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

ORDER MO-1339

Appeal MA-990345-1

Regional Municipality of Hamilton-Wentworth

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NATURE OF THE APPEAL:

The appellant submitted a request to the Regional Municipality of Hamilton-Wentworth (the Region) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The request stated:

> I would like to see the itemized bills/invoices sent to the region by Gowling, Strathy and Henderson for its services on the challenge to Federal Court of the federal environmental assessment of the Red Hill Creek Expressway; as well as bills/invoices from all lobbyists hired by the region or Gowling to lobby either the Ontario or federal governments on the expressway.

The Region replied as follows:

> In response to your request, I have provided you with a copy of the November 29th report to the Transportation Services Committee which discusses the status of the challenge to Federal Court and provides bottom line totals of monies spent to date.
>
> I am, however, denying you access to all itemized bills/invoices pursuant to section 12 of the *Act* which states that, "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."
>
> It is my position that even though the bills/invoices may not contain legal advice in a conventional sense, they do reflect communications of a confidential nature between Corporate Counsel and Outside Counsel which if disclosed, could reveal the substance of legal advice requested or provided, or the legal strategies pursued.

The appellant appealed the Region's decision to this office. In his letter of appeal, the appellant stated:

> I feel that the information requested does not constitute legal advice and in any event, it involves public spending on an issue of significant local importance.
>
> In particular, I object to the inclusion of tax money spent by lobbyists within the umbrella of legal advice.
>
> This would appear to be a deliberate attempt to hide political actions with a smoke-screen of legal action.

I sent a Notice of Inquiry setting out the issues in the appeal to the Region, Gowling, Strathy and Henderson (Gowlings) and 11 other affected persons. I received representations from Gowlings and nine of the other 11 affected parties. I then sent a modified Notice of Inquiry, reflecting the representations received from the Region and the affected parties, to the appellant, who made representations in response.

RECORDS:

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

Record 1	Cover letter dated July 13, 1999 to the Region from Gowling, Strathy and Henderson, enclosing an account for legal services rendered dated July 13, 1999
Record 2	Account for legal services rendered to the Region from Gowling, Strathy and Henderson dated July 28, 1999
Record 3	Account for legal services rendered to the Region from Gowling, Strathy and Henderson dated September 14, 1999
Record 4	Covering memorandum to the Region from Gowling, Strathy and Henderson, enclosing a two-page summary of accounts from 11 consultants, and copies of those accounts

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.

This section consists of two branches, which provide an institution with discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and

2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, and

(b) the communication must be of a confidential nature, and

(c) the communication must be between a client (or his agent) and a legal advisor, and

(d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation [Orders 49, M-2, M-19].

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for counsel employed or retained by an institution; and

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation [Order 210].

Although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

> In essence, then, the second branch of section [12] 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 [12] 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.)].

Solicitor-client communication privilege

The Region's representations raise the application of the common law solicitor-client communication privilege. This 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].

Representations

The Region submits:

> The records report on legal and professional consulting services provided to the [Region] by outside counsel as well as the billings of the consultants who were hired by said counsel. The records are a continuum of confidential communications relating to the Red Hill Creek Expressway and are directly related to the seeking, formulating or giving of legal advice between the client, the [Region] and its counsel.

The Region goes on to refer to three cases which it argues support the view that legal accounts are exempt under section 12: Orders 126 and PO-1714 of this office, and *Stevens v. Canada (Prime Minister)* (1998), 161 D.L.R. (4th) 85 (Fed. C.A.) [*Stevens*]. The Region continued:

> Outside counsel have conducted research in relation to the federal environmental assessment of the Red Hill Creek Expressway. In so doing they have sought out the

opinions and advice of various consultants. The advice provided by the consultants has assisted outside counsel with the process of forming a legal opinion and developing strategies for the conduct of the related litigation. This legal opinion has been communicated to the client, [the Region], and as such the records are directly related to the seeking, formulating or giving of legal advice, and consequently exempt from release in their entirety, pursuant to Section 12.

. . . [I]n reponse to your specific questions respecting Record 4, the [Region] has elected to consult with its outside counsel, [Gowlings], as all the consultants were retained by [Gowlings] on the [Region's] behalf.

(a) What role did each of the consultants play in the Red Hill Creek Expressway matter?

All consultant were retained by Gowlings in order to assist Gowlings (1) in providing confidential legal advice to the [Region] in respect of the Region's objective of obtaining statutory approvals under Federal legislation to complete the Expressway; or, (2) in providing legal advice to the [Region] and assisting Gowlings in respect of conducting proposed and actual litigation initiated by the [Region] in Federal Court concerning the Expressway, as well as in respect of a public hearing process concerning the Expressway, which assistance included confidential discussions with counsel, and provision to counsel of materials to be used in evidence.

(b) Did the consultants provide advice directly to the Region?

No. The consultants provided their advice directly to Gowlings . . . although in some cases the advice was simultaneously provided orally to a restricted number of Regional staff who also were responsible for directing or providing evidence for the [Region's] litigation.

(c) Did the consultants provide advice to the law firm?

Yes.

(d) Who retained the consultants.

Gowlings.

(e) Who paid the accounts? If the law firm paid the accounts, did the Region reimburse the law firm?

The law firm paid the consultants and the payments made by Gowlings were included as disbursements on Gowlings' accounts to the [Region], which accounts were paid by the [Region].

(f) Was the consultants' advice integral to the legal advice given by the law firm to the Region?

As indicated in the answer to (a), yes the advice was integral to Gowlings' legal advice to the [Region] and/or to assisting Gowlings in preparing for and conducting litigation on behalf of the [Region].

(g) Were the consultants agents of the law firm and/or the Region? Did the consultants act in place or under the direction of the law firm and/or the Region?

In answering this question we have referred to the passages you reference in R.D. Manes and M. Silver, *Solicitor-Client Privilege in Canadian Law* (Markham, Ont.: Butterworth, 1993) at p. 73-78. The primary role of the consultants has been set out in answers to questions (a) to (f). However, in the sense described in Manes and Silver some of the consultants at some times during their retainer may have been acting as agents of Gowlings and/or of the [Region] in the context of communications between solicitor and client relating to the giving or receiving of legal advice and in contemplation of litigation.

(h) Were the consultants third parties who acted "under their own steam", or "for themselves"?

No. See answers to questions (a) to (f) above.

Gowlings submits:

> We were retained by the [Region] as legal counsel . . . in respect of the Red Hill Creek Expressway (the Expressway). We were specifically retained to provide legal advice to the Region and to act as legal counsel in respect of anticipated and actual litigation regarding the Expressway. Our advice was confidential legal advice to the Region in respect of numerous legal issues surrounding the Expressway and in respect of representation of the Region regarding the Expressway. Any documents in the process are subject to common law solicitor-client privilege under "Branch 1 and 2" of the exemption from disclosure contained in s. 12 of the [*Act*]. Our advice to the Region on various Expressway issues, the Federal Court litigation and the need for the Region to prepare for public hearings and other legal processes related thereto remain on-going. Our invoices to the Region contain information of a confidential nature pertaining to the above such that if made public they would reveal the substance of legal advice requested or provided and legal strategies considered, advised or pursued.

Gowlings went on to provide submissions in response to my specific questions regarding the consultants' accounts in Record 4 which are the same in substance as those of the Region. Gowlings also provided copies of five retainer letters in respect of five of the affected party consultants, and stated:

> As you will see from a review of this correspondence, each of these letters clearly indicated that these firms were being retained in respect of a matter that was contemplated for litigation and each letter stressed the fact that all communications were confidential and solicitor client privileged and that their entire work product in that regard was considered confidential.
>
> In the instances of the other consultants who were also retained by Gowlings, it was clearly indicated to them that their retainer was on the same terms set out in the correspondence provided and that their work product would also be required to be treated in a confidential manner.

Eight of the nine other affected party representations are identical, and read as follows:

> We were retained by [Gowlings] who are legal counsel to the Region in respect of the Red Hill Creek Expressway (the Expressway).
>
> We were specifically retained by Gowlings on a confidential, solicitor and client basis, in order to assist Gowlings in providing legal advice to the Region and in respect of anticipated litigation regarding the Expressway involving the Region.
>
> We clearly understood that our advice, information and assistance to Gowlings, including our invoices, were to be confidential insofar as they were provided in connection with Gowlings' brief to provide legal advice to the Region in respect of numerous legal issues surrounding the Expressway and in respect of Gowlings' advice to and representation of the Region in respect of contemplated and actual litigation before the Federal Court and a proposed public inquiry regarding the Expressway. We therefore submit our documents are subject to common law solicitor-client privilege under "Branch 1 and 2" of the exemption from disclosure contained in s. 12 of the [*Act*]. We understand Gowlings' legal advice to the Region on various Expressway issues, the Federal Court litigation and the need for the Region to prepare for a potential public hearing and other legal processes related thereto remain on-going.
>
> Our invoices contain information of a confidential nature pertaining to the above such that if made public they would reveal the substance of legal advice requested or provided and legal strategies considered, advised or pursued.
>
> Our invoices were sent to, approved and paid for by Gowlings, although we understand the amount of the invoices were subsequently included as disbursements on Gowlings' accounts to the Region.

The remaining affected party who made submissions states simply that the records "were submitted in confidence to Gowlings and were done as part of their legal work on an anticipated and now on-going

Federal Court litigation case and as part of their on-going legal advice to the Region . . ."

The appellant submits:

> The basic test regarding confidentiality appears to be it applies as long as the material in question relates to giving or receiving legal advice. The Region is trying to capture everything done by its consultants within the rubric of legal advice. I believe there are simple questions that should be focussed on, in determining whether the documentation requested properly falls under solicitor-client privilege. Those questions are: What is the real function of the lobbyists? Is their role part of the litigation or party of the environmental assessment? Is their role legal advice or political lobbying? These are the questions from which the ruling should flow.
>
> There are several points in the [Region's representations] where the issues are blurred; where the difference between "consulting" and "legal advice" is blurred and the difference between litigation and regulatory approval is blurred. Once having blurred the two processes, the Region goes on to claim privilege for both.
>
> The Region [states]: "The records report on legal **and professional consulting services**" [appellant's emphasis] . . . Clearly, by the Region's own admission, there is a role here that is not simply legal but also consulting, i.e., political.

The appellant goes on to provide other examples where the Region, in its representations, draws a distinction between litigation and regulatory processes. The appellant continues:

> The federal environmental assessment is a regulatory approval, a technical review and not litigation. The Region calls this legal advice but it is not legal advice in contemplation of litigation. It is something else. And it is within the climate of contemplated litigation that the strictest rules of confidentiality apply.
>
> Given their own admission of a different role for the consultants/lobbyists, the Region's claim that all of the material from the consultants involves legal advice should not be taken at face value. There needs to be a determination that it is what they say it is.
>
> Further to the same point, in the Notice of Inquiry, it is noted that one of the tests for confidentiality, Branch 1, states: "the communication must be directly related to the seeking, formulating or giving legal advice." Again, given the admitted role for the consultants/lobbyists in influencing the approval process, it is clear that some of the material - at a minimum - should not qualify for solicitor-client privilege.
>
> In respect to a federal approval, it is safe to assume that lobbyists are in fact trying to influence the outcome of that approval **outside** of whatever formal process exists, further removing them from any claim to legal privilege.

. . . . .

In conclusion, I would like to reiterate the point made in my initial appeal that taxpayers' money spent on political action should not be open to scrutiny. If the law is construed in such a way as to allow a government to shield political activity from that scrutiny, simply by having a legal firm hire the lobbyists, then the public is not well served.

Analysis

Records 1, 2 and 3

These records consists of accounts sent to the Region by Gowlings seeking payment for legal services rendered, and providing a detailed description of those services. In Order PO-1714, Adjudicator Holly Big Canoe was asked to determine whether accounts submitted by a solicitor to a client were subject to solicitor-client communication privilege. In that decision, she stated:

> In my view, the Federal Court of Appeal's recent decision in [*Stevens*] 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.
>
> . . . . .
>
> 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.

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*.

In my view, the principles in PO-1714, derived in part from *Stevens*, are applicable here. Records 1, 2 and 3 clearly on their face consist of legal bills rendered to a client, the Region, in relation to legal advice provided respecting the Red Hill Creek Expressway. Accordingly, I find that Records 1, 2 and 3 qualify for

solicitor-client communication privilege. In addition, there is nothing before me to indicate that this privilege has been waived. Therefore, these records are exempt under section 12 of the *Act*.

Record 4

The application of solicitor-client communication to this record, consisting of accounts rendered by a number of consultants to Gowlings, is less straightforward compared to Records 1, 2 and 3. This record is different on its face, since it relates to services rendered not by the law firm itself, but by consultants. Thus, the findings of Adjudicator Big Canoe in Order PO-1714 and by the court in *Stevens* do not necessarily apply. Thus, I will return to the four-part test for common law solicitor-client privilege to determine whether section 12 applies. That test reads:

(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.

Record 4 is clearly a written communication, and I am satisfied that it was communicated in circumstances of confidentiality.

The third part of the four-part test for common law solicitor-client communication privilege states that "the communication must be between a client (or his agent) and a legal advisor". Thus, if the consultants can be considered the Region's agent, that part of the test is met. The authors in Manes and Silver explain the difference between an agent and a third party in the context of solicitor-client privilege (at p. 73):

> Different treatment is given to communications from agents versus those from third parties. Agents act in place of the solicitor/client or under the solicitor's/client's directions. Third parties act for themselves.
>
> Where the communication between the solicitor and client is made by or through an agent of the solicitor and/or an agent of the client, the communication remains privileged as a direct communication, as long as it relates to the receiving or giving of professional legal advice.

A party has been found to be an agent (and thus solicitor-client privilege applied) where, for example, the communication was made between a client of a law firm and an accountant employed by the law firm [*United States v. Kovel*, 296 F. 2d 918 (C.A.N.Y., 1961)].

Based on the representations of Gowlings, the Region and the affected parties, including the sample retainer letters provided by Gowlings, I am persuaded that Gowlings retained the consultants to act as agents for

both Gowlings and the Region. The representations and the retainer letters indicate that the consultants were acting under the direction of Gowlings and the Region, for example, in respect of confidentiality issues, attendance at meetings and the nature of the consulting services to be given. Accordingly, I find that the invoices which comprise Record 4 should be treated in the same fashion as Records 1, 2 and 3 with respect to the third part of the test for solicitor-client communication privilege.

Finally, the fourth part of the test for common law solicitor-client privilege requires that the communication be directly related to seeking, formulating or giving legal advice. The appellant argues, in part, that the advice for which the invoices were rendered cannot be characterized as "legal advice".

In my view, the distinctions made out by the appellant with respect to legal advice and "regulatory lobbying" do not negate the application of solicitor-client communication privilege in this case. The following passage from Manes and Silver (at pp. 76-77) is apt in the circumstances:

> . . . The changing complexities of a modern law practice have been recognized in the United States to give rise to a wider ambit of privileged communications in the context of agents or employees. Obviously, in a modern law practice, it would be impossible for litigation to be properly conducted if solicitors could not rely on the confidential information given to them by technical experts, e.g., physicians, engineers, private investigators, etc., as well as their own internal employees.
>
> . . . . .
>
> It is submitted that there is an ever-expanding scope for solicitor-client agents and employees to participate in a privileged communication. This is natural because **solicitors and clients increasingly hire outside or internal consultants**, enter into affiliate arrangements with other firms, contract out for various services, and sign on a variety of in-house experts and staff . . . [emphasis added]

In this case, I am satisfied that no clear distinction can be drawn between the legal advice and services provided by Gowlings to the client, and the advice and other services provided by the consultants to Gowlings and/or the client. The role of the Region in the Red Hill Creek Expressway matter is obviously very complex, with many legal, political, environmental and other aspects which are inter-related in a number of ways. It stands to reason, and I am satisfied based on the material before me, that the services provided by the consultants were essentially integrated into the legal services provided by Gowlings, and that there is no distinction between these services for the purpose of solicitor-client privilege. As a result, I find that the invoices comprising Record 4 are entitled to the protection of solicitor-client privilege, in the same manner as those in Records 1, 2 and 3. In addition, there is no basis for a finding of waiver of privilege. Accordingly, Record 4 also qualifies for exemption under section 12 of the *Act*.

The appellant takes the position that "taxpayers' money spent on political action should be open to scrutiny" and states that "if the law is construed in such a way as to allow a government to shield political activity from that scrutiny, simply by having a legal firm hire the lobbyists, then the public is not well served." First, I point out that there is nothing in the material before me to indicate that Gowlings, the Region or the consultants

chose this particular billing process in order to avoid public scrutiny, and that this type of process is commonplace. Second, while the *Act* contains a "public interest override" that requires disclosure in the public interest, despite the application of certain exemptions, the Legislature did not see fit to include the solicitor-client privilege exemption. Thus, as long as the exemption validly applies (as in this case), any public interest in scrutiny of the bills cannot dictate a different result. Finally, I note that the Region has made some effort to satisfy the "public interest" principle articulated by the appellant, by disclosing to him a document which sets out the "bottom line figure" of monies the Region has spent respecting the Red Hill Creek Expressway matter.

ORDER:

I uphold the Region's decision to withhold Records 1, 2, 3 and 4.

Original signed by: September 21, 2000
David Goodis
Senior Adjudicator