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

ORDER M-923

Appeal M_9700020

City of Scarborough

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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The appellant is a member of a residents group which has an interest in a residential development on lands proximate to the residents' properties. The residents group has taken issue with the City of Scarborough (the City) regarding the actions and inactions of its Works and Environment Department, which the residents group considers to have had an adverse impact on their properties.

The appellant submitted a two-part request to the City under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The first part was for access to a copy of a specified letter, dated November 7, 1996, from the Development Control Engineer, Works and Environment Department (the Engineer) to the City Solicitor. The second part requested access to a copy of the City Solicitor's response to the first letter.

The City located the record responsive to part one of the request and denied access to it in its entirety on the basis of section 12 (solicitor-client privilege) of the Act. The City advised the appellant that no record exists with respect to part two of the request.

The appellant appealed the City's decision. During mediation, the City clarified that the City Solicitor's response to the November 7 letter was provided verbally and, therefore, no record exists. The appellant accepted this explanation and the existence of such a record is not at issue.

The record at issue consists of a one-page memorandum from the Engineer to the City Solicitor with a one-page letter addressed to the Mayor attached.

This office provided a Notice of Inquiry to the appellant and the City. Because the record appeared to contain the personal information of the appellant, the Appeals Officer raised the possible application of section 38(a) (discretion to refuse requester's own information) of the Act.

In her letter of appeal, the appellant indicated that the record is located in a file of the City's Works and Environment Department which is available for inspection by the public, upon request. Therefore, in the Notice of Inquiry, the Appeals Officer also invited the parties to comment on whether or not the solicitor-client privilege, if found to apply, had been waived in the circumstances of this appeal.

The City's representations were submitted on its behalf by its solicitor. Representations were received from the appellant. Along with her representations, the appellant attached unsworn statements by two other residents in which they indicate that they were given an opportunity to review the file in question upon request

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DISCUSSION:

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/SOLICITOR-CLIENT PRIVILEGE

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. The memorandum refers to the letter which was attached to it. The attached letter was sent to the Mayor by the appellant. The memorandum goes on to detail the Engineer's knowledge of the appellant and the department's views regarding her activities. I find that the record contains only the personal information of the appellant. The comments made by the Engineer were made in his professional capacity and do not qualify as his personal information.

Under section 38(a) of the Act, the City has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. Section 38(a) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, 8, 9, 10, 11, **12**, 13 or 15 would apply to the disclosure of that personal information. [emphasis added]

The City has exercised its discretion to refuse access to the record at issue under section 12. In order to determine whether the exemption provided by section 38(a) applies to the information in this record, I will first consider whether the exemption in section 12 applies.

Section 12 of the Act states:

> 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.

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 an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The City relies on both branches of the exemption.

In order for the record to be subject to the common law solicitor-client privilege (Branch 1), the City 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]

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 City; **and**

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

Having reviewed the record, I am satisfied that it is subject to the common law solicitor-client privilege (Branch 1). It is a written communication of a confidential nature prepared by an employee of the City and directed to the City's legal advisor. The contents of the record directly relate to the seeking of legal advice.

However, as I indicated above, the appellant submits the solicitor-client privilege was waived by the City when it placed a copy of the record in a publicly accessible file. As I noted above, the appellant has provided unsworn statements by two other residents in which they indicate that they were given an opportunity to review the file in question upon request.

One individual stated that he was given full access to the file in question in November 1996 (prior to the date of the appellant's request), pursuant to his request under the Act for the contents of the Works and Environment Department file. He indicated that he opted to review the file, and that during his review, he came across the record at issue. Although he did not make a photocopy of the record, he copied out, verbatim, the contents of the memorandum, and provided this copy to the appellant. He also attached a copy of the notes he made to his statement.

The second individual states that she had been advised on a number of occasions between September 1996 and February 1997 (the date of her statement), by the Engineer and a municipal councillor that she could inspect the file in question whenever she wished. This individual does not indicate that she availed herself of the opportunity, however.

The appellant states that during mediation of this appeal, the City confirmed that a copy of the record at issue was located in the file in question, and that this file was accessible to the public.

The City indicates that it is not necessary to make a request under the Act in order to view the contents of the file in question. However, if an individual asks to review the file, Works and Environment Department staff would screen the file before allowing it to be viewed. The City acknowledges that an individual had viewed the file prior to the appellant's request and that the record was present in the file, but indicates that when the current request came in and the file was reviewed, access was denied to the record.

The City has not made any representations on the issue of waiver. It merely states that "There is no basis upon which to suggest that solicitor-client privilege has been waived in this case."

In Order M-260, Inquiry Officer Anita Fineberg addressed a similar situation. In that case, a letter from a lawyer to the Chief of Police had been placed in the appellant's personnel file, which she was able to view at any time, upon request. The Inquiry Officer found that the letter was subject to the common law solicitor-client privilege.

In considering the issue of waiver, Inquiry Officer Fineberg noted that only the client may waive the solicitor-client privilege. Further, she found that waiver of the solicitor-client privilege may be express or implied. Because of the relevance of her discussion on whether the waiver is express or implied to this issue in the current appeal, I have set out this portion of her order in full.

> In the recent text Solicitor-Client Privilege in Canadian Law, R.D. Manes and M.P. Silver, (Butterworth's, 1993) at pp. 189 and 191, the authors distinguish between the two types of waiver:
>
> Express waiver occurs where the client voluntarily discloses confidential communications with his or her solicitor.
> Generally waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. Fairness is the touchstone of such an inquiry.
>
> Given the circumstances of this case, and after carefully examining the representations, I am persuaded that the Police did not expressly waive the solicitor-client privilege.
>
> In S & K Processors (1983), 35 C.P.C. 146 (B.C.S.C.) McLachlin J. noted:
>
> > However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require ...
> >
> > In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive privilege at least to a limited extent. The law then says

> that in fairness and consistency it must be entirely waived. (pp. 148_149)

The following passage from Wigmore on Evidence, vol. 8 (McNaughton rev. 1961), as set out in The Law of Evidence in Canada (Markham: Butterworth's, 1992), by Sopinka, Lederman and Bryant at p. 666, was quoted with approval by the Ontario Court (General Division) in the recent case of Piche et al. v. Lecours Lumber Co. Ltd. et al. (1993) 13 O.R. (3d) 193 at 196:

> A privileged person would seldom be held to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not.

In the particular circumstances of that appeal, Inquiry Officer Fineberg found that an objective consideration of the facts suggested that the Police had implicitly waived the solicitor-client privilege associated with the record at issue. Accordingly, she found that section 12 did not apply to the record.

I agree with the discussion and findings expressed in that order, and I adopt them for the purposes of this appeal.

With respect to the current appeal, I acknowledge that the information confirming the location of the record at issue in the publicly accessible file has been provided by the appellant, and that much of this information is unsworn. Nevertheless, the City has confirmed that the record is located in a file to which the public has access, upon request. With respect to the issue of public accessibility, however, the City indicates that its policy is to screen the file to remove any sensitive documentation before it is viewed.

I have no evidence before me to suggest that the City has expressly waived the solicitor-client privilege.

However, I find that the evidence provided by the appellant is sufficient to satisfy me that the record at issue was, and continues to be, located in a file to which the public has access, and that access had, in fact, been previously provided to the record. The City's representations do not address the prior disclosure of the record.

As a result, in the circumstances, I conclude that an objective consideration of the facts suggests that, having previously permitted the record to be viewed by a member of the public, the City has implicitly waived the solicitor-client privilege with respect to the record at issue and section 12 does not apply.

Accordingly, the record at issue should be disclosed to the appellant.

Because of the findings I have made in this order, it is not necessary for me to consider the application of section 38(a).

ORDER:

1. I order the City to disclose the record at issue to the appellant by sending her a copy by **April 25, 1997**.

2. In order to verify compliance with the provisions of this order, I reserve the right to require the City to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: April 10, 1997
Laurel Cropley
Inquiry Officer