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

ORDER MO-1233

Appeal MA-990027-1

Town of Bradford West Gwillimbury

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NATURE OF THE APPEAL:

The Town of Bradford West Gwillimbury (the Town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the following:

> A copy of the recommendation made and settlement in the December 3, 1998 correspondence from [named law firm], which were received, approved and authorized in/by Resolution No. 38-029 (and later confirmed by By-law).

In response to the request, the Town located a two-page letter from the law firm dated December 3, 1998, with an attached two page settlement agreement signed by the requester on the same date. The Town then wrote to the requester stating that:

> In accordance with the [Act], access is denied to your request for the December 3, 1998 correspondence from the [law firm] and which was dealt with in-camera. Access is denied under Section 12 of the Act being solicitor-client privilege in that the December 3rd letter was prepared by counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.
>
> In accordance with the [Act], access is denied to your request for the [settlement agreement], said [settlement agreement] also dealt with in-camera. Access is denied under the following Sections of the Act:
>
> > "(b) The request for access is frivolous or vexatious"
> >
> > This opinion has been reached on reasonable grounds, in that your signature is on the document and you had input through and with the [law firm] as to the contents of the document.
> >
> > Section 12, already explained in this letter.

The requester, now the appellant, appealed the Town' decision to this office.

In his letter of appeal, the appellant stated:

> Pursuant to a settlement agreement on which I received an apology from a Town official, I furthermore insisted upon and the Town apparently agreed to execute releases additionally between us. The applicable Resolution approved and authorized the recommendations contained in correspondence by its [law firm] dated December 3, 1998, which was represented to me by the Town orally and only begrudgingly later in writing as approving and authorizing the settlement agreement. The Resolutions were then ratified by By-law. Those recommendations and settlement were the subject matter of the above refusal, and I have not received those documents.

. . . . .

> . . . The Recommendations and Settlement were received approved and authorized by Resolution and By-law, which are public actions of a Municipal Corporation[] and, furthermore, it is legally required that Resolutions/By-laws are to be made available to the public under the Municipal Act, namely, sections 76 and 77. The Municipality may not publicly act while simultaneously hiding its actions and the content of the Resolution/By-law by indirect means;
>
> . . . . .
>
> . . . The contents of the December 3, 1998 correspondence and settlement agreement cannot be privileged as they have already been apparently communicated . . .

During the mediation stage of the appeal, the Town provided the appellant with a copy of the settlement agreement. As a result, the sole record remaining at issue is the December 3, 1998 letter to the Town from the law firm. The Town also confirmed that it was withdrawing its reliance on the "frivolous or vexatious" claim under section 4(1)(b) of the Act.

I sent of a Notice of Inquiry setting out the issues in the appeal to the Town and the appellant. I received representations from the appellant only.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual' name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

The appellant submits that the record is "about and concerning" him and includes his "name as well as his personal information especially regarding the subject matter of the lawsuit, counterclaim and settlement thereof." In my view, the record clearly contains personal information of the appellant regarding the appellant' action against the Town and the Town' Clerk-Administrator.

RIGHT OF ACCESS TO ONE' OWN PERSONAL INFORMATION/SOLICITOR-CLIENT PRIVILEGE

Introduction

Since the record contains the appellant' personal information, the provisions in Part II of the Act regarding the right of access to one' own personal information apply. Section 36(1) provides individuals with a general right of access to their own personal information in the custody or under the control of an institution. However, this right of access under section 36(1) is not absolute; section 38 provides a number of exceptions to this right. In particular, under section 38(a), a head may refuse to disclose to the individual to whom the information relates personal information if section 12 (solicitor-client privilege) (among others) would apply to the disclosure of that personal information.

Branches 1 and 2

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).

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.

[Orders 49, M-2, 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.

[Order 210]

Scope of Branches 1 and 2 determined with reference to the common law

Although the wording of the two branches is different, the Commissioner' orders have held that their scope is essentially the same:

> In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation. In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships.
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> [Order P-1342; upheld on judicial review in Ontario (Attorney General) v. Big Canoe, [1997] O.J. No. 4495 (Div. Ct.)]

Solicitor-client communication privilege

At common law, solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ...
>
> [Descôteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The appellant submits that solicitor-client communication privilege does not attach to the record. The appellant states:

> Once the very recommendation(s) of a solicitor is/are directly incorporated by government, a public law-making body, into its legislation/quasi-legislation and/or measures taken as the very basis of its action, solicitor-client privilege cannot attach to such a record where the legislation/quasi-legislation and/or measure does not on its face disclose its substance and content. Additionally, the purpose and scope of solicitor-client privilege is to obtain professional legal advice in confidence, it cannot therefore cover the act of legislating, or measures taken as the very basis of government action, which is precisely the role of (elected) government. The two situations are clearly distinct, and where the very recommendation(s), which may otherwise have been protected by solicitor-client privilege is/are directly incorporated into legislation/quasi-legislation and/or measures taken as the very basis of government action, there can be no solicitor-client privilege with respect to the latter.

> Secondly, revealing actual legislation/quasi- legislation and/or measure taken as the very basis of government action, can in no way interfere with the purpose and scope of solicitor-client privilege of obtaining professional legal advice in confidence, because the government body need not incorporate the same into such legislation/quasi-legislation and/or measure. If solicitor-client privilege attached to a record, it would still be protected as such if the same were merely received, and even discussed in camera. That communication could even become the reason, motive, or intention regarding subsequent legislation/action and still might be protected. Such communications, however, may not be directly incorporated into legislation, quasi-legislation and/or measures taken as the very basis of government action, which then obscures the content and substance thereof. In that case, solicitor-client privilege cannot attach to the extent that the actual communication is incorporated into and serves as the basis or becomes the actual wording of that legislation/quasi-legislation and/or measure. The rest and remainder of the communication, if any, may indeed retain its confidential and privileged nature and protection. There is authority for the proposition that "the law will only give effect to the privilege while the purpose for its recognition continues to be served." [Order P-1551].
>
> Third, legislation has precedence over common law. Under the Municipal Act, a municipality is legally required to make their Resolutions/By-laws available for public scrutiny without fee. The reason for the rule is rooted in democracy and the rule of law. A municipality may not hide its legislation/quasi-legislation, or actions through indirect means, by not disclosing the substance or content of the resolution or by-law. To do so would involve the municipality writing out of existence the meaning and purpose of the legislation, which incidentally it could not do in any case on the grounds of jurisdiction and federalism [Municipal Act, ss. 73, 74, 76 and 77].

The record clearly, on its face, constitutes a confidential communication made by a lawyer to his clients, the Town and the Town' Clerk-Administrator, for the purpose of providing legal advice, and therefore is subject to solicitor-client communication privilege.

The appellant' submissions set out above appear to suggest that because the settlement agreement included an undertaking that the Town ratify its execution of the settlement by by-law, the communication from the lawyer to his clients cannot be subject to solicitor-client communication privilege. The appellant provides no authority for these submissions and I find they are without foundation. The rationale for solicitor-client communication privilege, as stated above, is to ensure that a client may confide in his or her lawyer on a legal matter without reservation. I find no basis in the appellant' submissions for finding that this rationale is not present in this case.

In addition, the appellant submits that the Municipal Act requires by-laws to be made available for public scrutiny. This submission has no relevance to the issue of whether or not the record qualifies for solicitor-client communication privilege.

Since I found that the record is subject to solicitor-client communication privilege under section 12, the record is exempt unless privilege has been lost.

Loss of privilege

Solicitor-client communication privilege may be lost through actions on behalf of the institution which constitute waiver. As stated in Order P-1342:

> ... [C]ommon law solicitor-client privilege can also be lost through a waiver of the privilege by the client. 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)]. Generally, disclosure to outsiders of privileged information would constitute waiver of privilege [J. Sopinka et al., The Law of Evidence in Canada at p. 669. See also Wellman v. General Crane Industries Ltd. (1986), 20 O.A.C. 384 (C.A.); R. v. Kotapski (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].
>
> Strictly speaking, since the client is the "holder" of the privilege, only the client can waive it. However, the client' waiver of the privilege can be implied from the actions of the client' solicitor. Legal advisors have the ostensible authority to bind the client to any matter which arises in or is incidental to the litigation, and that ostensible authority extends to waiver of the client' privilege. [J. Sopinka et. al., The Law of Evidence in Canada at p. 663. See also: Geffen v. Goodman Estate (1991), 81 D.L.R. (4th) 211 (S.C.C.); Derby & Co. Ltd. v. Weldon (No. 8), [1991] 1 W.L.R. 73 at 87 (C.A.)].

The appellant takes the position that in a letter to the appellant, the Town' lawyer waived privilege with respect to the record. In the letter to the appellant, the lawyer states:

> If it is of assistance to you, I am prepared to confirm, without waiving any solicitor-client privilege, the fact that my advice to the Town and [the Clerk-Administrator] was that . . .

The lawyer went on to provide a very brief summary of the advice given.

In Orders M-1165 and MO-1172, disclosure by the institution of the "bottom line" of legal advice it received was held not to constitute waiver. As stated by Adjudicator Laurel Cropley in Order MO-1172:

> 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' 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.
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> . . . . .
>
> 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**. [Adjudicator Cropley' emphasis]

Although the matter in Stevens arose in the context of disclosure under the federal Act, in my view, the Court' 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.

In my view, the circumstances of this case are similar to those in Orders M-1165 and MO-1172 for the purpose of the waiver analysis and I agree with Adjudicator Cropley' application of the common law principles discussed in Stevens to those circumstances. On this basis, I find in this case that the lawyer' relatively minimal disclosure of the "bottom line" of the advice given to his clients does not constitute express waiver of solicitor-client communication privilege.

In addition, I am satisfied in the circumstances that the Town treated the record as confidential, and that there is insufficient evidence to indicate that the City implicitly waived privilege, either by means of the by-law or the letter from the lawyer to the appellant.

The appellant submits that "once the solicitor-client communication is put into issue in a proceeding, it cannot be protected". The appellant cites the case of Toronto-Dominion Bank v. Leigh Instruments Ltd. (1997), 32 O.R. (3d) 575 (Gen. Div.). This principle does not apply in the context of this case; an appeal respecting an access request under the Act cannot be equated with another proceeding in which a privileged communication is put into issue (Order P-1559). In this case, there is no compelling fairness issue which would require that full disclosure be made.

The appellant asserts that the Town should not be permitted to disclose only parts of a privileged document to its advantage, which may be misleading or unfair. The appellant relies on Transamerica Life Ins. Co. v. Can. Life Assurance Co. (1995), 27 O.R. (3d) 291 (Gen. Div.) in this regard. This case has no application here, for reasons similar to those set out above. Moreover, the Stevens judgment indicates that partial disclosure by an institution under an access to information scheme, following a policy of transparency, is "highly commendable".

The appellant makes further submissions with respect to constitutional law and principles relevant to disclosure of information "applicable to municipal resolutions and/or by-laws." The appellant' central argument is that non-disclosure of the content or substance of a municipal resolution or by-law is contraryto the Canadian Charter of Rights and Freedoms, constitutional convention and amounts to "bad faith". However, the appellant has failed to draw a connection between the record at issue and the legal principles cited. As a result, I find that these principles have no application in the context of this appeal.

To conclude, I find that solicitor-client privilege has not been waived, and that the record is exempt under section 12.

ORDER:

I uphold the Town' decision.

Original signed by: September 7, 1999
David Goodis
Senior Adjudicator