



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-459

Appeal M-9400493

Township of Clearview



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act, (the Act). The Township of Clearview (the Township) received a request for access to copies of all accounts rendered to the Township by a named law firm in connection with a specified expropriation proceeding. The requester is an employee of the law firm retained by the party adverse in interest to the Township in the expropriation proceeding. The Township located 22 records which are responsive to the request and denied access to them, in their entirety, relying on the following exemptions under the Act:

- right to a fair trial - section 8(1)(f)
- solicitor-client privilege - section 12.

The requester appealed the Township's decision. A Notice of Inquiry was forwarded to the Township and the appellant. Representations were received from the Township, through its solicitors, only.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

This section consists of two branches, which provide a head 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 the Township 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 Township 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.

A record can be exempt under Branch 2 of section 12 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for counsel employed or retained by the Township; **and**
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

The Township indicates that the legal accounts at issue in this appeal fall within both branches of the section 12 exemption.

Several recent orders of the Commissioner's office have specifically addressed the application of section 12 to legal accounts. An approach to the analysis of the application of the section to these records was articulated by Inquiry Officer Anita Fineberg in Order M-274 as follows:

The rationale for the common law solicitor-client privilege is to protect communications between a client and his/her solicitor from disclosure in the interest of providing all citizens with full and ready access to legal advisors (Order 136). Two of the principles of the Act as set out in sections 1(a)(i) and (ii) are that information should be available to the public and that necessary exemptions from the right of access should be limited and specific.

In my view, these principles are reflected in the analysis developed by Assistant Commissioner Glasberg in Order M-213. In that order he concluded that:

... the implication of this decision [Order 126] 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.

This approach requires a case by case analysis of accounts to ascertain if the section 12 exemption applies. Moreover, because the decision maker makes this determination on the **information** contained in each legal account, it is also consistent with the principle of severance set out in section 4(2) of the Act. I adopt this approach for the purposes of this appeal.

Each of the legal accounts consist of a covering page setting out the fee for professional services rendered by the law firm followed, on separate pages, by a detailed breakdown of the actual service provided, the date the work was performed and the total fees due for this work. The detailed breakdown includes a description of the people the Township's solicitor contacted in connection with the expropriation, including potential expert witnesses. In addition, the breakdown of fees contains information concerning the subject matter of discussions between the Township and its solicitors and references to the strategy employed by the solicitors in the conduct of the expropriation proceeding.

Following the analytical guidelines described above, I find that information which relates directly to the conduct of the proceeding, particularly the strategy to be employed, falls within the purview of the common law solicitor-client portion of the section 12 exemption. I have highlighted in yellow on the copy of the records provided to the Township's Freedom of Information and Privacy Co-ordinator those portions of the solicitors accounts which are exempt from disclosure under Branch 1 of the section 12 exemption.

Further, I find that the remaining information does not fall within Branch 2 of the section 12 exemption as it was not prepared for use in giving legal advice or in contemplation of or for use in litigation. Rather, it simply indicates the fees to be paid for certain services which were provided by the law firm to the Township.

RIGHT TO A FAIR TRIAL

In its representations, the Township argues that it would be deprived of its right to a fair trial if the information contained in the solicitor's accounts is disclosed. It submits that the disclosure of information relating to strategies being pursued, or not pursued, in the context of the continuing litigation involving the parties would prejudice its right to a fair trial.

In my discussion of section 12 above, I have found that portions of the detailed breakdown of fees contained in the accounts are exempt from disclosure. These exempted portions relate to strategies, proposed witnesses and the general "game plan" for the litigation between the parties. Following the severance of such information under the section 12 exemption, I find that the disclosure of the remaining information would not result in the Township being deprived of its right to a fair trial.

Accordingly, I find that section 8(1)(f) has no application to that information contained in the records which remains following the severance of the portions exempt under section 12.

ORDER:

1. I order the Township to disclose to the appellant those portions of the records which are **not** highlighted on the copy forwarded to the Township's Freedom of Information and Privacy Co-ordinator with a copy of this order within twenty-one (21) days of the date of this order.

2. I uphold the Township's decision to deny access to those portions of the records which are highlighted on the copy forwarded to the Township's Freedom of Information and Privacy Coordinator with a copy of this order.
3. In order to verify compliance with this order, I reserve the right to require the Township to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Donald Hale
Inquiry Officer

February 28, 1995