



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

ORDER MO-1413

Appeal MA_000257_1

Town of Penetanguishene



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NATURE OF THE APPEAL:

The appellant wrote to the Town of Penetanguishene (the Town) seeking access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the following:

. . . all records, notes and communications, including in camera meetings and communications between lawyer and Town, in the case of the "Lords Prayer" court case. This case has come to a conclusion and no appeal is possible.

The Town responded by stating that the Town's relevant litigation file had previously been provided to the requester, with the exception of correspondence from the solicitors acting on behalf of or providing legal advice to the Town and letters from the public on the matter. The Town denied access to the outstanding records on the basis that they are exempt under section 12 (correspondence between the Town's solicitor and the Town) and section 14 (correspondence from members of the public) of the *Act*.

The Town further advised the requester that formal minutes of in camera meetings are not available as they are not taken.

The requester appealed the Town's decision to this office, both with respect to the denial of access to information and the non_existence of in camera minutes.

During the mediation stage of the appeal, the appellant narrowed the information being sought to:

1. the information the Town withheld on the basis of section 12 of the *Act*;
2. letters to the Town from organizations and from individuals where the letter does not contain the identity of the author.

The Town then disclosed additional records to the appellant, either in part or in their entirety.

The appellant subsequently removed two additional records from the scope of the appeal. As a result, the application of section 14 (personal privacy) is no longer an issue in this appeal.

The appellant also informed the Mediator that he is no longer pursuing the issue of whether or not in camera meeting minutes exist.

The Town subsequently located one additional record _ correspondence between the Town's solicitor and another solicitor. This record is numbered 1(a). The Town is applying section 12 of the *Act* to deny access to this record.

The sole remaining issue in this appeal is the denial of access to the records the Town withheld under section 12 (solicitor_client privilege) of the *Act*.

I sent a Notice of Inquiry initially to the Town, the Town's solicitor, two law firms and another affected person inviting their representations on the issues raised by the appeal. In response, I received three sets of representations: (i) from the Town's solicitor on his own behalf and on behalf of the Town; (ii) from one law firm on its own behalf (the first affected person); and (iii) from another law firm on its own behalf and on behalf of the other affected person (the second affected person). I then sent the Notice of Inquiry, together with all three sets of representations, to the appellant, who provided representations in response.

RECORDS:

The following records remain at issue in this appeal, as described in the index of records provided by the Town:

- Record 1 Letter to the Town's solicitor from a law firm dated July 11, 1997
- Record 1(a) Letter to a law firm from the Town's solicitor dated July 3, 1997
- Record 2 Memorandum to the Town from the Town's solicitor dated June 21, 2000, with attached letter to the Town from the Town's solicitor dated July 18, 1997
- Record 15 Memorandum to the Town Council from the Town Clerk dated November 16, 1999, with attached letter to a named individual representing a named organization, from a law firm, dated November 1, 1999
- Record 16 Memorandum to the Town from the Town's solicitor dated November 16, 1999
- Record 19 Memorandum to the Town from the Town's solicitor dated October 5, 1999, with attached memorandum to the Town from the Town's solicitor dated September 29, 1999
- Record 20 Letter to the Town from the Town's solicitor dated October 6, 1999
- Record 21 Memorandum to the Town Council from the Town Clerk dated July 16, 1998, with attached letter to the Town from the Town's solicitor dated July 15, 1998
- Record 25 Letter to the Town from the Town's solicitor dated February 12, 1998
- Record 28 Letter to the Town from the Town's solicitor dated January 28, 1998, with attached notice of appeal to the Ontario Court of Appeal
- Record 35 Letter to the Town from the Town's solicitor dated December 11, 1997, with attached statements of account

Record 50 Memorandum to the Town from the Town's solicitor dated December 10, 1997

ISSUES:

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, it must be established that one or the other, or both, of these heads of privilege apply to the records at issue.

The Town and its solicitor submit that all of the records at issue are covered by both solicitor_client communication privilege and litigation privilege. I will first address the applicability of solicitor_client communication privilege to the records.

Solicitor_client communication privilege

Solicitor_client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P_1551].

This privilege has been described by the Supreme Court of Canada as follows:

... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor_client relationship ... [Descôteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P_1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

. . . the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most

solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [Balabel v. Air India, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P_1409].

The Town and its solicitor submit generally:

. . . [T]he records form a body of confidential and privileged solicitor_client communications made in the course of advice regarding a particular legal matter ... [T]hese communications are exempt under section 12 of the *Act* and should therefore not be disclosed.

Some of the records are correspondence made for the purpose of legal advice and consultation in the face of threatened litigation; some records were made during the conduct of the litigation; some relate to a time period after the litigation but during the period in which an appeal could have been launched and dealt with that question.

All of the records . . . were matters between Town council and staff, and their solicitor, for the purpose of legal advice on a real and pressing question.

To disclose the contents of this solicitor_client privileged communication would indeed have a "chilling effect" upon the solicitor_client relationship.

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. . . [S]olicitor_client communication privilege attaches to all the records. Communication between solicitor and client must be confidential and remain so. The privilege is not limited to only litigation matters. Where litigation is in fact threatened or conducted the solicitor_client privilege does not change its character; it does not cease if the matter is never litigated, or, when litigation has run its course.

Clients and solicitors must be able to communicate freely and fully with one another, without fear of disclosure of the communication.

. . . [T]he fact that the litigation has now been concluded, is not, therefore, a valid reason to disclose the communications which are subject to solicitor_client privilege.

The Town and the Town's solicitor go on to provide more specific submissions with respect to each of the records at issue, except for Record 28.

The first affected person submits:

I believe that Records 1 and 1(a) relate to the provision of legal advice that we gave to the Town's solicitor. Our position is that both Records are exempt by reason of s.12 of the [Act] in that they are communications and documents made confidentially for the purpose of providing legal advice and in contemplation of litigation.

Records 1(a) clearly indicates that legal advice is being sought by the Town's solicitor, and also that it was with respect to contemplated litigation. Record 1 is clearly legal advice provided to the Town's solicitor, on a confidential basis, and in contemplation of litigation. In fact, Record 1 clearly states that it is to be treated as privileged in the context both of the solicitor/client relationship and in contemplation of litigation.

. . . [T]hese two records clearly fall within the scope of the exemption provided by s.12 of the Act as interpreted by the Commissioner's orders and by the common law. These authorities have been set out in the discussion of the issues in the Notice of Inquiry which we received, and both Records . . . meet the requirements of solicitor/ client communication privilege and litigation privilege.

The second affected person submits, without elaboration, that Record 15 is subject to solicitor_client communication privilege.

The appellant does not make any specific submissions on the application of solicitor_client communication privilege.

In my view, all of the records at issue, with the exception of Record 15, clearly, on their face, consist of confidential communications made for the purpose of giving or receiving legal advice with respect to the matter of the litigation between the Town and the appellant. In most cases, the communications are between a lawyer and a client, the Town and its solicitor (Records 2, 16, 19, 20, 21, 25, 28, 35, 50). In the case of Records 1 and 1(a), the communications are between the Town's solicitor and another law firm retained by the Town (the first affected person). Although these two records are not direct communications between a lawyer and a client, I am satisfied that they are confidential communications made within the framework of the solicitor_client relationship, and for the purpose of giving legal advice, as discussed in Descôteaux above.

Record 15 consists of a memorandum to the Town Council from the Town Clerk with an attached letter from a law firm to a client (the second affected person). However, the client in question is not the Town. With respect to this record, the Town submits:

Record 15 was clearly obtained by the [second affected person] from its solicitor in order to allow this [person] to assist the Town. This was a legal opinion provided between a solicitor and client.

I realize that the point of contention may be whether the record could be a "solicitor_client" communication, as it was a third party that obtained the opinion, from its solicitor.

Record 15 was . . . clearly obtained expressly to assist the Town and to be presented only to the Town.

. . . [F]ormer Commissioner Linden's reasoning in Order P_136 and in Order P_49 applies to this record; all four criteria of solicitor_client privilege are met; the interests of the [second affected person] and the Town were sufficiently similar, to allow that this record was and is solicitor_client communication and privileged.

In this case, branch 2 of the privilege also applies as this opinion was obtained specifically to have advice regarding existing litigation.

In Order MO_1338, I stated the following:

In my view, the solicitor_client privilege exemption is designed to protect the interests of a government institution in obtaining legal advice and having legal representation in the context of litigation, not the interests of other parties outside government. Had the Legislature intended for the privilege to apply to non-government parties, it could have done so through express language such as that used in the third party information and personal privacy exemptions at sections 10 and 14 of the *Act*. This interpretation is consistent with statements made by the Honourable Ian Scott, then Attorney General of Ontario, in hearings on Bill 34, the precursor to the *Act's* provincial counterpart . . .

Thus, where the client in respect of a particular communication relating to legal advice is not an institution under the *Act*, the exemption cannot apply. The only exception to this rule would be where a non_institution client and an institution have a "joint interest" in the particular matter. In Order P_1342, Adjudicator Holly Big Canoe described the principal of "joint interest" as follows:

It is possible for two or more parties to have a joint interest in a record which could have an impact on solicitor_client privilege. In *Johal v. Billan* [1995] B.C.J. No. 2488 (B.C.S.C.) the court found that a husband and wife who had consulted the same solicitor for the purpose of drafting wills had waived the privilege between themselves, but maintained this privilege against third parties who did not share a joint interest with one or both of them. This judgement makes reference to this interest being supported by Mr.

Justice Sopinka in the text *Law of Evidence in Canada*, at page 638:

Joint consultation with one solicitor by two or more parties for their mutual benefit poses a problem of relative confidentiality. As against others, the communication to the solicitor was intended to be confidential and thus is privileged. However, as between themselves, each party is expected to share in and be privy to all communications passing between either of them and their solicitor, and accordingly, should any controversy or dispute subsequently arise between the parties, then, the essence of confidentiality being absent, either party may demand disclosure of the communication. ... Moreover, a client cannot claim privilege as against third persons having a joint interest with him in the subject_matter of the communication passing between the client and the solicitor.

Although Adjudicator Big Canoe rejected the joint interest argument in Order P_1342, it has been found to apply in other cases. In Order P_49, for example, former Commissioner Sidney Linden found a joint interest between the Ministry of Community and Social Services and a home for the aged funded by the Ministry in the context of a dispute over the performance of a construction contract.

In this case, based on the representations of the parties, and on the face of the record, it is clear that the client for the purposes of the record is the [World Wildlife Fund (WWF)], not the City. The City submits, however, that it has a joint interest with the WWF. I do not accept the City's submission. I have not been provided with evidence sufficient to establish a "joint interest" between the WWF and the City for the purposes of solicitor_client privilege. The WWF is a public interest organization with a focus on conservation and environmental issues, and in this case was seeking to ensure that the City adopted a by_law which was sensitive to these issues. Although it may be said that the City also had an interest in adopting an environmentally sound by_law, the WWF was acting as an arm's_length public interest group. I am not convinced that the interests of the WWF and the City in regard to the adoption of an environmentally sound by_law are sufficiently connected to be accurately characterized as a "joint interest".

In my view, following the approach in my earlier Order MO_1338, Record 15 cannot be subject to solicitor_client privilege under section 12, because the client respecting this record is clearly the second affected person, not the Town. Further, I do not accept the Town's argument that it and the second affected person have a joint interest in the subject matter of the record. It may be that the Town and the second affected person both shared similar views of what the final outcome of the litigation should be. However, this alone is not sufficient to establish a joint interest as that term has been interpreted in previous cases.

I also do not accept that this record is subject to litigation privilege, which cannot apply in circumstances where the litigation in question has been terminated [see, for example, Orders P_1551 and MO_1337_I].

ORDER:

- 1 I uphold the Town's decision to deny access to all of the records at issue, with the exception of Record 15, on the basis of the exemption at section 12 of the *Act*.
2. I order the Town to disclose Record 15 to the appellant by May 10, 2001 but not earlier than May 4, 2001.

Original Signed By: _____ April 4, 2001
David Goodis
Senior Adjudicator