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

ORDER MO-1316

Appeal MA-990238-1

Township of King

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NATURE OF THE APPEAL:

The appellant made a request to the Township of King (the Township) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to "all of the Township's files concerning the Ascot Estates at King property and the proposed estate residential development."

In particular, the appellant requested:

1. anything relating to Ascot's re-zoning application and to passage of the zoning by-law in regard to the Ascot Property, from August 1987 to the present;

2. anything relating to Ascot's application for an official plan amendment, and application for draft subdivision approval, in regard to the Ascot Property, from June 1988 to the present; and

3. anything pertaining or relating to the 1990-91 request to, and denial by, the Minister of Environment to review the proposed development of the Ascot Property under the Environmental Assessment Act.

The appellant also requested all correspondence between Council members, including the Mayor, and the various Township departments, particularly the Planning Department, the Public Works Department, and the Building Department, concerning the matters listed above from August 1987 to the present.

The Township located the records responsive to the request and granted access to a large number of them. The Township denied access to the remaining records pursuant to sections 6, 7, 12 and 14 of the Act. The Township also provided the appellant with a detailed index of the responsive records.

The appellant appealed the Township's decision to deny access.

During mediation, the Township and the appellant agreed to meet to review the general content of the withheld records, with a view to narrowing the records at issue in this appeal. As a result of this meeting, only 15 records remain at issue. The Township provided the appellant with a revised index containing only those records remaining at issue. Records 5 and 15 are duplicates and will, therefore be dealt with as a single record. Therefore, I will not refer to Record 15 again in this order, and my decision with respect to Record 5 will apply equally to Record 15. The appellant has agreed that the records identified in the amended index are the only records remaining at issue in this appeal.

By narrowing the records at issue in the appeal, the application of sections 6 and 14 of the Act are no longer at issue.

The Township claims that section 7(1) (advice or recommendations) applies to exempt those records numbered 5, 8, 10 and 14 as set out in the amended index. The Township indicates that it has applied section 12 (solicitor-client privilege) to all of the records remaining at issue.

In reviewing the records, I noted that Records 5 and 8 pertain to two engineering firms (the affected parties). Record 5 is a letter which was sent to the Township's solicitors from one firm and Record 8 is a letter which was sent to the Township by the same firm with a record pertaining to another firm attached. Because these two firms may have an interest in the disclosure of these two records, I raised the possible application of the mandatory exemption in section 10(1) of the Act in the Notice of Inquiry which I sent to the parties.

I sent a Notice of Inquiry, initially, to the Township and the affected parties. Representations were received from the Township. After reviewing its representations, I decided to move this inquiry to stage two and sought representations from the appellant. In doing so, I decided to seek representations from the appellant only with respect to the issue of the "communication privilege" aspect of solicitor-client privilege and the issue of waiver. The Notice of Inquiry which was originally sent to the Township and the affected parties was modified to reflect this. I sent this modified Notice to the appellant and enclosed a copy of the Township's non-confidential representations which address these two issues.

I received the appellant's representations on these issues and decided to move this inquiry into stage three, in order to provide the Township with an opportunity to reply to them. The appellant consented to the full disclosure of his representations to the Township and they were enclosed with the Reply Notice of Inquiry which I sent to the Township. In addition, I modified the Reply Notice to reflect the issues which I requested the Township to address in reply. The Township submitted representations in response to the Reply Notice which specifically addressed the issues raised by the appellant in his representations.

RECORDS:

Only the 14 records included in the Township's three page amended index are at issue. The records at issue were located in three areas: the Clerks Department Official Plan Amendment (Folder #3), The Clerks Subdivision file (Folders #1, 2 and 3) and the Public Works Department File (Folder # 1). The records at issue consist of correspondence, notes and a memorandum.

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 and 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 relies on solicitor-client communication privilege for all of the records and litigation privilege for Records 8, 10 and 14. 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]

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].

Direct written communications

Records 1, 2, 3, 4, 6, 7, 9, 11, 12 and 13 all contain direct written communications between the Township's solicitor and the Township as client, including the Mayor, members of the Township Council and various employees of the Township. All of these communications pertain to legal matters arising in relation to the Ascot Development.

Attachments to the direct written communications

Record 4 contains three attachments consisting of a letter from counsel for the appellant to the Ontario Municipal Board (the OMB), an affidavit sworn by the appellant and a Financial Agreement signed by a signing officer for the appellant's company.

Record 6 contains two attachments consisting of a letter to the Township's solicitor from the appellant's partner and the minutes of a meeting involving a number of individuals including the appellant.

Record 7 contains a draft letter written by the Township's solicitor to the appellant's solicitor.

Record 13 contains three letters between the Township's solicitor and the appellant's solicitor and one letter from the Township's solicitor to the Deputy Clerk.

Correspondence from the Township's Consulting Engineers

Record 5 is a letter from the engineering firm retained by the Township to the Township's solicitor.

Record 8 is a letter from the same engineering firm to the Director of Public Works. The Township's solicitor is copied on the letter. Attached to Record 8 is another letter from a different engineering firm which is referenced and discussed in the first letter. It is apparent from a review of Record 9, which is a letter from the Township's solicitor to the Deputy Clerk, that the information in Record 8 was used as a basis for the discussion in the solicitor's communication to the Township.

Notes

Record 10 consists of notes of a meeting prepared by the Director of Public Works. The Township states that these notes were made for reference by its solicitor with respect to his report to Council (which is found in Record 12).

Record 14 contains handwritten notes prepared by the Clerk outlining the discussion from a meeting. The Township states that the record was prepared for reference by its solicitor in providing his advice to it concerning the issues discussed or raised at that meeting.

The appellant indicates that the OMB issued a decision in October 1990 approving the Ascot development, which the Township had opposed. He states that the Township's deliberations on the development related

to its powers under the Planning Act. He notes that all of the records at issue post date the decision made by the OMB and states that the "Township was only implementing a public policy decision that had already been made." The appellant submits that disclosure of these records could not prejudice any party other than himself (as representative of the Ascot Estates).

As I noted above, the rationale for solicitor-client communication privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551]. In my view, the fact that disclosure of these records, in the appellant's opinion, would not prejudice the Township's interests in the matter to which they relate is not relevant in determining whether the privilege attaches to these records. If the Township can establish that the records are 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, then these records will qualify for exemption under section 12. Section 12 is a discretionary exemption, however, and the issue of "harm" may be relevant in a consideration of the Township's exercise of discretion in the circumstances. I will, therefore, address this issue further below under my discussion of the exercise of discretion.

The appellant also claims that during the time period to which the records relate, letters from the Township's solicitors to Council were not confidential, as these communications were routinely listed on Council and Committee agendas that were available to the public, as was correspondence from the Township's consulting engineers with the exception of the records at issue. The appellant states that these communications were considered in public meetings of Council and its Committees and that copies of such communications were made available to the public at that time. The appellant attached samples of some agendas, minutes and letters that he has received in the past from the Clerk's department. Further, the appellant notes that only one of the records at issue is marked as being "confidential", thus implying that there was no expectation of confidentiality with respect to the rest.

With respect to the appellant's assertion that the Township's process in dealing with the issue was open and that there was no confidential relationship between the Township and its legal counsel, the Clerk describes the Township's approach to the matter at the time the Subdivision proposal was refused by Council and referred to the OMB. She states:

> The Clerk and council of the day did in fact choose to provide much of the material to the public by way of including it in the weekly agenda package, including correspondence with Township counsel.
>
> ... some of counsel's letters were shared ... because there was a great deal of public support for the position taken by Council on this matter, and this was a way of communicating Council's actions with those supporters.

The Clerk acknowledges that the appellant was provided with many items which were on the agendas, including letters, reports from counsel and engineering consultants, as well as both public and in camera minutes of Council meetings. The Clerk notes that the information related to the agendas for public meetings was public information. However, she indicates that the decision to release the minutes of in camera

meetings was likely made because there was nothing in them which would negatively impact on the Township or its interests in the matter.

With respect to in camera minutes, the Clerk indicates that sometimes only the Clerk's notes were kept and there were no detailed minutes released to the public. Further, she states that there were some in camera meetings of counsel, engineering consultants, senior staff and Council where legal strategy was discussed and solicitors' and engineers' letters and other documents were considered. She states further that this information was kept confidential, and was not released as part of any agenda.
She also indicates that in order to further safeguard confidential documents in the files pertaining to the Ascot development, "post-it" notes were placed on some of the documents stating: "this item is to be kept confidential, do not give out".

In Order MO-1276, Senior Adjudicator David Goodis dealt with a situation where the appellant alleged that because the Township (of Glenelg) discussed a number of the communications it had had with its solicitors at an open meeting of Council, solicitor-client communication privilege could not apply to the records. In that order, he set out the parties' arguments and his conclusions on this issue as follows:

> The appellant argues, in effect, that solicitor-client communication cannot apply to the records, since their contents were discussed at open Township council meetings, as reflected in minutes of those meetings. In support of this argument, the appellant provided me with relevant excerpts from minutes of meetings dated February 17, 1999 and April12, 1999. The appellant also provided me with a copy of minutes from a June 28, 1999 council meeting indicating that the meeting went into closed session to discuss a topic relating to litigation or potential litigation, to support her assertion that council could have gone into closed session regarding the matters discussed in open session on February 17 and April 12. In addition, the appellant referred to sections 55(5)(e) and (f) of the Municipal Act which read:
>
> > A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
> >
> > (e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
> >
> > (f) the receiving of advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
>
> The Township submits:
>
> > Surely there is no need for Council to go in camera to decide to seek a legal opinion. Granted, when Council is considering the legal opinion, or correspondence relating to it, it would be wise for the Council to go in

> camera, and this would be a further recognition of the importance of the privilege. However, surely the [appellant] cannot make something out of the fact that each and every statement about getting a legal opinion on a matter was not discussed in camera.

I have reviewed the four records at issue, and having compared them to the council minutes of February 17, 1999 and April 12, 1999, I find that the requirement of confidentiality for solicitor-client communication privilege has not been met with respect to Records 1 and 4. In my view, Record 1 reveals no more information of substance than is revealed in the minutes of the February 17, 1999 open council meeting, or that is not already of a public nature (e.g., the newspaper and newsletter excerpts attached to the Township's covering letter). Likewise, Record 4, consisting of a covering letter and attached excerpts from minutes of the April 12, 1999 open council meeting, reveals no more than is contained in the April 12, 1999 minutes which are publically available.

However, Records 2 and 3 are distinguishable from Records 1 and 4. I am satisfied that these records are confidential communications between the Township and the Township's solicitor made for the purpose of providing or obtaining professional legal advice on a matter concerning the group represented by the appellant. Each of the records is part of the "continuum of communications" between a solicitor and client as described in Balabel. In contrast to Records 1 and 4, there is no indication that the information in Records 2 and 3 was discussed at an open council meeting. As a result, I am satisfied that Records 2 and 3 qualify for exemption under section 12 on the basis of solicitor-client communication privilege.

In my view, the situation described by Senior Adjudicator Goodis above is similar to the events which transpired in the Township during the time period in question. I have considered his approach in determining whether the records at issue meet the test for solicitor-client communication privilege. While I agree generally with his approach and conclusions, I find that, based on the factual circumstances of the current appeal, I cannot reach the same conclusions regarding the "confidentiality" of the communications for all of the records at issue.

The records at issue all relate to matters involving the Township and the appellant's company arising, in part, from a decision made by the OMB. It is apparent from the records that there were a number of issues in dispute between the parties. I accept that, in these circumstances, it is not unreasonable to expect that some communications between the Township and its solicitors would be considered and maintained as confidential. The fact that the Township decided to disclose much of this type of information to the public does not render its entire relationship with its solicitors a public one.

In reviewing the records at issue, I find that Records 1, 2, 3, 4, 6, 7, 9, 11, 12 and 13, including their attachments are clearly, on their face, communications between the Township (as client) and its solicitor for the purpose of seeking and/or giving legal advice on the development and OMB matters concerning Ascot Estates or form part of the continuum of communications between the solicitor and the client aimed at keeping both informed. In the circumstances, I am satisfied that these records were intended to be, and

were treated as "confidential" by both the solicitor and client at the time they were exchanged. Therefore, I find that these records are subject to solicitor-client communication privilege under section 12.

Although Records 10 and 14 are not in themselves communications to or from a lawyer and a client, these records fall within the "continuum of communications" as described in Balabel, and could be described as part of the solicitor's "working papers" [Susan Hosiery Ltd.] [Orders MO-1205 and MO-1258]. Further, I am satisfied that these records were prepared with an intention to keep them confidential. Therefore, I find that these records qualify for exemption under the section 12 solicitor-client communication privilege. Records 5 and 8 are communications from an engineering firm to the Township's solicitor. The engineering firm is not "employed" by the Township. In Order M-1112, Adjudicator Donald Hale had occasion to consider a similar situation. In that case, the Township in question engaged the services of a Planner employed by another jurisdiction. In finding that solicitor-client privilege attached to communications between the Planner and legal counsel, Adjudicator Hale commented as follows:

> The Township engaged the services of the Planner employed by the County (the Planner) to provide it with advice respecting the zoning issue. The Planner, in the course of his duties as the Township's expert, communicated on behalf of the Township with the solicitors for both the Township and the Township's insurers. The Planner is not an employee of the Township. However, this does not necessarily mean that documents flowing to and from the Planner are not privileged.
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> In Canadian Pacific v. Canada (Competition Act, Director of Investigations), [1995] O.J. No. 67 (June 2, 1995) (Ontario Court General Division), Mr. Justice Farley held that:
>
> > If a third party is truly an agent of the client seeking professional advice from the lawyer, not merely in the sense of being an agent of the client, but also being the agent who actually seeks the advice then there has been no waiver of disclosure to that third party.
>
> I find that the Planner's involvement was an essential conduit on behalf of the Township for legal advice and instructions to counsel, and that he was "playing an indispensable role which cannot be performed reasonably by the client in the client's affairs, and for this role to be carried out, the party must be part of the process in seeking and obtaining legal advice." (Canadian Pacific, supra). Since the Planner was an essential part of the client Township's team, I find that any privileged document communicated to or by the Planner on behalf of the Township maintains its privileged status.

In the circumstances of the current appeal, I am satisfied that the engineering firm was engaged by the Township to fulfill a technical role in assessing the viability of specific development issues and that it was in the best position to communicate with the Township's solicitor on the Township's behalf on matters falling within its technical expertise. Similar to the findings in Order M-1112, I am satisfied that the engineering firm was an essential part of the Township's team and that the communications between it and the Township's solicitor were made on behalf of the Township for the purpose of seeking or giving legal advice

relating to development matters. Therefore, I find that Records 5 and 8 also qualify for exemption under section 12.

Waiver

Even if 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 Adjudicator 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:
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> > 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 noted above, the appellant states that communications from the Township's solicitors were considered in public meetings of Council and its Committees and that copies of such communications were available to the public at that time. The appellant attached samples of some agendas, minutes and letters that he has received in the past from the Clerk's department.

In responding to this claim, the Township acknowledges that privilege was expressly waived in much of its communications with its solicitors and access to these records was given to the public. The Township takes the position, however, that the records at issue were not included as part of the public record and that it never intended to waive privilege in them. The Township notes that at one point in dealing with this matter it was advised by its solicitor not to include his correspondence in the public agenda. The Township indicates that after receiving this advice it did not place any such correspondence on the public agendas.

The Township reiterates that its policy is that any item that has been included on a public agenda, or minutes which have been publicly adopted by Council may be provided to anyone who asks for it.
The Township states that none of the records at issue has been disclosed to the public in a public forum or in other documents given to the public. It acknowledges, however, that in some cases, attachments or enclosures to the records at issue were public documents or correspondence which the appellant or his agents may have sent and that these attachments may have been disclosed or made available to the public since they were not exclusive to the Township.

In my view, although a record may have been a public document at one time or a communication from a third party, including the appellant, where that record has been used by legal counsel in preparing or giving legal advice or where it is exchanged between the client and its counsel as part of the "continuum of communications" aimed at keeping both informed, the record will fall within the communication privilege as described in Balabel, and could be described as part of the solicitor's "working papers" [Susan Hosiery Ltd.]. I find that waiver does not apply to the attachments simply because they are of this nature.

As I noted above, the Township asserts that "none of the records" has been disclosed to the public. The minutes of a meeting of the Planning and Building Committee held on March 31, 1992 indicate that the first letter in Record 4 was reviewed by it during this session. The minutes do not state that the Committee meeting was held in camera and it is not clear whether the letter itself was circulated outside the membership of the Committee. However, in my view, because of my findings below, I need not determine whether the Committee distributed the letter itself thus expressly waiving solicitor-client privilege.

In Order MO-1276 (referred to above), Senior Adjudicator Goodis found, in the circumstances of that appeal, that the Township had not established the requirement of confidentiality for certain records which had been discussed during a Council meeting. However, each case must be decided on its facts. In the

current appeal, as I indicated above, I am satisfied that Record 4 was considered to be a confidential communication at the time that it was exchanged between the Township and its solicitor. The issue I must now determine is whether the Township's subsequent decision to discuss it at a meeting, the minutes of which were provided to the appellant, constitutes waiver.

The minutes of the meeting were provided to the appellant by the Township at his request. I have compared the minutes of the Planning and Building Committee with Record 4. The discussion pertaining to this letter covers over a page of the minutes and describes, in considerable detail, the contents of the letter provided by the Township's solicitor.

In Order MO-1172, I considered the situation where a small portion of an institution's solicitor's legal advice was included in a report submitted to Council. In that order, I stated:

> 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 aspects 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:
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> > 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.

In my view, the Committee's references to the letter and the Township's decision to disclose the minutes of this meeting to the appellant go far beyond maintaining a "policy of transparency" with respect to issues before it. Essentially, the minutes disclose the majority of the message in the letter. In these circumstances, I find that the extent of the references to the content of the letter constitutes an express intention to waive solicitor-client privilege in this record.

Although a similar degree of disclosure was not made with respect to the attachments to Record 4, an objective consideration of the client's conduct in raising the issue to which they apply and subsequently disclosing the details in the form of the minutes demonstrates an implicit intention to waive privilege. In these circumstances, fairness would require that the complete package be disclosed. As a result, I find that Record 4 in its entirety is not exempt under section 12. As no other exemptions have been claimed for this record it should be disclosed to the appellant.

The evidence provided by the appellant does not establish that the remaining records were similarly considered in either an open meeting or in a meeting of which the minutes have been disclosed. I accept the Township's submissions that although the decision was made to make much of the information pertaining to this matter public, certain records were maintained in confidence. On the basis of the evidence before me, I find that the Township has not waived privilege in the remaining records to which section 12 applies.

Exercise of discretion

I have considered the Township's submissions in their totality and have taken into consideration the appellant's views that the Township will not be prejudiced by disclosure of the records. As I noted above, the issue of "harm" is a relevant consideration in the exercise of discretion. In my view, however, the appellant's identification of "harm" is based on his company's interests in the matter. In all of the circumstances of this case, including the fact that a considerable amount of information has been made available to the public, I find that the Township's interest in maintaining the confidentiality of its communications relating to legal strategy is a legitimate consideration of the perceived "harm" in disclosure. I find nothing improper in the Township's exercise of discretion in these circumstances. Accordingly, Records 1, 2, 3, 5, 6, 7, 8, 9, 10, 11,12, 13 and 14 are exempt from disclosure under section 12 of the Act. Record 4 is not exempt under section 12 and should be disclosed to the appellant.

Because of the findings I have made in this order, it is not necessary for me to consider the possible application of the "litigation" component of solicitor-client privilege or section 7 to the records.

ORDER:

1. I uphold the Township's decision to withhold Records 1, 2, 3, 5, 6, 7, 8, 9, 10, 11,12, 13 and 14 from disclosure.

2. I order the Township to disclose to the appellant Record 4 in its entirety by providing him with a copy of this record by **July 19, 2000**.

3. In order to verify compliance with the terms of Provision 2 above, I reserve the right to require the Township to provide me with a copy of the record sent to the appellant.

Original signed by: June 27, 2000
Laurel Cropley
Adjudicator