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

# ORDER MO-1172

## Appeal MA-980122-1

## City of Vaughan

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 made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the City of Vaughan (the City) for a copy of a confidential memorandum from the Deputy City Manager and City Solicitor which was received by the City Council at an open session.

The City located the record and denied access to it in full on the basis of section 12 (solicitor-client privilege) of the Act. The appellant appealed this decision and claimed that the City had waived privilege in the document.

This office sent a Notice of Inquiry to the appellant and the City. The parties were specifically asked to address the issue of waiver. Representations were received from both parties.

## RECORD:

The record at issue is a two-page memorandum to the Mayor and Members of Council from the Deputy City Manager and City Solicitor dated February 27, 1998.

## DISCUSSION:

### SOLICITOR-CLIENT PRIVILEGE

Section 12 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).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution 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. See also Order M-2 and Order M-19]

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 an institution; and

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

[See Order 210]

The City indicates that it is relying on Branch 1 of the exemption to withhold the record from disclosure. In this regard, the City submits that the record is a written communication from the City Solicitor to members of Council, that it was prepared and submitted to Council in confidence as evidenced by the notation on the first page of the memorandum, and that it is directly related to the giving of legal advice to Council concerning the Pine Valley Drive link.

The appellant submits that the "taxpayers" are the true clients within the meaning of section 12 of the Act since the taxpayers ultimately pay the salary of the Council and the City's solicitor. If I were to accept this argument, there would effectively be no need for the exemption in section 12. Moreover, section 1 of the Act provides that the public has a right to information held by government institutions, but also stipulates that this right to information is not absolute. Through section 12, the Act recognizes the confidential relationship between public officials and their counsel to the same extent that the common law recognizes the private solicitor and client relationship (Orders P-1551 and P-1561). Further, section 12 acknowledges that public officials may be "clients", distinct from the public at large, notwithstanding the special duties and responsibilities these officials have with respect to the public. Accordingly, I find that the appellant's arguments in this regard are without merit.

I have reviewed the record at issue and find that it is a direct written communication between the City Council and the City's solicitor. I also find that it contains advice from the solicitor regarding the issues and options to be considered by Council respecting the Pine Valley Drive link. I am satisfied that this document was prepared and intended to be communicated in confidence. This view is reinforced by the manner in which the document was referred to in the minutes of the Council meeting of March 9, 1998. Accordingly, I find that the record qualifies for exemption under the solicitor-client communication privilege in Branch 1 of section 12 of the Act.

As I indicated above, the appellant claims that the City has waived privilege in the document. The appellant raises several points in asserting this claim. I will address each one separately.

The appellant's first argument is based on the provisions of the Planning Act, R.S. O. 1990, C.P.13. He specifically refers to sections 16, 17 and 20 of the Planning Act as providing legal authority for the disclosure of the record. These sections refer to the public hearing process as it relates to the amendment of the official plan. In essence, these sections provide that any person or public body may make written submissions to the Council before a plan is adopted. These provisions of the Planning Act provide that the public shall be given sufficient information to enable them to participate in the public hearing process and indicate further that all submissions in this forum shall be made available to the public.

In my view, these sections refer to the process whereby the public is included in the decision-making process regarding planning issues. There is nothing in the Planning Act which indicates that all information in the custody of the City respecting any amendments to the official plan must be made available to the public. I find that simply because the Planning Act envisions and provides for access to some information regarding amendments to the official plan and for public input into these issues, it does not follow that all information available to the City or Council on these issues thereby becomes public. Accordingly, I am not persuaded that the application of the Planning Act either requires disclosure of the record at issue or is of any assistance in determining whether solicitor-client privilege has been waived in the circumstances of this appeal.

The appellant also relies on the exceptions under section 13(2) [the appellant is referring to the provisions of the provincial Act in this discussion. Section 13(2) is the equivalent of section 7(2) of the Act (advice and recommendations)]. However, the City has not relied on section 7(1) to withhold the record at issue. The exceptions to section 7(1) are, therefore, not relevant in determining the issues in this appeal.

The appellant has attached a letter addressed to himself from a City councillor in which the councillor makes reference to legal advice regarding financial consideration for construction of a road. I find that the content of this letter does not relate to the issues discussed in the legal memorandum at issue. Accordingly, this letter does not assist me in determining the waiver issue.

Finally, the appellant refers to page 3 of Report No. 18 of the Committee of the Whole which was adopted, as amended by Council on March 9, 1998. The following statement was included under the heading "Vaughan Legal":

> Vaughan legal advises that Council may delete the Link from OPA 400 by way of an Official Plan Amendment. This will require a public hearing on the matter...

The City submits that at no time was the content of this legal opinion made available to the public. In this regard, it states:

> This legal opinion was written to the Mayor and Members of Council by the Deputy City Manager and City Solicitor. A copy of this memorandum was also provided to specific senior city staff who has [ sic] an interest in planning matters such as the Pine Valley Drive link. This memorandum was stamped "confidential" prior to being copied to senior City staff. This memorandum was received by the City Clerk. It was filed under the record series Council/Committee of the Whole Working papers. This memorandum is kept in the file in a sealed envelope marked "confidential." This memorandum was made available to Members of council and some senior City staff. Due care was taken to ensure that this memorandum was not made available to the public, it was stamped as confidential and it is stored in the Clerk's Department in a sealed confidential envelope.

Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive the privilege (S.&K. Processors Ltd. V. Campbell Avenue Herring Producers Ltd., [1983] 4 W.W.R. 762, 45 B.C.L.R. 218, 35 C.P.C. 146 (S.C.) At 148 - 149 (C.P.C.)).

In Order M-260, former Inquiry Officer Anita Fineberg considered the issue of waiver of solicitor-client privilege (at pp. 4 - 5):

> Only the client may waive the solicitor-client privilege. Waiver of the solicitor-client privilege may be express or implied. As the appellant has not specifically stated whether she claims the waiver was express or implied, I shall examine both issues.
>
> 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.
> > ...
>
> In S.& K. Processors Ltd. V. Campbell Avenue Herring Producers Ltd. (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 v. Lecours Lumber Co. (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.

I adopt this analysis for the purposes of this appeal.

I have reviewed page 3 of Report No. 18 of the Committee of the Whole. I find that it contains a small portion of the "bottom line" of the advice provided to Council from the City's solicitor. It very briefly outlines the City Solicitor's view of what the City is entitled to do and what is required in order for it to do so. The bulk of the legal opinion deals with other aspect of this issue. In my view, it is often necessary or desirable for a public body to refer to the crux of the advice its solicitors provide to it in order to carry out its mandate and responsibilities. In many cases, the public body will intend to retain the privilege, while at the same time provide a minimal degree of public disclosure to ensure the proper discharge of its functions. In the usual case, this should not of itself constitute express waiver of the privilege attaching to the underlying solicitor-client communication (Order P-1559).

This issue was recently addressed by the Federal Court of Appeal in Stevens v. Canada (Prime Minister) (1998), 161 D.L.R. (4th) 85 at pp.108 -109. In this case, pursuant to an access request under the federal Access to Information Act, a federal institution provided partial access to legal accounts, severing out the narrative portion of the accounts while providing access to the dollar amount of the accounts. In dealing with the issue of waiver in the freedom of information context, Linden J.A. stated on behalf of the Court:

> In Lowry v. Can. Mountain Holidays Ltd. [(1984, 59 B.C.L.R. 137 (S.C.), at p. 143] Finch J. emphasized that all the circumstances must be taken into consideration and that the

> conduct of the party and the presence of an intent to mislead the court or another litigant are of primary importance.
> ...
>
> I would add, with respect to the release of portions of the records, that, in light of these reasons, the Government has released more information than was legally necessary. The itemized disbursements and general statements of account detailing the amount of time spent by Commission counsel and the amounts charged for that time are all privileged. But it is the Government qua client which enjoys the privilege; the Government may choose to waive it, if it wishes, or it may refuse to do so. By disclosing portions of the accounts the Government was merely exercising its discretion in that regard. **As I mentioned earlier, a government body may have more reason to waive its privilege than private parties, for it may wish to follow a policy of transparency with respect to its activity. This is highly commendable; but the adoption of such a policy or such a decision in no way detracts from the protection afforded by the privilege to all clients**. [emphasis added]

Although the matter in Stevens arose in the context of disclosure under the federal Act, in my view, the Court's rationale may be similarly applied to the disclosure, generally, made by government institutions of information in their custody or control. This is not to say that an institution can never be found to have waived solicitor-client privilege by partial disclosure of a privileged document. Rather, in determining this issue, a decision-maker must be cognizant of the environment in which institutions operate and their responsibilities with respect to the public interest, which may include maintaining a "policy of transparency" regarding information which is used in the decision-making process.

In the circumstances of the current appeal, I am satisfied that in making the relatively minimal disclosure of a small portion of the "bottom line" of the advice, the City did not intend to waive privilege with respect to the record. Accordingly, I find that the City has not expressly waived privilege.

There is no evidence that the City provided access to the legal opinion to anyone other than City officials. As well, the City took active steps to preserve the confidentiality of the opinion. I am satisfied that the City treated the record as confidential. In the circumstances, although the City did provide a small portion of the "bottom line" of the advice, I am not satisfied that fairness or consistency would require a finding that the privilege ceased. Therefore, I conclude that the City did not implicitly waive privilege.

Because I have found that there has not been waiver of solicitor-client privilege, I find that the record is exempt under the first part of Branch 1 of section 12 of the Act.

## ORDER:

I uphold the City's decision.

Original signed by: December 8, 1998
Laurel Cropley
Adjudicator