



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER MO-1482**

**Appeal MA-010109-1**

**Township of Oro-Medonte**



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## **NATURE OF THE APPEAL:**

This is an appeal from a decision of the Township of Oro-Medonte (the Township), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had sought access to legal opinions from a specified law firm to the Township and other documents related to such legal opinions, used by the Township's planning staff in preparing and providing its opinion to the Township council at a meeting on October 18, 2000.

In its decision, the Township denied access to the records on the basis that they were subject to solicitor-client privilege and therefore exempt from disclosure under section 12 of the *Act*.

During the course of mediation through this office, certain issues were narrowed or clarified. The appellant agreed to limit the scope of this appeal to two legal opinions. The appellant claims that the Township has demonstrated a clear intention to disclose these opinions and has therefore waived its right to claim that the opinion was subject to solicitor-client privilege.

I sent a Notice of Inquiry to the appellant, initially, inviting his representations on the issues in dispute. These representations were then shared with the Township, which has also provided representations.

## **CONCLUSION:**

I find that the records are exempt from disclosure on the basis of solicitor-client privilege, and that there has been no waiver of this privilege by the Township.

## **RECORDS:**

Record 1 is an opinion letter from a law firm to the Township, dated October 13, 2000.

Record 2 is an opinion letter from the same law firm to the Township, dated September 25, 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 Township must demonstrate that one or the other, or both, of these heads of privilege apply to the records at issue.

The Township submits that solicitor-client communication privilege applies to the records at issue.

### **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 Region submits that it sought professional legal advice from its solicitor, with a view to obtaining some legal options for resolving a dispute between residents of the Township.

The appellant submits that the opinion letters were never intended to form privileged solicitor/client communications, in that they were always intended for inclusion in a report provided to Township Council and available to the public. The appellant's submission is, in effect, that at the time of their creation, the records were intended for public distribution. The appellant refers to a Report to Council, dated October 18, 2000, in support of his submissions. The appellant asserts that the Report makes it apparent that the letters of September 25 and October 13 were intended to be attached to the Report, which was tabled for discussion at a public meeting on October 18, 2000.

There may be circumstances where a legal opinion is sought from a solicitor for the purpose of making it available to the public. However, I do not find this to be such a case.

On my review of the representations and materials before me, I am satisfied that the records constitute direct communications of a confidential nature between a solicitor and client within the framework of obtaining professional legal advice. I accept the Township's representations on this issue, and I find that they are supported by the content of the records themselves. Further, I note that the records are marked as "confidential". This is not necessarily determinative in itself; however, there is nothing in the records or the surrounding circumstances to suggest that they were intended for public distribution at the time they were created.

As noted above, the appellant refers to a Report to Council, dated October 18, 2000, in support of his submissions. I do not find that this Report establishes that the records were intended to be made available to the public. Below, in discussing the issue of waiver, I will elaborate further on this finding.

In sum, I am satisfied that the records at issue are covered by the solicitor-client privilege exemption in section 12 of the *Act*. I now turn to the appellant's submission that this privilege has been waived.

### **Waiver**

The actions by or on behalf of the institution and/or another party may constitute waiver of solicitor-client communication privilege or litigation privilege. As stated in Order P-1342:

... [C]ommon law solicitor-client privilege can also be lost through a waiver of the privilege by the client. Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive the privilege [*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, [1983] 4 W.W.R. 762, 45 B.C.L.R. 218, 35 C.P.C. 146 (S.C.) at 148-149 (C.P.C)]. Generally, disclosure to outsiders of privileged information would constitute waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669. See also

*Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.).

As stated above, the appellant relies on the Report to Council of October 18, 2000 in support of his position that the Township has waived solicitor-client privilege with respect to these records. Part of that Report states:

Earlier this year, Council directed that staff work with the Township Solicitor to determine options available to Council in regard to these restrictive lands. [A named solicitor] prepared an opinion for Council listing two options for Council to consider (Attached #1).

On May 13, 2000 a meeting took place with residents of Plan 626 (Lakeshore Promenade) regarding this property at which time further background was provided to the residents and clarification was provided by [the solicitor] regarding the two options. The direction emanating from the meeting was that the residents provide the Township input regarding the option that was preferred within their "community".

The appellant states that the above expresses a clear intention to attach the records at issue to the Report. In that the Report, with its attachments, is publicly available, the above statement in the Report is evidence of an intention to waive solicitor-client privilege with respect to those opinion letters.

The appellant attended at the Township's offices to obtain a copy of the Report with its attachments. Instead of letters from the solicitor (which the appellant expected to find), Attachment #1 consisted of a Notice of Public Meeting dated April 27, 2000 which, among other things, sets out two options which were to be considered at a meeting in May. The appellant's position is that although the original intention was clearly that the solicitor's opinion letters form Attachment #1, "someone at the Township office" attached the notice of the prior meeting in place of those letters.

The Township denies that it ever had any intention to attach its solicitor's opinion letters to the Report.

On my review of the matter, I am satisfied that the Township has not waived solicitor-client privilege with respect to the records. On one reading of the Report, it may indicate an intention to attach the solicitor's legal opinion referred to therein (although it would still be difficult to conclude that the reference is to the records, which were prepared many months after the May meeting). However, it may also be read as an intention to attach any other document which provides information about the two options referred to in the Report. The Notice of Public Meeting dated April 27, 2000 sets out the content of these two options. There is nothing untoward about the fact that the Township chose to attach this Notice as the means of setting out the nature of those two options. It is entirely consistent with the meaning of the above excerpts from the Report that Attachment #1 consist of that Notice, and not of the solicitor's legal opinions. In this regard, I accept the representations of the Township that it was never its

intention to attach legal opinions to the Report and, further, that at no time was any substitution of attachments made.

I conclude, accordingly, that in the absence of any waiver of the solicitor-client privilege, section 12 applies so as to exempt the records from disclosure.

**ORDER:**

I uphold the decision of the Township.

Order signed by: \_\_\_\_\_  
Sherry Liang  
Adjudicator

\_\_\_\_\_ November 9, 2001