, these records fall under the first branch of the common law solicitor-client privilege and are exempt from disclosure under section 19.

In Order 126, Commissioner Linden found that, while the invoices and accounts, themselves, did not contain legal advice, they reflected communications of a confidential nature directly related to the seeking, formulating or giving of legal advice, and were, therefore, exempt from disclosure. In my view, the implication of this decision is not that the solicitor client exemption will apply automatically to records of this nature, but rather that the decision maker must determine, based on the contents of each legal account, whether the information contained in the document relates in a tangible and direct way to the seeking, formulating or provision of legal advice.

In Order 210, Commissioner Tom Wright was called upon to interpret the meaning of "legal advice" for the purposes of the exemption provided under section 19 of the provincial Act (the equivalent of section 12 of the Act). He dealt with this issue in the following fashion:

The term "legal advice" is not defined in the Act. In my view, the term is not so broad as to encompass all information given by counsel to an institution to his or her client. Generally speaking, legal advice will include a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications. It does not include information given about a matter with legal implications, where there is no recommended course of action, based on legal considerations, and where no legal opinion is expressed.

I believe that these comments are helpful in interpreting the scope and meaning of the fourth part of the test under branch one of section 12. That is, that the communication in question must be related to seeking, formulating or giving legal advice.

I have carefully reviewed the legal account at issue in the present appeal. While this record sets out, in a summary fashion, the steps which the law firm took to complete its work assignment, the legal account neither contains legal advice, nor reveals any such advice indirectly. In addition, because of the non-specific fashion in which this account is drafted, the record discloses neither the subject(s) which the law firm was asked to investigate, the strategy used to address these issues nor the result of this exercise. In short, I find that this record has no direct connection with either "seeking, formulating or giving legal advice". This conclusion has been reached following a careful analysis of section 12 of the Act in relation to this specific legal account.

It follows that the fourth part of the test for the application of the first branch of the section 12 exemption has not been met and that the legal account should be released.

I also believe that the intent of the legislation would be ill-served by allowing the section 12 exemption to be used to shield a non-substantive record of this nature from legitimate public scrutiny. That result would be particularly unfortunate in the current recessionary climate which places an unparalleled obligation on officials at all levels of government to ensure that tax dollars are spent wisely.

ORDER:

1. I order the Board to disclose the record to the appellant within fifteen (15) days of the date of this order.
2. In order to verify compliance with this order, I order the Board to provide me with a copy of the record disclosed to the appellant pursuant to Provision 1 of this order, **only** upon request.

POSTSCRIPT:

I would like to express my thanks to both the appellant and the Board for the excellent quality of representations which were submitted with respect to this appeal. These submissions materially assisted me in rendering my decision.

Original signed by: _____
Irwin Glasberg
Assistant Commissioner

_____ November 10, 1993