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

ORDER MO-1408

Appeal MA-000193-2

Township of Lutterworth

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NATURE OF THE APPEAL:

The Township of Lutterworth (the Township) received a request under the *Municipal Freedom of Information and Protection of Privacy* (the *Act*) for the following records:

- documentation outlining the salary ranges of all non-unionized staff, including job title, years of service and any bonuses these staff received over the past four years;

- documentation which identifies the legal fees paid by the Township over the past four years, along with information describing the nature of all legal matters and the names of the parties involved;

- Statements of Account from outside solicitors retained by the Township indicating the total legal fees incurred by the Township for each of the past four years.

The Township responded to the request as follows:

- It advised the requester that salary ranges did not exist, but prepared an unofficial salary range for each Township employee which was provided to the requester.

- It denied access to records relating to the years of service of individual employees on the basis that disclosure would constitute a presumed unjustified invasion of privacy (section 14(1), with specific reference to section 14(3)(d) of the *Act)*.

- It denied access to records reflecting any bonuses paid to staff on the basis that disclosure would constitute a presumed unjustified invasion of privacy (section 14(1), with specific reference to section 14(3)(f) of the *Act*).

- It provided the requester with access to records indicating the total legal fees incurred by the Township, but denied access to all Statements of Account in their entirety under section 12 of the *Act* (solicitor-client privilege).

The requester, now the appellant, appealed the Township's decision to deny access to records reflecting bonuses, and the denial of access to the Statements of Account under section 12. He also sought clarification regarding why the salary ranges were described as "unofficial" in the decision letter, and this issue was resolved during mediation.

Also during mediation, the Township clarified its position regarding records reflecting bonuses paid to staff. In a second decision letter sent to the appellant, the Township stated that no responsive records exist because no bonuses were paid to staff during the previous four-year period. The appellant was not satisfied with this response, so the issue of whether or not the Township conducted an adequate search for records of this nature remains at issue in this appeal.

After the appeal moved to the adjudication stage, I initially sent a Notice of Inquiry to the Township asking for representations on the two remaining issues. The Township submitted representations. I then sent the Notice to the appellant, together with a copy of the non-confidential portions of the Township's representations. The appellant also provided representations.

RECORDS:

The records at issue consist of Statements of Account submitted by outside law firms to the Township for the four-year period preceding the appellant's request.

DISCUSSION:

REASONABLE SEARCH/SCOPE OF THE REQUEST

In its initial decision letter to the appellant, the Township states:

> Access is denied to any bonuses that staff have received in the last four years, under Section 14(3)(f). This provision applies because bonuses are personal information describing an individual's income.

As stated earlier, this position was clarified during mediation with the issuance of a revised decision letter by the Township indicating that no bonuses had been paid and therefore records responsive to this part of the request did not exist. The appellant did not accept this explanation, and continued to maintain that responsive records should exist.

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the Township has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Township will be upheld. If I am not satisfied, further searches may be ordered.

Where a requester provides sufficient detail about the records which he/she is seeking and an institution indicates that further records do not exist, it is my responsibility to ensure that the Township has made a reasonable search to identify any records which are responsive to the request. The *Act* does not require the Township to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the Township must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the Township's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

The appellant provided me with a copy of the Township's Council minutes which, in his opinion, confirmed that certain employees had received bonuses. The appellant states:

> I submit that while these records are for nominal amounts, it confirms that indeed records do exist; thereby, supporting a reasonable search for same.

The minutes provided by the appellant show resolutions approving supermarket vouchers, annual staff dinners, holidays with pay and other items of a similar nature.

The appellant also submits that his request for bonus information should include "accumulated overtime". In this regard, the appellant submits:

> Finally, with respect to the Township's longstanding tradition, which applies to all employees, such as staff barbecues, closing down operations during Christmas and New Years, etc. I personally have no objection to this. However, I would be concerned if overtime (bonuses) were being awarded that had significantly impacted the salary ranges of municipal employees.

The appellant goes on to state:

> In other words, I understood that in order [to] get the information that we were requesting, a reasonable search had to be completed, then the issue with respect to my right to the information concerning bonuses would be addressed. Please note that since this request for information, the Township of Lutterworth has, in my view, **twice** made errors with respect to this request for information. The first time concerning the monetary bonuses wherein denial for this information was changed from denial pursuant to section 14(3)(f) that being, denial of the records on the basis that they were of a "personal nature" to "No records exist". The second time being the Township's longstanding traditions as food coupons, etc. would not being considered as part of the bonuses. Did the Township also understand that my request for information included staff overtime?

In support of its position that no records exist the Township submits:

> The appellant's request for documentation of any bonuses received by staff in the past four years was interpreted to mean cash bonuses to specific individuals. This interpretation was supported by the appellant's request, by the format of the chart he proposed for providing information. This interpretation of his request for information regarding bonuses is further reinforced in the last sentence of his letter of Appeal to the Commissioner dated June 19th, 2000: "monetary bonuses being awarded to select employees".
> ...

> During the mediation phase of this appeal, discussion was held with [the mediator] regarding the matter of bonuses. In my capacity as Clerk-Treasurer for the Township of Lutterworth for the past ten years I have personal knowledge of all decisions of Council, and all payments of funds. No record exists of a cash bonus being awarded to an individual employee. Therefore, on the advice of [the mediator], I stated to [the appellant] in my letter of September 28th, 2000 that no record exists for this portion of his request.
>
> There are long standing traditions in this township which apply to all employees, such as staff barbeques or dinners, closing down operations between Christmas and New Year's and providing a Christmas turkey or supermarket voucher. Records relating to these activities were not disclosed since they were not considered responsive to the request, i.e. a monetary bonus to a specific individual.
>
> In conclusion, I state that the Township of Lutterworth is a small municipality with eight full time employees, and in my capacity as Clerk-Treasurer I have personal knowledge that no record exists of a cash bonus being awarded to a specific individual in the past four years.

The Clerk-Treasurer states that she has worked with the Township in this capacity for the past ten years and, given her job responsibilities, it is reasonable to conclude that she would be privy to information regarding any monetary bonuses paid to employees during this period. I find that the Clerk-Treasurer's statement that no responsive records exist because no monetary bonuses have been paid to staff is sufficient evidence to establish that the search for records of this nature was adequate in the circumstances.

I also find that the appellant's interpretation of what constituted "bonuses" is not supportable. In my view, the Township was correct in inferring from the appellant's request letter that he was interested in receiving monetary bonuses paid to staff. His letter states, "If bonuses have been awarded to the employee, please indicate the dates and amounts". It is not reasonable to include items such as barbeques and paid leave during vacation periods within the scope of the term "bonuses" as described by the appellant, and it is also not reasonable to conclude on the basis of not having identified these items that the Township did not undertake a thorough search for records that do reflect bonus payments.

I also disagree with the appellant's position that overtime payments fall within the scope of the term "bonus".

"Overtime" is defined in the *Concise Oxford Dictionary* as:

> in addition to regular hours; payment for this.

"Bonus", on the other hand, is defined as:

> gratuity to employees beyond their normal pay.

In contrast to "overtime", which is that work be done in return for pay, a "bonus" is a gratuitous payment not dependent on the employee undertaking additional tasks or working additional hours.
Accordingly, I find that the Township's search for responsive records relating to bonus payments was reasonable, and this part of the appeal is dismissed.

SOLICITOR-CLIENT PRIVILEGE

The Township claims section 12 of the *Act* as the basis for denying access to the various Statements of Accounts submitted by outside solicitors. In the Township's view, these records are protected by the solicitor-client communication 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 Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

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].

In order for a record to be subject to the common law solicitor-client communications privilege, the Township 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;

[Order 49]

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 Township submits that the findings in Order PO-1714, and in particular the discussion of the case of *Stevens* v. *Canada (Privy Council)* 1998, 161 D.L. R. (4th) 85 (F.C.A.), are applicable to the current appeal.

The appellant quotes extensively from *Stevens* and then makes the following submissions:

> Order PO-1714 states:
>
> > Accordingly, despite the complexity of issues, the bottom line in *Stevens* is clear. Unless an exception such as a waiver applies, lawyers' bills of account, in their entirety, are subject to solicitor-client privilege at common law, and the common law must determine the application of privilege where an access statute incorporates it in an exemption.
>
> I do not agree. *Stevens* does not state that lawyers' bills of accounts, in their entirety, are subject to solicitor-client privilege. *Stevens* does state that "He was provided with 336 pages of legal accounts, receipts and other related documents, but the narrative portions on 73 pages of the disclosed accounts were expunged on the basis of solicitor-client privilege under section 23 of the Act. The appellant was informed by the Information Commissioner [of Canada] that the expurgated material had been properly withheld from disclosure. On application for judicial review to the F.C.T.D., Rothstein J. found that the material was protected by a solicitor-client privilege, as it was "directly related to the seeking, formulating or giving of legal advice or assistance"... (tab 40 - page 2). *Stevens* also states: "In the case at bar, the narrative portions of the bills of account were communications for the purpose of obtaining legal advice" (tab 40 - page 3).
>
> In other words, I am submitting that I am entitled to the lawyers' bills of accounts but with the narrative portions that pertain to solicitor-client privilege expunged.
>
> Further, Justice Linden acknowledges **... The expenses of government bodies pertaining to legal fees or otherwise, are always of interest to the public. It is**

> **public money that is being spent. In so far as the intent of the Act is generally to promote the transparency of governmental activity, the incorporation of the common law doctrine of solicitor-client privilege indicates that it was meant to be discluded from the operation of the Act ...** I am unsure why the Honourable Justices ruled as such as this wasn't the issue at bar being posed; however, because this point represents the very nature and intent of our request, it appears, at this particular point, that this aspect of our request has become a political one, rather than legal one. [appellant's emphasis]

In my view, the appellant has inaccurately described the impact of *Stevens* on the application of solicitor-client communications privilege to solicitors' accounts.

In Order PO-1714, former Adjudicator Holly Big Canoe considered the effect of *Stevens* on the application of section 19 of the *Freedom of Information and Protection of Privacy Act* (the provincial equivalent of section 12 of the *Act*) to solicitors' accounts. Her discussion and reasoning is directly relevant to the Statements of Account which are at issue in this appeal. I have reproduced Adjudicator Big Canoe's discussion at length in this order because it is directly relevant to the records at issue in this appeal, and I am in total agreement with her findings. Adjudication Big Canoe states:

> In my view, the Federal Court of Appeal's recent decision in *Stevens* v. *Canada (Privy Council)* (1998), 161 D.L.R. (4th) 85 (F.C.A.) has persuasive value in the context of the Information and Privacy Commissioner's decisions relating to lawyer's bills of account and solicitor-client privilege. In that case, the requester and appellant had sought access to billings, cheque requisitions and authorizations for certain named counsel who provided services to the Commission of Inquiry headed by Mr. Justice Parker. The Commission of Inquiry had investigated and reported on allegations that Mr. Stevens had a conflict of interest during his tenure as a minister in the Mulroney cabinet.
>
> The Privy Council Office disclosed approximately 336 pages of accounts, receipts and related documents. The accounts normally showed the name of the lawyer providing services, the dates on which services were being rendered, the time spent each day, and disbursements. Billed amounts were disclosed. However the narrative portions on 73 pages, describing the services, were withheld as being subject to privilege. This decision was upheld on appeal by the Information Commissioner, whose decision was upheld by the Federal Court, Trial Division on judicial review.
>
> The decision of the Federal Court of Appeal contains a detailed analysis of the cases on privilege and legal invoices. Prior to *Stevens*, there appeared to be confusion regarding the privilege that attached to lawyers' bills of account and other kinds of lawyers' accounting records. This confusion has arisen from the apparent contradiction between *Mutual Life*

Assurance Co. of Canada v. *Deputy Attorney General of Canada*, 84 D.T.C. 6177 (Ont. H.C.) and other cases. In *Mutual Life*, the Court stated (as quoted at page 103 of *Stevens*):

> The privilege attaches not only to communications made by the client but obviously to communications made by the solicitor to the client as well and generally speaking covers all communications relating to the obtaining of legal advice. That general rule in my view would cover a statement of account.

The cases that appear to disagree with this view arise from the exclusion from privilege of "acts of counsel" or "mere facts" (as referred to at page 97 of *Stevens*). Based on this exclusion, things like a lawyer's trust account ledger have been found not to be privileged (e.g. *Re Ontario Securities Commission and Greymac Credit Corp.* (1983), 41 O.R. (2d) 328, 146 D.L.R. (3d) 73 (Div. Ct.)). This same exclusion, and the resulting confusion in the law, was the basis for previous Information and Privacy Commissioner orders which found that lawyers' bills, or parts of them, are not privileged and therefore not exempt under section 19 (Orders P-624, M-274 and P-676).

The Court in *Stevens* indicates that it thinks the confusion regarding the status of lawyers' bills of account is resolvable (at page 102):

> In modern Canadian jurisprudence, the law is not entirely clear. There is authority that appears to go both ways. A number of authorities have expressly found that solicitor's accounts are privileged, while others seem to disagree. Nevertheless, in my view, bills of account are privileged, but lawyers' trust accounts and other accounting records are not so privileged. What has been considered as two conflicting lines of authority can be reconciled.

After citing several decisions to the effect that lawyers' bills of account are privileged in their entirety, the Court proceeds to distinguish them from cases dealing with "facts" and/or "acts of counsel" as reflected in trust ledgers, etc. The Court concludes (at page 106) that:

> ... the jurisprudence in this area is not really in conflict. It merely reflects the existence of a broad exception to the scope of the privilege, namely that it is only communications which are protected. The acts of counsel or mere statements of fact are not protected. This is an important balancing mechanism which, along with the prohibition against protecting communications which are themselves criminal, takes into account the public interest inherent in the proper administration of justice.

> Where a lawyer is involved in the dealings of his or her client, like the disposition of funds held in trust for the client, as in Greymac, or the execution of an agreement for the purchase and sale of property, the existence or contents of these acts are not protected. The lawyer, in the situation, is not in the process of giving advice to the client, but is more like a witness to an objective state of affairs.
>
> This explains the apparent conflict between the reasons of Southey J. in *Greymac* and *Mutual Life Assurance Co. of Canada*. In the former case the trust account was determined not to be protected by the privilege, while the solicitor's accounts in the latter case were held to be privileged. The statement of account is privileged because it is integral to the seeking, formulating and giving of legal advice. The trust account ledger is not protected because it relates to acts done by counsel.

Later (at pages 107-8), the Court describes the privilege applicable to legal bills of account as a "blanket" privilege:

> In the case at bar, though the appellant contends that the information which he seeks relates only to acts of counsel and therefore should not be privileged, I am satisfied that the narrative portions of the bills of account are indeed communications. This is not analogous to a situation where a lawyer sells a piece of property for the client or otherwise acts on the client's behalf. The research of a subject or the writing of an opinion or any other matter of that type is directly related to the giving of advice. Despite the fact that the appellant is content to have the specific topic of research remain privileged, those other portions of the bills of account still constitute communications for the purpose of obtaining legal advice. In those circumstances the lawyer is not merely a witness to an objective state of affairs, but is in the process of forming a legal opinion. This is true whether the lawyer is conducting research (either academic or empirical), interviewing witnesses or other third parties, drafting letters or memoranda, or any of the other myriad tasks that a lawyer performs in the course of his or her job. It is true that interviewing a witness is an act of counsel, and that a statement to that effect on a bill of account is a statement of fact, but these are all acts and statements of fact that relate directly to the seeking, formulating or giving of legal advice. And when these facts or acts are communicated to the client they are privileged. This is so whether they are

> communicated verbally, by written correspondence, or by statement of account.

The Court further drives home its conclusion that lawyers' bills of account are privileged in their entirety by means of the following commentary on the fact that severed copies had already been disclosed (at page 109):

> 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.

Another passage from *Stevens* (at page 97) indicates that the law to be relied on in connection with the solicitor-client privilege exemption in the Access to Information Act is the common law of solicitor-client privilege and that this is unaltered by its inclusion in an access statute:

> The effect of the provisions of the Act on the content of the privilege is nil. It was correctly determined by Rothstein J. that section 23 of the Act incorporates holus-bolus the common law of solicitor-client privilege. That term is not defined elsewhere in the Act. Hence, it can only be presumed that what is covered by the words "solicitor-client privilege" is the common law doctrine of solicitor-client privilege. That being the case, it is necessary for the government head to determine, before considering the operation of the Act, whether a document is subject to the privilege. If it is, then he or she may refuse disclosure. But the preliminary question is determined not in the context of the Act, but in the context of the common law. If the material is subject to the privilege, then the discretionary decision under section 23, whether to disclose it or not, is done in the context of the Act along with its philosophical presuppositions.

> Accordingly, despite the complexity of the issues, the bottom line in *Stevens* is clear. Unless an exception such as waiver applies, lawyers' bills of account, in their entirety, are subject to solicitor-client privilege at common law, and the common law must determine the application of privilege where an access statute incorporates it in an exemption. I agree. Accordingly, in my view, because Records 12, 13, 14, 15 and 20 would be subject to solicitor-client privilege at common law, I find that they are properly exempt under section 19 of the *Act*.
>
> The public policy objectives referred to in the *Stevens* case are valid, and the same considerations are present here. However, if the institution chooses not to waive privilege and disclose the total amounts charged by legal counsel on the lawyers' bills of account, it is worth noting that this information may not be subject to privilege if it is requested from other sources, such as copies of the institution's accounting records.

(See also Order PO-1822)

Based on *Stevens* and the findings in Order PO-1714, the Statements of Account at issue in this appeal are accurately characterized by the Township as confidential written communications directly related to the seeking, formulating and giving of legal advice between the Township and its legal advisers, and qualify for exemption under the solicitor-client communications privilege component of section 12 of the *Act* on that basis.

As stated in Order PO-1714, the Court in *Stevens* identified the privilege applicable to legal bills of account as a "blanket" privilege. These records are privileged in their entirety and cannot be severed as suggested by the appellant.

In the appellant's view, the finding in *Stevens* detracts from the need for "transparency of government." In this regard, *Stevens* makes the following point:

> 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.

In other words, the Township could have decided to provide the appellant with some or all of the information contained in the Statements of Accounts. However, a decision to do so would be based on the Township's rights as a client to waive the solicitor-client communication privilege, and not through any obligation under the *Act* to sever information from these records which I have determined qualify for exemption under section 12.

ORDER:

I uphold the decision of the Township.

Original signed by: March 7, 2001
Tom Mitchinson
Assistant Commissioner