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

ORDER MO - 1537

Appeal MA-010391-1

City of Vaughan

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NATURE OF THE APPEAL:

This appeal concerns a decision of the City of Vaughan (the City) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant), a ratepayers association, had sought access to a copy of a staff report and its contents received by the City's Committee of the Whole on December 18, 2000. The staff report is a document prepared by the City's Director of Legal Services that relates to a deputation and written submission given by a named individual regarding concerns about a specific property. The appellant stated in its request that, on August 28, 2000, the Committee of the Whole recommended that the named individual's deputation and written submission be received and referred to staff for a full investigation and report and that the named individual be informed accordingly.

In its decision, the City agreed to disclose an extract of an August 28, 2000 Committee of the Whole meeting relating to the deputation and written submission made by the named individual as well as an extract of the Committee of the Whole, Closed Session, December 18, 2000 – Report #83, Item #10. The City denied access to the December 18, 2000 Closed Session Minutes pursuant to section 6(1)(b) of the *Act*. The City also denied access to the recommendation of the Committee of the Whole, Closed Session, and supporting staff report, pursuant to section 12 of the *Act*.

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

During the mediation stage of this appeal, the appellant narrowed the scope of its appeal to the staff report only. The City also advised that it is relying on both sections 6(1)(b) and 12 of the *Act* to deny access to the staff report.

I sent a Notice of Inquiry setting out the issues in this appeal initially to the City, which provided representations in response. I then sent the Notice of Inquiry, together with a copy of the City's representations, to the appellant, which provided representations in response.

RECORD:

There is one record at issue in this appeal - a three-page staff report, relating to a specific property, prepared and signed by the Director of Legal Services for the City.

DISCUSSION:

CLOSED MEETING

Section 6(1)(b) of the *Act* states:

> A head may refuse to disclose a record,
>
> > that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

In order to rely on section 6(1)(b), the City must establish that:

1. A meeting of a committee took place, **and**

2. A statute authorizes the holding of such a meeting in the absence of the public; **and**

3. The disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

[Orders M-64, M-98, M-102 , M-219 and MO-1248]

Each part of the section 6(1)(b) test must be established.

The City states that a closed session meeting of the Committee of the Whole was held on December 11, 2000 to receive a confidential staff report, written by the Director of Legal Services concerning a specific property. The City states that this meeting was held in the absence of the public pursuant to sections 55(5)(g) of the *Municipal Act*. Section 55(5)(g) states:

> A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
>
> > a matter in respect of which a council, board, committee or other body has authorized a meeting to be closed *under another Act*. [emphasis added]

The City states that pursuant to section 55(7) of the *Municipal Act*, the City passed a resolution that a closed meeting was to be held on December 11, 2000 to discuss various topics including the receiving of advice concerning the specific property. Section 55(7) states:

> Before holding a meeting or part of a meeting that is to be closed to the public, a council or local board shall state by resolution,
>
> (a) the fact of the holding of the closed meeting; and
>
> (b) the general nature of the matter to be considered at the closed meeting.

I am satisfied that a meeting of the Committee of the Whole took place. Accordingly, I find that part one of the test has been met.

I am also satisfied that this meeting was closed to the public. However, the City has failed to meet the criteria set out in section 55(5)(g) of the *Municipal Act*. The City has not established that this meeting was authorized under another Act, as required under section 55(5)(g). Accordingly, I am not satisfied that the second part of the test has been met.

SOLICITOR-CLIENT PRIVILEGE

Introduction

The City submits that the record qualifies for exemption under section 12 of the *Act*, which 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 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege.

In the circumstances of this appeal, it appears that only solicitor-client communication privilege could apply and the City has indicated in its representations that it is relying exclusively on that head of privilege in support of its case. I will, accordingly, only address the possible application of the solicitor-client communication portion of the section 12 exemption.

Solicitor-client communication privilege

General principles

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].

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729].

Representations

The City submits that the staff report is subject to solicitor-client communication privilege under section 12:

1. There is written communication signed by the Director of Legal Services;

2. The communication is of a confidential nature as indicated in the three page confidential staff report written by the Director of Legal Services – quote "I advised that reports prepared by the City's solicitors are subject to solicitor/client privilege and that the report would be provided to Council in Closed Session";

3. The communication is between the City of Vaughan Council (City client) and the Director of Legal Services (legal advisor);

4. The communication relates directly to seeking, formulating and giving legal advice (legal advice and options for Council to consider concerning a specific property….

The appellant submits that it represents a group of residents and that "the residents are the de-facto clients of the staff of the City…" In effect, the appellant is saying that the exemption cannot apply because a solicitor-client relationship exists between the residents and the City's Director of Legal Services. The appellant's contentions in support of this view are reviewed below.

The appellant also suggests that if the staff report is protected by solicitor-client communication privilege the City waived its privilege when the Director of Legal Services "disclosed the contents of the report…" in a letter to the appellant. The relevant portion of the letter that the appellant relies upon states:

> …I reviewed the City's files and the information submitted by [a named individual] and determined based on the facts that in my opinion the outside storage was a legal non-conforming use pursuant to section 34(9) of the *Planning Act*.

Analysis

I am satisfied that the staff report is a confidential communication made between a lawyer, the Director of Legal Services, and a client, the City, for the purpose of giving legal advice. The Director of Legal Services provided information to a closed session of the City's Committee of the Whole regarding issues with respect to a specific property. In my view, it was the intention of both the Director of Legal Services and the City that this staff report would be maintained in confidence and I am satisfied that this intention was made clear to the named individual who made the deputation. Accordingly, I find that the record qualifies for exemption under the solicitor-client communication privilege aspect of section 12 of the *Act*.

As indicated above, the appellant submits that section 12 cannot apply because "the residents" are the *de facto* clients of the Director of Legal Services. The appellant offers two arguments in support of this statement. Firstly, the appellant contends that the City cannot rely upon the common law litigation privilege exemption since at the time of the deputation process the City was not involved in any legal issues regarding the zoning of the specific property. Secondly, the appellant contends that the residents had requested a report from the Committee of the Whole and that the Committee of the Whole had requested that the named individual be kept informed of the status of this matter.

A similar issue was addressed by Adjudicator Laurel Cropley in Order MO-1172, which coincidentally also involved this institution:

> The appellant submits that the "taxpayers" are the true clients within the meaning of section 12 of the *Act* since the taxpayers ultimately pay the salary of the Council and the City's solicitor. If I were to accept this argument, there would effectively be no need for the exemption in section 12. Moreover, section 1 of the *Act* provides that the public has a right to information held by government institutions, but also stipulates that this right to information is not absolute. Through section 12, the *Act* recognizes the confidential relationship between public officials and their counsel to the same extent that the common law recognizes the private solicitor and client relationship (Orders P-1551 and P-1561). Further, section 12 acknowledges that public officials may be "clients", distinct from the public at large, notwithstanding the special duties and

> responsibilities these officials have with respect to the public. Accordingly, I find that the appellant's arguments in this regard are without merit.
>
> I have reviewed the record at issue and find that it is a direct written communication between the City Council and the City's solicitor. I also find that it contains advice from the solicitor regarding the issues and options to be considered by Council respecting the Pine Valley Drive link. I am satisfied that this document was prepared and intended to be communicated in confidence. This view is reinforced by the manner in which the document was referred to in the minutes of the Council meeting of March 9, 1998. Accordingly, I find that the record qualifies for exemption under the solicitor-client communication privilege in Branch 1 of section 12 of the *Act*.

I adopt this analysis for the purposes of this appeal.

In addition, the appellant's first argument is irrelevant to the determination of whether solicitor-client communication privilege applies, since it is directed at the application of litigation privilege. With respect to the appellant's second argument, any request to keep the residents or the named individual informed of the matter are not sufficient to create a solicitor-client privilege relationship between the residents and the City's Director of Legal Services, or to negate the application of the privilege as between the City and its Director of Legal Services.

As I indicated above, the appellant also submits that the City waived its privilege in the staff report when the Director of Legal Services provided its opinion in a letter to the appellant. The relevant portion of the letter is quoted above. The appellant takes the position that by revealing this information, the Director of Legal Services "disclosed the contents of the staff report to the public, albeit without explaining the basis for her decision.".

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.)).

In Order M-260, former Inquiry Officer Anita Fineberg considered the issue of waiver of solicitor-client privilege (at pp. 4 - 5):

> Only the client may waive the solicitor-client privilege. Waiver of the solicitor-client privilege may be express or implied. As the appellant has not specifically stated whether she claims the waiver was express or implied, I shall examine both issues.
>
> In the recent text *Solicitor-Client Privilege in Canadian Law*, R.D. Manes and M.P. Silver, (Butterworth's, 1993) at pp. 189 and 191, the authors distinguish between the two types of waiver:

> Express waiver occurs where the client voluntarily discloses confidential communications with his or her solicitor.
>
> Generally waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. Fairness is the touchstone of such an inquiry.
> ...

In *S.& K. Processors Ltd. V. Campbell Avenue Herring Producers Ltd.* (1983), 35 C.P.C. 146 (B.C.S.C.), McLachlin J. noted:

> However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require...In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. (pp.148 - 149)

The following passage from *Wigmore on Evidence*, vol. 8 (McNaughton rev. 1961), as set out in the *Law of Evidence in Canada* (Markham: Butterworth's, 1992), by Sopinka, Lederman and Bryant at p. 666, was quoted with approval by the Ontario Court (General Division) in the recent case of *Piche v. Lecours Lumber Co.* (1993), 13 O.R. (3d) 193 at 196:

> A privileged person would seldom be held to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not.

I adopt this analysis for the purposes of this appeal.

Adjudicator Cropley, in Order MO-1172, was faced with a situation similar to the one in this appeal. In that order, Adjudicator Cropley states:

> I have reviewed page 3 of Report No. 18 of the Committee of the Whole. I find that it contains a small portion of the "bottom line" of the advice provided to Council from the City's solicitor. It very briefly outlines the City Solicitor's view of what the City is entitled to do and what is required in order for it to do so. The bulk of the legal opinion deals with other aspect of this issue. In my view, it is often necessary or desirable for a public body to refer to the crux of the advice its solicitors provide to it in order to carry out its mandate and responsibilities. In many cases, the public body will intend to retain the privilege, while at the same time provide a minimal degree of public disclosure to ensure the proper discharge

of its functions. In the usual case, this should not of itself constitute express waiver of the privilege attaching to the underlying solicitor-client communication (Order P-1559).

This issue was recently addressed by the Federal Court of Appeal in *Stevens v. Canada (Prime Minister)* (1998), 161 D.L.R. (4th) 85 at pp.108 -109. In this case, pursuant to an access request under the federal *Access to Information Act*, a federal institution provided partial access to legal accounts, severing out the narrative portion of the accounts while providing access to the dollar amount of the accounts. In dealing with the issue of waiver in the freedom of information context, Linden J.A. stated on behalf of the Court:

> In *Lowry v. Can. Mountain Holidays Ltd.* [(1984, 59 B.C.L.R. 137 (S.C.), at p. 143] Finch J. emphasized that all the circumstances must be taken into consideration and that the conduct of the party and the presence of an intent to mislead the court or another litigant are of primary importance.
> ...
>
> 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*. [emphasis added]

Although the matter in *Stevens* arose in the context of disclosure under the federal *Act*, in my view, the Court's rationale may be similarly applied to the disclosure, generally, made by government institutions of information in their custody or control. This is not to say that an institution can never be found to have waived solicitor-client privilege by partial disclosure of a privileged document. Rather, in determining this issue, a decision-maker must be cognizant of the environment in which institutions operate and their responsibilities with respect to the public interest, which may include maintaining a "policy of transparency" regarding information which is used in the decision-making process.

> In the circumstances of the current appeal, I am satisfied that in making the relatively minimal disclosure of a small portion of the "bottom line" of the advice, the City did not intend to waive privilege with respect to the record. Accordingly, I find that the City has not expressly waived privilege.
>
> There is no evidence that the City provided access to the legal opinion to anyone other than City officials. As well, the City took active steps to preserve the confidentiality of the opinion. I am satisfied that the City treated the record as confidential. In the circumstances, although the City did provide a small portion of the "bottom line" of the advice, I am not satisfied that fairness or consistency would require a finding that the privilege ceased. Therefore, I conclude that the City did not implicitly waive privilege.
>
> Because I have found that there has not been waiver of solicitor-client privilege, I find that the record is exempt under the first part of Branch 1 of section 12 of the *Act*.

In my view, the analysis followed by Adjudicator Cropley in Order MO-1172 applies to the circumstances of this appeal. The City's Director of Legal Services made a relatively minimal disclosure of a small portion of the "bottom line" of the advice given to the City and, in the circumstances, I am satisfied that in doing so there was no intention on the part of the City, either itself or through its Director of Legal Services, to waive privilege. Therefore, I find that the City did not expressly waive privilege. Further, given how the record was treated, as discussed above, I am not satisfied that fairness or consistency would require a finding that the privilege ceased as alleged by the appellant. I view the City's conduct as merely an attempt to provide the residents with information on the status of this matter in keeping with the City's commitment to do so. In providing this limited information I find that the City did not implicitly waive privilege. Therefore, I find that he record is exempt under section 12.

ORDER:

I uphold the City's decision.

Original signed by: May 9, 2002
Bernard Morrow
Adjudicator