



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

ORDER MO-1223

Appeal MA-980336-1

Township of Carling



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NATURE OF THE APPEAL:

The appellant wrote to the Township of Carling (the Township) seeking access to several records concerning issues relating to access to the appellant's property, including a letter to the Township from its solicitor. The appellant's letter made no specific reference to the Municipal Freedom of Information and Protection of Privacy Act (the Act). In its reply, the Township stated:

. . . [The solicitor who wrote this correspondence] was requested to give his opinion on the letter of objection filed by you and [your husband] with respect to the closing of a portion of [a] road allowance . . . It has been determined that this is [a] privileged communication between the [Township] and the solicitor and it will not be released. As requested, enclosed is a copy of the [Township's] request to [the solicitor] for an opinion.

The Township's reply also addressed other records not directly at issue in this appeal.

Later the appellant wrote to the Township and specifically requested access under the Act to the solicitor's letter (the record). The Township replied to the appellant's request by stating that it was denying access to the record on the basis of section 12 ("solicitor-client privilege"). The Township further stated that "the record is a communication between [the Township] and its legal advisor containing legal advice."

The appellant appealed the Township's decision to this office.

During the intake stage of the appeal, the appellant suggested that the Township had waived privilege with respect to the record.

I sent a Notice of Inquiry setting out the issues in the appeal to the Township and the appellant. I received representations from both parties.

RECORD:

The record at issue consists of a three page letter to the Township from its solicitor concerning a proposed Township by-law closing a road allowance.

DISCUSSION:

Section 12 of the Act reads:

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 an institution with 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].

Although the wording of the two branches is different, the Commissioner's 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

[Order P-1342; upheld on judicial review in Ontario (Attorney General) v. Big Canoe, [1997] O.J. No. 4495 (Div. Ct.)].

The Township has not specified whether it is relying on solicitor-client communication privilege or litigation privilege. However, the Township's representations, and the context of this appeal, suggest that only the former could apply.

Solicitor-client communication privilege

General principles

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 privilege has been found to apply to "a continuum of communications" between a solicitor and client:

. . . the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the

law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [Balabel v. Air India, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [Susan Hosiery Ltd. v. Minister of National Revenue, [1969] 2 Ex. C.R. 27, cited in Order M-729].

The Township submits:

. . . The record:

- a) is a written communication
- b) is of a confidential nature
- c) is between the client (the Township of Carling) and its solicitor
- d) was prepared specifically for use in giving legal advice on a particular matter.

The record was communicated to Council in confidence. It is Council's opinion that it must be able to rely upon the confidentiality of communications with its solicitor.

The appellant makes no specific submissions with respect to the common law test for solicitor-client communication privilege.

Having reviewed the record and the Township's representations, and having considered all of the relevant circumstances, I am satisfied that the record consists of a confidential communication from a solicitor to his client, the Township, for the purpose of giving legal advice. Accordingly, I conclude that this record satisfies the common law test for solicitor-client communication privilege. As a result, section 12 of the Act applies, unless I find that privilege has been lost.

Loss of privilege

The next issue I must consider is whether the actions on behalf of the Township constitute waiver of solicitor-client communication privilege with respect to the record. 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’s waiver of the privilege can be implied from the actions of the client’s 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’s 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 Township has indicated that, through its solicitor, it disclosed the record to the Ministry of Municipal Affairs and Housing for the purpose of obtaining the Ministry’s approval for a Township by-law to close and sell a road allowance leading to water, as required by section 297(3) of the Municipal Act. It appears also that the Ontario Ombudsman subsequently received a copy of the record from the Ministry, after receiving a complaint about the Ministry’s approval process under the Municipal Act.

I will first address the issue of whether or not the Township’s disclosure of the record to the Ministry constitutes waiver. In my view, the circumstances in this case are analogous to those in Order P-1342. In that case, a lawyer was charged with fraud, tried and acquitted. Shortly after the acquittal, the prosecuting Crown Attorney sent documents relating to the prosecution to the Law Society of Upper Canada. The Law Society had initiated but did not pursue disciplinary proceedings against the lawyer. Subsequently, the lawyer commenced a civil action for malicious prosecution against, among others, the Royal Canadian Mounted Police.

Approximately ten years after the acquittal, the lawyer asked the Law Society to provide him with copies of the records contained in his disciplinary file. The Law Society disclosed the records with the exception of documents received from the Attorney General for Ontario, because it did not have the Attorney General’s consent.

The lawyer then made a request to the Attorney General under the Freedom of Information and Protection of Privacy Act (FIPPA) for access to the records the Attorney General had given to the Law Society. The Ministry denied access on the basis that they were subject to solicitor-client privilege, and thus the exemption at section 19 of FIPPA applied. The lawyer appealed this decision to this office. Inquiry Officer Holly Big Canoe found that by disclosing the documents to the Law Society, the Attorney General had waived privilege. On judicial review of this decision, the Divisional Court upheld Order P-1342, and stated:

In our view any obligation that counsel for the Crown had to the Law Society did not obligate him to report anything that would entail a breach of solicitor-client privilege. Accordingly, by reporting or sending to the Law Society what was privileged, the Crown voluntarily waived privilege and that information is no longer shielded from disclosure under [FIPPA].

Applying the above principles here, in my view, the Township did not have an obligation to provide the legal opinion to the Ministry, for the purpose of obtaining approval of its by law under the Municipal Act, which would entail a “breach” of solicitor-client privilege. I accept that the Township had an obligation to provide relevant material, including any facts or arguments, to the Ministry to enable the Ministry to make its decision. However, I do not accept that this would necessarily include the actual legal opinion provided by the solicitor. In my view, the Township could have provided any relevant material contained in the legal opinion to the Ministry it wished, without the necessity of providing the record itself.

I am satisfied that the Township knew of the existence of the privilege and that by disclosing the record to the Ministry, the Township demonstrated a clear intention to forego the privilege. Accordingly, I find that any privilege which may have attached to the record at common law has been waived, and thus section 12 does not apply.

Because of my finding that disclosure of the record to the Ministry constituted waiver, it is not necessary for me to address the implications of disclosure of the record by the Ministry to the Ontario Ombudsman.

ORDER:

1. I order the Township to disclose the record to the appellant by **July 26, 1999**.
2. In order to verify compliance with Provision 1 of this order, I reserve the right to require the Township to provide me with a copy of the material disclosed to the appellant.

Original signed by: _____
David Goodis
Senior Adjudicator

July 5, 1999