



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

ORDER MO-1266

Appeal MA-990227-1

The Township of Cavan-Millbrook-North Monaghan



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NATURE OF THE APPEAL:

The appellant wrote to the Township of Cavan-Millbrook-North Monaghan (the Township) seeking access under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to a record described as the “Russell Report”.

The Township denied access to the record pursuant to section 12 (solicitor-client privilege) of the Act. The appellant appealed the Township’s decision to this office. In his letter of appeal, the appellant stated that he believes the record contains his personal information.

I sent a Notice of Inquiry to, and received representations from, the appellant. I found it unnecessary to seek representations from the Township.

The record at issue is an eight page letter to the Township’s Planning Advisory Committee from a law firm regarding a property matter.

RECORD:

The record at issue is an eight page letter to the Township’s Planning Advisory Committee from a law firm regarding a property matter.

ISSUES:

PERSONAL INFORMATION

Under section 2(1) of the Act, “personal information” is defined, in part, to mean recorded information about an identifiable individual.

The record contains references to the appellant in the context of the property matter. I find that the record contains the personal information of the appellant within the meaning of section 2(1) of the Act.

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

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access. Section 38(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

- (a) if section 6, 7, 8, 9, 10, 11, **12**, 13 or 15 would apply to the disclosure of that personal information [emphasis added].

The Township has claimed that section 12 (“solicitor-client privilege”) of the Act applies in the circumstances. If section 12 applies to the record, then the Township has the discretion to deny access on the basis of section 38(a).

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's orders have held that their scope is essentially the same:

In essence, then, the second branch of section [12] 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 [12] 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.)]

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 record at issue clearly, on its face, is a confidential communication to the Township from the Township's solicitor made for the purpose of obtaining professional legal advice on the property matter. I am satisfied that the record qualifies for exemption under section 12 on the basis of solicitor-client communication privilege.

The appellant refers to a civil court action he has brought, along with others, and states that the Township "was not a party to the legal action - therefore solicitor/client privilege should not apply." The fact that the Township is not a party to a particular proceeding does not negate the applicability of section 12; as explained above, the exemption applies because the communication was made for the purpose of obtaining legal advice.

Because section 12 applies, the Township may deny access to the record on the basis of section 38(a) of the Act.

ORDER:

I uphold the Township's decision to deny access to the record.

Original signed by
David Goodis
Senior Adjudicator

December 22, 1999