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

ORDER MO-1465

Appeal MA-010049-1

The Regional Municipality of Niagara

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NATURE OF THE APPEAL:

The appellant, a construction company, wrote to the Regional Municipality of Niagara (the Region) seeking access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the following:

1. All of the Region's legal budget(s) for litigation involving [the appellant].

2. All of the Region's actual legal expenditures to date, as shown by copies of all legal accounts paid to date for litigation with [the appellant].

3. All of the Region's outstanding liabilities for legal fees shown by outstanding legal accounts for litigation with [the appellant].

4. All reports, memos, and records etc., to council, auditors and other supervising persons or entities, dealing with the budgeting and expenses incurred and yet to be incurred in the above matter.

The Region responded to the request by stating that any responsive records are exempt under section 12 (solicitor-client privilege) of the *Act*.

The appellant then stated that he was "reducing" his request as follows:

1. A simple statement of the Region's legal budget allocation for its litigation with [the appellant].

2. Copy of all legal bills received from the firm Blake, Cassels and Graydon [the law firm] for legal fees and expenses for files dealing with [the appellant]. (Kindly sever only those portions of the bills that give legal advice, opinion or solicitor/client, etc. information)

The Region replied by stating that access was still denied to the responsive records on the basis of section 12.

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

During the mediation stage of the appeal, the appellant re-stated his request as follows:

1. What is the sum total that the Region has spent on litigation with [the appellant] since 1998, when the litigation began?

2. (a) Is there a separate line for "complaint against [named individual]"? (b) Is so, what is the sum total that the Region has spent on that litigation? (c) If not, is the billing for this complaint included in the [appellant] billing? (d) Is so, what is the breakdown between the litigation against [the appellant] and the "complaint against [named individual]"?

The Region responded to the appellant's re-stated request as follows:

> 1. I would refer you to the attached memo from our Director of Corporate Services. Insofar as the costs to the Region, the information concerning our legal billing is still considered to be exempt under section 12.
>
> 2. (a) No. (b) Not applicable as no file was created or record maintained in respect of [named individual]. (c) No. (d) Not applicable.
>
> In support of the foregoing, we are including a memorandum from the Assistant Director of our Water and Wastewater Division, responding to my request for his department to identify any separate budget item related to this matter. This memo is included as part of our disclosure.
>
> Also included are copies of the 1998, 1999 and 2000 budget summaries and annual reports. These are public records and are available for review.

Later, the appellant again revised his request as follows:

> 1. The amount paid by [the Region] to [the law firm] in 1998, 1999 and 2000 by monthly payments.
>
> 2. A list of all the litigation cases [the law firm] handled on behalf of [the Region] in 1998, 1999 and 2000.

The Region did not formally respond to the appellant's revised request. However, with respect to item 2 of the revised request, the Region advised the Mediator that the only litigation the law firm has handled on the Region's behalf is that concerning the appellant.

The appellant later stated that, in addition to the two items in its revised request, it was seeking "all invoices from [the law firm] relating to the [appellant] for the past three years".

The sole issue in this appeal is whether the records identified below are subject to the section 12 solicitor-client privilege exemption.

Mediation was not successful and the matter was streamed to the adjudication stage. I sent a Notice of Inquiry setting out the issues in the appeal initially to the Region, which provided representations in response. I then sent the Region's representations to the appellant, who in turn provided representations in response.

RECORDS:

The records at issue in this appeal are described as follows:

Records 1-15	Statements of account from the law firm to the Region dated from December, 1998 to December, 2000
Records 16-19	Region accounting statements reflecting payments made to the law firm from August, 1998 to November, 2000

DISCUSSION:

Solicitor-Client Privilege

Introduction

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.

Section 12 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 12 to apply, the Region must demonstrate that one or the other, or both, of these heads of privilege apply to the records at issue.

The Region submits that both solicitor-client communication privilege and litigation privilege apply to all of the records at issue.

Solicitor-client communication privilege

Introduction

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]

Records 1-15

The Ministry refers to the Federal Court of Appeal case of *Stevens* v. *Canada (Privy Council)* (1998), 161 D.L.R. (4th) 85 in support of its position that the statements of account from the law firm comprising Records 1-15 are protected from disclosure by solicitor-client communication privilege.

The appellant does not address the legal issues arising under section 12, but rather explains why he should be granted access to the records "in the public interest".

This office has found in previous appeals that a solicitor's statement of account can be characterized as a confidential written communication and as such qualifies for solicitor-client communication privilege and is exempt from disclosure under section 19 (the provincial equivalent to section 12) (Orders PO-1714 and PO-1822). In Order PO-1714, Adjudicator Holly Big Canoe stated:

> 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.

In my view, Records 1-15, consisting of statements of account from the Region's law firm, are clearly subject to solicitor-client communication privilege based on *Stevens* and orders of this office which have applied the principles in that case, such as Orders PO-1714 and PO-1822. Therefore, these records are exempt in their entirety under section 12. In the circumstances, it will not be necessary for me to consider the application of litigation privilege to these records.

Records 16-19

These records are internal Region accounting statements reflecting payments made to the law firm respecting legal services provided.

The Region submits:

> . . . [T]he principles enunciated in the cases referred to above [*Stevens*, Orders P-1551, 126, PO-1714, MO-1339] also apply to the Region's records reflecting payments of [the law firm's] accounts. In *Stevens*, specific reference is made to the fact that the amounts of the retainer and the arrangements with respect to payment are central to the solicitor-client relationship. Furthermore, there is specific authority for the proposition that records reflecting payments to a law firm are cloaked with the same protection as a solicitor's account statements. For example, in *Re Playfair Developments Ltd. v. The Deputy Minister of National*

> *Revenue* (1985), 85 D.T.C. 5155 (S.C.O.), Galligan J. held that a letter from the client to the law firm enclosing a cheque to pay an interim legal account was privileged.
>
> . . . [T]he cases *Re Ontario Securities Commission and Greymac Credit Corp.* (1983), 41 O.R. (2d) 328 (H.C.J.) and *Law Society of Prince Edward Island v. Prince Edward Island (Attorney General)*, [1994] P.E.I.J. No. 85 (S.C.-T.D. In Chambers), which are referred to in the Notice of Inquiry, are not applicable to this appeal. These cases considered whether privilege applied to records generated by a law firm reflecting solicitors' activities with respect to money held in trust. In each case, the court held that the records did not reflect communications between the solicitor and client as the records exclusively related to the solicitor's activities independent of the client. This Appeal does not involve a solicitor's records with respect to records exclusively related to [the law firm's] activities independent of the Region but records reflecting communications between [the law firm] and the Region with regard to matters central to their relationship.

In *Stevens*, the court discusses the historical context of solicitor-client communication privilege and its present-day application. It then goes on to cite what it describes as exceptions to the privilege as follows (p. 93):

> It will be seen that Canadian law has sought to strike an appropriate balance between openness and secrecy by creating two exceptions to the privilege. One exception ... is for communications which are themselves criminal or which counsel a criminal act (eg. Where a lawyer advises a client to conceal evidence). The second exception ... relates to that *information which is not a communication but is rather evidence of an act done by counsel or is a mere statement of fact*. ... [my emphasis]

Further on in the judgement (p. 99), the court makes it clear that:

> Thus statements of fact are not themselves privileged. It is the communication of those facts between a client and a lawyer that is privileged.

After citing several decisions to the effect that lawyers' statements 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., (p. 104):

> These [previously referenced] cases are in sharp distinction to those which find that trust account ledgers and other financial records of that type are not privileged. None of these cases deals specifically with bills of account, and so cannot be relied on without understanding the nature of the material which was sought to be disclosed. Ultimately, these cases can be distinguished because acts of counsel or statements of fact are not privileged. In *Re Romeo's Place Victoria*

Ltd. and The Queen [(1981), 128 D.L.R. (3d) 279 (F.C.T.D.)] for example, a client was being investigated and the trust account ledgers of the client's solicitor were ordered to be disclosed. Collier J. held that it was the record of the lawyer, and not of the client and, therefore, not subject to privilege. However, other cases have found such items to be outside the ambit of the privilege on the more substantive ground that they do not disclose communications, but only acts. In *Re Ontario Securities Commission and Greymac Credit Corp*., [(1983), 41 O.R. (2d) 328, 146 D.L.R. (3d) 73 (Div. Ct.).] the question of privilege arose in the context of a solicitor's activities with respect to money held in trust for the client. Southey J. held that the privilege did not attach to this activity. He stated [at page 337]:

> Evidence as to whether a solicitor holds or has paid or received moneys on behalf of a client is evidence of an act or transaction, whereas the privilege applies only to communications. Oral evidence regarding such matters, and the solicitor's books of account and other records pertaining thereto (with advice and communications from the client relating to advice expunged) are not privileged ...

The accounts were examined and those things revealing privileged communications were severed. This decision might, at first glance, appear to be in conflict with Southey J.'s decision in *Mutual Life Assurance Co. of Canada*. However, as discussed *infra*, this decision is merely the proverbial exception that makes the rule - it deals with acts of counsel and not communications.

In *Law Society of Prince Edward Island v. Prince Edward Island (Attorney General)*, [(1994), 382 A.P.R. 217 (P.E.I.S.C.)] the R.C.M.P. attempted to seize documents in the possession of a lawyer relating to trust ledgers, general ledgers and bank reconciliation ledgers which pertained to the dealings of a number of the lawyer's clients. MacDonald C.J.T.D. determined [at p. 221]:

> It is the communications between the client and his lawyer that are privileged. The trust ledgers, general ledgers and bank reconciliation ledgers are not communications between the solicitor and the client. These documents form part of the solicitor's records and are reports of acts, not communications. Privilege does not attach to these documents.

Thus, 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.

I find that the record at issue in this appeal does not fall within the scope of solicitor-client communication privilege, since it is not a communication between a solicitor and a client. Rather, the record contains the type of information identified by the Court in *Stevens* as not being subject to solicitor-client privilege - a "statement of fact". Specifically, the record is a factual statement of the amount of money the Region paid its law firm in respect of legal services provided on particular matters.

Relying on *Playfair*, the Region submits that "records reflecting payments to a law firm are cloaked with the same protection as a solicitor's accounts statements." I do not accept this submission, which is clearly in conflict with the cases cited above, as well as the judgment in *Playfair* itself. In the portion of the case relied on by the Region, the court states (at para. 18 of the version reported at [1985] O.J. No. 910):

> Document number 553b is simply a letter from the client to the solicitors enclosing a cheque to pay an interim account, together with a photocopy of the cheque. In my opinion the letter itself is not a part of the accounting record and is privileged. However, in my opinion the photocopy of the cheque could be said to be a part of the accounting records and I rule that it is not privileged.

Thus, the court drew a distinction between the *communication* on the one hand (the letter), and another document (the cheque), finding that the latter was not privileged, despite the fact that obviously it would have revealed a payment by a client to a lawyer. Thus, information about such payments is only protected if it forms part of an otherwise privileged communication.

In addition, I do not accept the Region's argument that this case can be distinguished from other cases cited in *Stevens*, on the basis that those cases involved solicitor's records while the case at hand involves client records. *Stevens* and other cases are clear in indicating that "statements of fact" made outside a solicitor-client communication are not privileged, regardless of where the statements originate or where the relevant records are located.

To conclude, I find that Records 16-19 are not protected by solicitor-client communication privilege. However, the section 12 exemption may still apply if these records fall within the scope of litigation privilege.

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

In Order MO-1337-I, Assistant Commissioner Tom Mitchinson found that even where records were not created for the dominant purpose of litigation, copies of those records may become privileged if they have "found their way" into the lawyer's brief [see *General Accident*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.); *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (B.C. C.A.)]. The court in *Nickmar* stated the following with respect to this aspect of litigation privilege:

> . . . the result in any such case depends on the manner in which the copy or extract is made or obtained. If it involves a selective copying or results from research or the exercise of skill and knowledge on the part of the solicitor, then I consider privilege should apply.

In Order MO-1337-I, the Assistant Commissioner elaborated on the potential application of the *Nickmar* test:

> The types of records to which the *Nickmar* test can be applied have been described in various ways. Justice Carthy referred to them in *General Accident* as "public" documents. *Nickmar* characterizes them as "documents which can be obtained elsewhere", and [*Hodgkinson*] calls them "documents collected by the ... solicitor from third parties and now included in his brief". Applying the reasoning from these various sources, I have concluded that the types of records

> that may qualify for litigation privilege under this test are those that are publicly available (such as newspaper clippings and case reports), and others which were not created with the litigation in mind. On the other hand, records that were created with real or reasonably contemplated litigation in mind cannot qualify for litigation under the *Nickmar* test and should be tested under "dominant purpose".

The Region submits:

> . . . [T]he statements of account from [the law firm] and the Region's accounting statements reflecting the payment of same are privileged under the litigation privilege branch of section 12 of the *Act*, as the litigation between the Region and the Appellant and to which the records at issue in this Appeal relate is ongoing. This position is supported by Order P-1551 (March 31, 1998), where Inquiry Officer Holly Big Canoe stated that the litigation privilege includes "*documents generated internally by the solicitor or the client* . . . where the dominant purpose for which they were created or obtained is existing or reasonably contemplated litigation" (p. 5). Clearly, this Order envisages that both types of records are exempt from disclosure as specific reference is made to records created by the client and the solicitor.

I do not accept the Region's submissions on this point. While it is true that, as Adjudicator Big Canoe stated in Order P-1551, litigation privilege may apply to records created by the lawyer or by the client, the privilege cannot apply unless the records were created for the dominant purpose of existing or reasonably contemplated litigation. It is not sufficient that the records merely have some connection to the litigation. It is clear on their face and in the circumstances that the Region created the accounting records as part of its routine adherence to ordinary accounting practices. There is no evidence before me, other than the Region's bald statement, that these records were or are to be used in any way in any litigation and, even if they were, based on *General Accident*, it must be shown that this was the *dominant* purpose for their creation. The Region's submissions fall far short of this requirement.

In addition, I have no evidence before me to indicate that the accounting records formed part of the Region's lawyers' brief in the litigation.

Therefore, I find that litigation privilege does not apply to the accounting records, Records 16-19, and therefore section 12 does not apply to them.

To conclude, Records 1-15 are exempt under section 12, while Records 16-19 are not.

ORDER:

1. I uphold the Region's decision to deny access to Records 1-15.

2. I order the Ministry to disclose Record 16-19 to the appellant no later than **September 29, 2001**.

3. To verify compliance with this order, I reserve the right to require the Region to provide me with a copy of the materials sent to the appellant.

Original signed by: August 30, 2001
David Goodis
Senior Adjudicator