



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

ORDER M-837

Appeal M_9600175

Regional Municipality of Peel



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Regional Municipality of Peel (the Municipality) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of a specific report prepared for the Municipality prior to a meeting with a named company (the Company). The Municipality located a copy of the requested document and denied access to it, in its entirety, claiming the application of the following exemption contained in the Act:

- solicitor-client privilege - section 19

The appellant appealed the Municipality's decision to deny access to the report. This office provided a Notice of Inquiry to the Municipality, the appellant and the Company. Because the report appeared to contain information which may fall within the mandatory exemption contained in section 10 of the Act (third party information), the parties to the appeal were also asked to address the possible application of this exemption to the record.

Representations were received from all of the parties.

PRELIMINARY ISSUE:

HAS THE QUESTION OF ACCESS TO THE RECORD ALREADY BEEN DETERMINED BY THE COURT?

An action under the Construction Lien Act has been commenced by the appellant against the Municipality and the Company in the Ontario Court of Justice (General Division). A cross-claim between the Municipality and the Company has been settled. The appellant and the Municipality exchanged Affidavits of Documents as is required under the Rules of Civil Procedure. One of the records referred to in the Municipality's affidavit is the record which is the subject of this appeal. The record was included in the Schedule B list of documents which the Municipality objected to producing to the appellant on the basis that it is privileged.

On January 3, 1996 a motion was heard in the Ontario Court of Justice (General Division) before Mr. Justice Ronald Thomas in which the appellant sought an Order for the production of the document which is also the subject of this appeal. In his endorsement, Mr. Justice Thomas declined to order the production of the document to the appellant at that time but reserved the right of the appellant to make a similar motion to the trial judge to compel the production of this record. Essentially, the Municipality and the Company argue that the Court has already made a finding that the document is protected from disclosure under solicitor-client privilege on the basis that it is a report from an expert, pursuant to the Rule 53.03 of the Rules of Civil Procedure.

I disagree with this assertion. It appears from my reading of Mr. Justice Thomas' endorsement that the question of the production of the requested record has been reserved to a decision of the trial judge, should a motion for production be made at the time of trial. In my view, the Office of the Information and Privacy Commissioner is statutorily empowered to conduct a full and impartial review of the Municipality's decision to deny access to the requested document under

the Act. This right of review of the Municipality's decision is independent of any right the appellant might have in relation to his action under the Construction Lien Act or the Rules of Civil Procedure. In addition, I find that Mr. Justice Thomas did not definitively rule on the issue of whether the requested record is subject to privilege. I find that I have jurisdiction under the Act to review the decision of the Municipality to deny the appellant access to the record under section 12. I will, accordingly, proceed with my analysis of the application of both sections 10 and 12 to the record.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Municipality and the Company submit that the requested record is exempt from disclosure under section 12. This section consists of two branches, which provide the Municipality 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 Municipality 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 Municipality and/or the Company 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.

(Orders 49, M-2 and M-19)

The Municipality relies on the second part of Branch 1 of the section 12 test. The Municipality submits that because the record was obtained by it from the Company especially for existing or contemplated litigation, it is subject to solicitor-client privilege and is, therefore exempt under section 12.

The appellant submits that the record was not created or obtained especially for the lawyer's brief or for existing or contemplated litigation. Rather, it argues that the report was prepared by a consulting firm on behalf of the Company, as opposed to counsel for either the Company or the Municipality. The appellant also points out that the report is dated November 1993 and that since the Company delivered its pleadings in the legal proceeding in February 1993, the report was not used in preparing the Company's defence against the appellant's action against it.

I have reviewed the record and the submissions of the parties regarding the application of the second part of Branch 1 of the solicitor-client privilege. I find that the report at issue was created by the Company and was provided to the Municipality in order to clarify the nature and extent of the damages being cross-claimed by the Company in the legal action involving the Municipality, the Company and the appellant. The report quantifies the amount of the cross-claim made against the Municipality in a detailed fashion.

However, as the cross-claim between the two defendants in the action, the Municipality and the Company, has been settled, I find that any privilege which may have once existed in the document has been lost. Since the cause of action between the co-defendants no longer exists, any litigation privilege in the document disappeared along with the cause of action. For this reason, I find that the record is not exempt from disclosure under the second part of Branch 1 and section 12, accordingly, has no application.

THIRD PARTY INFORMATION

As noted above, the Notice of Inquiry provided to the parties asked them to address the application of section 10 of the Act to the record at issue. Representations on this issue were submitted by the Municipality and the appellant. For a record to qualify for exemption under section 10(1)(a), (b) or (c) the parties resisting disclosure, in this case the Municipality or the Company, must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the Municipality in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 10(1) will occur.

Type of Information

The Municipality submits that the report contains references to commercial and financial information regarding the Company's unit prices for the provision of material. I find that the record contains both commercial and financial information within the meaning of section 10.

Supplied In Confidence

The Municipality refers to a notice which is included on each page of the subject record in which the Company sets out clearly the purposes for which the document was created and its confidential nature. I find that the record was supplied to the Municipality explicitly in confidence and that the Company's expectation of confidentiality was reasonably held.

Harms

The Municipality submits that significant prejudice to the competitive position of the Company will result from the disclosure of the record. It argues that the disclosure of unit pricing information will adversely effect the competitive position of the Company by demonstrating its best negotiated price for the supply of certain materials to its competitors. It further argues that these unit prices were submitted by the Company in response to the Municipality's tender 91_6801 and that all unit prices submitted in that competition are protected and have not been made public.

I have reviewed the submissions of the Municipality and the appellant with regard to the application of section 10 to the record. I find that the disclosure of the information contained in it could reasonably be expected to prejudice significantly the competitive position of the Company. The record quotes extensively from the Company's original tender and describes in detail the nature of the work performed and materials supplied as well as their costs. For this reason, I find that the record is properly exempt from disclosure under section 10.

ORDER:

I uphold the Municipality's decision not to disclose the record.

Original signed by: _____
Donald Hale
Inquiry Officer

September 18, 1996