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

ORDER MO-1306

Appeal MA-990296-1

Corporation of the Municipality of Clarington

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NATURE OF THE APPEAL:

The appellant submitted a request to the Corporation of the Municipality of Clarington (the Municipality) under the Municipal Freedom of Information and Protection of Privacy Act for access to:

> all information, documentation, memorandum and other materials...in possession of the...[Municipality] relating to the passage of By-law 97-36.

The appellant also requested:

> all information, documentation, memorandum and any and all other materials relating to By-law 99-123 which was passed on or about June 19, 1999 and which repeals By-law 97-36.

The appellant clarified that the request included but was not limited to all documents from the Durham Regional Police Service to the Municipality and vice versa, all reports prepared internally or publicly by the Municipality, by the Department of Developing and Planning Services, by the Public Security Panel, by the Development and Corporate Services Community, any and all documents relating to the above noted by-laws which were produced prior to its enactment and subsequent thereto to the present day, all minutes of meetings held with respect to the by-laws and any and all other documents, materials, information with respect to the enactment or amendments thereto.

The Municipality located the records responsive the request and granted access to most of them. The Municipality denied access to one record in its entirety pursuant to section 12 (solicitor-client privilege) of the Act.

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

During mediation, the Municipality indicated that the record at issue was prepared by its solicitor for the purpose of illustrating legal advice which he gave to the Municipality concerning the proposed enactment of an Adult Entertainment By-law by the Municipality and in contemplation of litigation that could result therefrom.

Also during mediation, the appellant indicated that he does not believe that this record is subject to solicitor-client privilege as it was circulated among the officers and council of the Municipality. It appears that the appellant is also suggesting that the Municipality has waived solicitor-client privilege in the record.

I sent a Notice of Inquiry to the appellant initially. The appellant did not submit representations in response to the Notice. After reviewing the record, the discussions which took place during mediation that are not subject to mediation privilege, all of which have been provided to me, and previous orders of this office, I have decided that it is not necessary to hear from the Municipality.

RECORD:

The record at issue consists of a 20-page document relating to a draft by-law.

DISCUSSION:
SOLICITOR-CLIENT PRIVILEGE

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 Municipality relies on both solicitor-client communication privilege and litigation privilege. I will first consider the application of solicitor-client communication privilege and then, if necessary, litigation privilege, to the records. In my analysis I will apply common law principles of solicitor-client privilege, without differentiating between the two branches, for the reasons set out above.

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 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]

The record at issue is set up as a draft by-law. The solicitor responsible for drafting this document indicated that he was asked by the Municipality to provide legal advice relating to the drafting of its by-law concerning the regulation of adult entertainment parlours within its jurisdiction. The solicitor indicates that the record at issue was intended to supplement his legal advice to the Municipality. In this regard, he indicated that he created a draft by-law which incorporated the essence of his advice.

In my view, there is no requirement that "legal advice" be in a particular format. For example, previous orders of this office have found that handwritten comments made by legal counsel on a draft by-law are sufficient to qualify as legal advice (Order MO-1205). In the current case, the fact that the record is set up as a draft by-law is immaterial as to whether it qualifies for exemption under section 12. The question is whether it is a communication made for the purpose of giving legal advice.

As I indicated above, the appellant believes that because the record was circulated among "officers" of the Municipality and the Municipal Council it is not protected by solicitor-client privilege.

In Order MO-1205, Senior Adjudicator David Goodis considered the application of section 12 in circumstances where draft versions of documents and regulations were circulated among members of a "drafting team" and City officials. In my view, his comments on this issue correctly reflect the approach to be taken in these circumstances. He stated:

> In my Order PO-1663, I addressed the application of solicitor-client privilege in circumstances involving the drafting of a regulation under the Pension Benefits Act. Various documents, including memoranda and draft versions of the regulation, were circulated among the members of the drafting team, which included legal counsel and senior government officials. In that case I stated the following:
>
> > These records consist of communications among various members of the drafting team and senior officials providing instructions on the draft Regulation. It is clear on the face of Records 2, 6, 8, 9, 15 and 17, and on the basis of the Commission's representations, that the Commission's Senior Legal Counsel received each of these records in the course of the drafting process, either as an addressee (Records 15, 17) or as a person who was "carbon copied" (Records 2, 6, 8, 9).
> >
> > . . . . .

> The Commission submits that each of these communications was made on a confidential basis for the dominant purpose of giving or receiving legal advice from the Commission's Senior Legal Counsel. The appellant submits that these communications were not made for this purpose. More specifically, in the case of Records 8, 9 and 15, the appellant states that "[a] memo merely summarizing comments made concerning draft regulations" does not meet the test of "seeking, formulating or giving of legal advice."
>
> In my view, the appellant's characterization of solicitor-client communication is overly restrictive and not consistent with the common law, which indicates that the privilege applies to a "continuum of communications" between a lawyer and client (see Balabel above). The fact that the communication does not set out "facts and issues and legal principles" does not remove it from the scope of solicitor-client privilege, as long as the communication was made for the dominant purpose of obtaining legal advice (see [Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner) (1997), 102 O.A.C. 71 (Div. Ct.)] and Descôteaux above).
>
> In the circumstances, given what was clearly Senior Legal Counsel's key role in providing advice in the Regulation drafting process, I accept the Commission's argument that these communications were made for the dominant purpose of obtaining legal advice. Further, I accept the Commission's submission that these communications were made with an intention to keep them confidential among the members of the drafting team.
>
> Based on the above, I find that Records 2, 5, 6, 8, 9 and 13 to 18 are subject to solicitor-client communication privilege ...

In my view, there are strong parallels between the circumstances of this case and those in PO-1663. In both cases, the documents at issue record communications among members of a "drafting team," including lawyers, in the course of providing legal advice to, and seeking instructions from, the client, with the ultimate purpose of enacting subordinate legislation. In my view, each of these communications in pages 18-27, 41-43 and 49-53 was made for the dominant purpose of seeking or obtaining legal advice. Further, I accept the City's submission that these communications were made with an intention to keep them confidential. Therefore, I find that pages 18-27, 41-43 and 49-53 are subject to solicitor-client communication privilege.

In my view, the reasoning in these two orders is similarly applicable in the current appeal. In this regard, I find that it is entirely to be expected that the drafting of a by-law would involve a number of individuals, including those employed by the Municipality, or elected to represent the Municipality in their capacity as

"legislators." Further, 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). In this case, I am satisfied that for the purpose of seeking and giving legal advice, the "client" is the Municipality which includes both elected officials and employees.

In reviewing the file, I am satisfied that the record is exempt from production under the solicitor-client communication privilege in section 12. This record is a confidential written communication (in the form of a draft by-law) from a solicitor retained by the Municipality. In providing a draft of suggested provisions for a by-law, the solicitor has provided legal advice to the Municipality respecting the matters to be covered in and by such a by-law. I am satisfied that, in the context of seeking legal advice on the drafting of the by-law, these communications were made in confidence. Accordingly, I find that the record meets the criteria for exemption under the solicitor-client communication privilege in section 12.

Waiver

Even if section 12 solicitor-client communication privilege applies to a communication at the time it is made, that privilege may be lost through waiver. Waiver of common law solicitor-client 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), 35 C.P.C. 146 (B.C. S.C.); Order P-1342].

In Order M-260, former Inquiry Officer Anita Fineberg considered the issue of waiver of solicitor-client privilege:

> 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. ... 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 Piché 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.

As I indicated above, the "client" in this matter is the Municipality which, in this context, includes both its elected officials and employees. Therefore, circulation of the record among this group does not constitute waiver. Other than commenting on the circulation of the record amongst the client group, the appellant has provided no information on this issue. Having reviewed the file in its entirety, I find that there is nothing in the material before me to indicate that the Municipality has waived privilege, either implicitly or explicitly, with respect to the record I found to be exempt under section 12. Accordingly, I find that the solicitor-client communication privilege in section 12 applies to the record at issue.

ORDER:

I uphold the Municipality's decision.

Original signed by: May 30, 2000
Laurel Cropley
Adjudicator