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

ORDER MO-1500

Appeal MA-010034-2

District Municipality of Muskoka

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NATURE OF THE APPEAL:

The District Municipality of Muskoka (the Municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> All records in any way referring to, relating to, or possibly relating or referring to [a named construction company] that [the company] has not already received for the period between Jan. 1, 1996 to date [December 29, 2000]. This would also include but not be limited to records that relate in any way to the contract between the District and [the company] for the Ferndale Road Water Treatment Plant and Minto Street Water Treatment Plant. This request is for written documents, as well as e-mail, handwritten notes, phone messages, personal diary entries, etc, of any individual and each member of council.

The Municipality originally refused to process the request, claiming that under sections 4(1)(b) and 20.1 of the *Act*, the request was frivolous and vexatious. By way of Order MO-1427, dated May 1, 2001, Adjudicator Sherry Liang did not uphold the decision of the Municipality not to process the request on the basis that it was frivolous and vexatious. Accordingly, the Municipality was required to process the request.

During the mediation stage of the earlier appeal dealing with the issue of whether the request was frivolous and vexatious, the requester clarified that he was not seeking any documents which he has received from the Municipality as a result of previous requests under the *Act* or through the normal course of events during the progress of the construction project.

Following the issuance of Order MO-1427, the Municipality issued a decision letter denying access in full to the responsive records, claiming the application of sections 7(1) (advice or recommendations) and 12 (solicitor-client privilege) to them. The Municipality also stated that there were no records responsive to that portion of the request relating to council members' records as these individuals are not employees of the Municipality.

In a subsequent decision letter, the Municipality also claimed the application of section 6(1)(b) and the mandatory exemptions in sections 10(1)(a) and (c) of the *Act* to the records.

The requester, now the appellant, appealed each of these decisions. He also indicated that he was not seeking access to minutes of public Municipal council meetings, but is interested in receiving records relating to any in-camera meetings.

During the mediation stage of this appeal, the appellant agreed to remove the council members' records and the issue of any in-camera records from the scope of the appeal. Accordingly, the application of section 6(1)(b) to the records is no longer at issue. The Municipality continued to claim the application of one or more of the remaining exemptions to the 78 documents still at issue. As no further mediation was possible, the appeal was moved into the Adjudication stage of the process.

I decided to seek the representations of the Municipality, initially. I received its submissions, which were shared, in part, with the appellant. Portions of the representations of the

Municipality were withheld from the appellant because of concerns that I had about their confidentiality. The appellant also made representations in response to the Notice.

The Municipality has identified an additional record beyond those included on its Index, but has not made any submissions with respect to this document, marked as Record 79. I have reviewed its contents and am satisfied that no mandatory exemptions apply to exempt it from disclosure. I will, accordingly, order that it be disclosed to the appellant.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Positions of the Parties

The Municipality claims the application of the solicitor-client privilege exemption in section 12 of the *Act* to the majority of the records at issue in this appeal. It argues that these records represent either confidential communications between solicitor and client or that they form part of the "lawyer's brief" and are, accordingly, subject to litigation privilege. It submits that, given the appellant's propensity towards litigation, it was clear early on in the construction project that litigation was likely to ensue and that its solicitors began documenting its position on various issues in order to respond to what it viewed as legal proceedings which were certain to follow.

Other records represent correspondence between the Municipality and its counsel, both in-house and outside, regarding issues which arose following the initiation of the construction project by the appellant. The Municipality argues that these records were also prepared in contemplation of litigation and are subject to privilege on that basis, and that they are also exempt under the solicitor-client communication component of the exemption in section 12. In addition, the Municipality is claiming solicitor-client communication and litigation privilege with respect to correspondence between its counsel and the solicitors for various lienholders involved in the construction project. Finally, the Municipality also claims privilege attached to correspondence between its counsel and the project's performance bonding company as it argues that these records were prepared in contemplation of litigation.

The appellant submits that only those documents prepared after November 5, 2000, as this is the date when it advised the Municipality of its default under the terms of its contract, are subject to litigation privilege. The appellant is of the view that all documents created prior to that date "were produced in the normal course of business" and that before that date, litigation could not have been contemplated. Finally, the appellant argues that the Municipality's in-house counsel is simply an employee and is not the "solicitor of record" in any of the proceedings under way. As a result, the appellant takes the position that communications involving this solicitor are not privileged and documents from his files are not subject to litigation privilege.

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].

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].

Many of the records at issue in this appeal are memoranda, correspondence and records of communications between representatives of the Municipality, the consultants and engineering firms retained by it and the Municipality's counsel, both in-house and external. From the beginning of the construction project, and for a number of reasons, some of which involved the appellant's performance, legal advice was sought and provided by both in-house and external counsel. In my view, the fact that advice may have been provided to the Municipality by counsel in its employ does not negate the fact that a solicitor-client relationship existed between them. I

disagree with the position taken by the appellant that no such relationship exists since the Municipality's in-house counsel is an employee.

Record 1 is a lengthy memorandum prepared by the Municipality's in-house counsel for its Commissioner of Engineering and Public Works which addresses a legal problem which occurred at the time the original tenders for the work were received. In my view, this represents a confidential communication about a legal matter between solicitor and client and falls squarely within the ambit of solicitor-client communication privilege. This document is, accordingly, exempt under section 12. Similarly, Record 47 contains legal advice provided by the Municipality's in-house counsel to other Municipal employees concerning certain actions to be taken. In my view, this document constitutes a confidential communication between solicitor and client relating to the provision of legal advice, and it also qualifies for exemption under section 12.

Records 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40 are copies of correspondence or e-mails passing between the Municipality's representatives, including its in-house counsel, and outside counsel retained by it. I find that each of these pertain to legal issues involving the Municipality and represent confidential communications between solicitor and client with respect to those issues. As such, each of these records is also exempt from disclosure under the solicitor-client communication privilege component of the section 12 exemption.

The Municipality also submits that Records 42 to 46 and 48 to 73 are exempt under solicitor-client communication privilege. These documents are various correspondence received by or sent from the Municipality to a large number of suppliers and subcontractors on the construction project or their counsel. I find that these letters are not subject to solicitor-client communication privilege as they are not confidential communications between a solicitor and client. Rather, they outline various claims being made by suppliers and sub-contractors against the Municipality for non-payment of their accounts. Any privilege between the claimants and their counsel which may have existed in the information contained in the correspondence was waived when that information was conveyed to the Municipality. As a result, I find that these records are not subject to solicitor-client communication privilege. I will address whether they may be subject to litigation privilege in the hands of the Municipality below.

Similarly, Records 74 to 78 are correspondence between the Municipality, including its in-house and external counsel, and the solicitors for the company holding the performance bond on the construction project. Again, these records do not represent communications between solicitor and client and cannot, therefore, qualify under the solicitor-client communication privilege component of section 12.

By way of summary, I find that Records 1, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40 and 47 qualify for exemption from disclosure under section 12 as they represent confidential communications between solicitor and client and are directly related to the giving of legal advice.

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 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.

The Municipality suggests that Records 4 to 26 and 71 to 73, dealing with claims for extra payment made by the appellant, were prepared or received by the Municipality in contemplation of litigation. It argues that it was apparent throughout the time period during which these records were created that litigation would ensue between it and the appellant. The Municipality submits that Records 4 to 26 and 71 to 73 represent correspondence between the Municipality and its consultants evaluating the validity of the appellant's claims for extra payment and were created in contemplation of the litigation which has, in fact, been initiated.

Record 4 is a letter prepared by a consultant setting forth a number of options to address a very specific engineering problem encountered during the construction project. In my view, the purpose of the creation of this record was to evaluate this engineering problem and not to examine the alleged deficiencies in the appellant's work or his claims for extra payment. I find that Record 4 is not, accordingly, exempt under the litigation privilege aspect of section 12.

Records 5, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, 23, 24, 25, 26 are correspondence relating specifically to the Municipality's position with respect to the claims for extra payment made by the appellant during the course of the construction project. In my view, it was reasonable for the Municipality to contemplate that litigation over the payment of these claims would ensue. I find that they were created in contemplation of reasonably anticipated litigation between the appellant and the Municipality. As such, I find that these documents are exempt from disclosure under section 12 as they are litigation privileged.

Records 6, 7, 20, 21, 22, 52, 55, 56, 61, 71, 72 and 73 were not prepared with a view towards contemplated litigation, however. These records simply document the progress of the work on the job site or describe the claims made by subcontractors to the Municipality. They were not prepared in contemplation of litigation and, accordingly, they do not qualify for exemption under the litigation privilege aspect of section 12.

Record 41 is a one-page summary of liens registered during the course of the construction project. This document was prepared by the Municipality's in-house counsel and relates directly to what was, on the date the record was prepared, reasonably contemplated litigation. I find that this record clearly qualifies for exemption under the litigation privilege component of the section 12 solicitor-client privilege exemption.

Records 74, 75, 76 and 77 are correspondence passing between counsel for the bonding company and the Municipality's in-house and external counsel relating to the claim put forward by the Municipality against the performance bond submitted by the appellant. The Municipality and the bonding company do not have a common interest with respect to any of the litigation which was contemplated at the time of the creation of these records, or in any subsequent proceedings. In my view, no litigation privilege can exist in communications between opposing parties. As such, I find that section 12 has no application to these records.

By way of summary, I find that Records 1, 5, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41 and 47 qualify for exemption under the section 12 solicitor-client exemption.

ADVICE OR RECOMMENDATIONS

The Municipality submits that Records 2, 3, 4, 7, 10, 11, 22, 62, 71 and 72 are exempt from disclosure under the discretionary exemption in section 7(1) of the *Act*. This section states:

> A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

> . . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

A number of previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)*

(December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)].

Record 2 is a report containing recommendations from a consultant retained by the Municipality with respect to the acceptance of tenders received in response to its call for tenders in October 1999. The record clearly contains very detailed recommendations about the successful bidder on the project. As such, I have no difficulty in finding that Record 2 qualifies for exemption under section 7(1).

Record 3 is a similar piece of correspondence addressing the recommendations of the Municipality's consultants with respect to the award of the contract to the appellant. I find that Record 3 also qualifies for exemption under section 7(1).

Record 4 is a report prepared by a consultant for the Municipality addressing certain engineering difficulties encountered during the course of the construction project. The report makes certain recommendations regarding alternative methods of dealing with the problems encountered. As such, I find that Record 4 also qualifies for exemption under section 7(1).

Record 7 is a "summary of field work" which was prepared by the Municipality's consulting engineers from on-site diaries kept at the location of the construction project. Based upon my review of the information contained in Record 7, I find that it does not include any "advice or recommendations" as that term has been defined in previous orders of the Commissioner's office. Accordingly, I find that Record 7 is not exempt from disclosure under section 7(1). As I have found that Record 7 is also not exempt under section 12 and no other exemptions have been claimed to apply, it will be ordered disclosed to the appellant.

Record 10 consists of a letter dated May 18, 2000 from the Municipality's engineering consultants to its Director of Environmental Services regarding a reference check conducted at the time the appellant was awarded the construction contract. Record 10 refers specifically to certain recommendations made to the consulting engineers by the references. As the references are not employees or officers of the Municipality or consultants retained by it, I find that the advice or recommendations contained in this record does not qualify for exemption under section 7(1) of the *Act*.

Records 11, 22, 71 and 72 do not contain any information which would qualify as "advice or recommendations" for the purposes of section 7(1). These records do not, therefore, qualify for exemption under that section.

Record 62 is a letter from one of the suppliers of equipment to be installed in the completed filtration plant. In this letter, the supplier expresses his concerns and makes certain suggestions with respect to how to manage these concerns. The supplier is not, however, either an officer or employee of the Municipality or a consultant retained by it. As such, the suggestions from the supplier which are contained in Record 62 cannot be exempt from disclosure under section 7(1).

To summarize, I find that Records 2, 3 and 4 contain information which qualifies for exemption under section 7(1) of the *Act*.

THIRD PARTY INFORMATION

The Municipality submits that Records 6, 10, 11, 20, 21, 22, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 73, 74, 75, 76, 77 and 78 qualify under the mandatory exemption in sections 10(1)(a) and (c) of the *Act*. For a record to qualify for exemption under sections 10(1)(a), (b) or (c), the Municipality must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 10(1) will occur.

[Orders 36, P-373, M-29 and M-37]

The Court of Appeal for Ontario, in upholding Assistant Commissioner Tom Mitchinson's Order P-373 stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words **"detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)]

The Submissions of the Parties Regarding Sections 10(1)(a) and (c)

The Municipality's representations on the application of the section 10(1)(a) and (c) exemptions are not detailed or specific to each record. Rather, with respect to Records 42 to 65, the Municipality simply states that the "documents provide commercial or financial information about the lien claimants claims against [the appellant]." They go on to add that:

> release of the correspondence will be prejudicial to the lien claimants. Clearly the documentation reveals positions adverse in interest to [the appellant] and the third parties could reasonably expect to find themselves the subject of a harassment lawsuit. This is a very negative position to be in.

With respect to Records 66 to 70, the Municipality reiterates that these documents contain "information about various sub-trades and the status of their work. Such information has a financial component and the release of the information would be prejudicial to the claims of those entitled against [the appellant]."

The appellant has not made any reference whatsoever to the third party information exemptions in sections 10(1)(a) or (c).

Findings

Record 6 contains reference to an overdue account owed to a truck rental firm by the appellant. I find that I have not been provided with any evidence to demonstrate that the disclosure of this information to the appellant could reasonably be expected to cause prejudice to the competitive position or result in undue loss or harm to the rental firm indicated therein. While the information may qualify as commercial information within the meaning of section 10(1), and may have been supplied to the Municipality by the rental company, I am not satisfied that its disclosure can reasonably be expected to give rise to any of the harms contemplated by sections 10(1)(a) or (c). Accordingly, I will order that Record 6 be disclosed to the appellant.

Record 10 is a summary of the recommendations of the references provided by the appellant to the Municipality at the time of the awarding of the construction contract. In my view, this record does not contain any of the types of information outlined in section 10(1) and it is not, therefore, exempt under that section.

Record 11 is an eight-page "operational description" for the Port Carling Water Treatment Plant which was prepared by the manufacturer of the equipment for the Municipality. This record clearly contains technical information within the meaning of section 10(1). The covering e-mail which is attached to the record also explicitly indicates that the record is being supplied to the Municipality "with the understanding that it is not to be reproduced or otherwise communicated to any third part[y] or used in any manner detrimental to the interest of [the manufacturer]." I

further find that, owing to the technical nature of the information contained in the record, its disclosure could reasonably be expected to result in harm to the competitive position of the manufacturer. As all three parts of the section 10(1) test have been met with respect to Record 11, I find that it is exempt from disclosure.

Records 20 and 21 are letters to the Municipality's Commissioner of Engineers and Public Works from its consulting engineers describing their efforts to locate certain requested records, including the construction schedules prepared by the appellant. In my view, these records do not contain information which fits within the types of information described in section 10(1); nor do these records contain information supplied by any third parties, either implicitly or explicitly. As a result, Records 20 and 21 are not exempt under section 10(1). As I have also found that they are not exempt under section 12, they should be disclosed to the appellant.

Records 22, 42 to 46, 48 to 70, 72 and 73 contain information relating to the claims of various suppliers, sub-trades and others involved in the construction project against the appellant and /or the Municipality. Records 74 to 78 involve the documentation of the claim instituted by the Municipality against the performance bond company and also contain details of the claims of lienholders and other suppliers and sub-trades. I find that these records contain information which qualifies as "financial" or "commercial" information for the purposes of section 10(1). In addition, this information was supplied to the Municipality by each of the suppliers and sub-trades.

I have not, however, been provided with any evidence to indicate that the information was supplied with an expectation of confidentiality, either implicit or explicit. Further, the Municipality has not provided the kind of "detailed and convincing" evidence required to uphold a finding that the harms contemplated by sections 10(1)(a) or (c) could be reasonably expected to occur should the records be disclosed. I cannot agree with the argument put forward by the Municipality that the disclosure of the information contained in the records would result in any "undue" loss or gain by the suppliers and sub-trades. The fact that the appellant may choose to commence litigation against these third parties is, in my view, speculative at best and cannot reasonably be expected to result in undue loss to them. Similarly, I find that the disclosure of the information contained in these records would not prejudice significantly the competitive position of the third party suppliers and sub-trades or interfere significantly with their contractual or other negotiations. The supplied information contained in these records is well-known to the appellant as it forms the basis for the third parties' claims against his construction firm. The information is included in other documents which have been disclosed to the appellant including various lien claims registered against the construction project.

I find that the Municipality has failed to satisfy me that the disclosure of the information contained in Records 22, 42 to 46, 48 to 70, 72 or 73 could reasonably be expected to result in the harms contemplated by sections 10(1)(a) or (c).

Similarly, the evidence tendered in support of its contention that the interests of third party suppliers and sub-trades would be prejudiced by the disclosure of the information in Records 74 to 78 is insufficient for me to make such a finding. Specifically, I find that the Municipality has not satisfied me that the disclosure of the information in each of these documents could

reasonably be expected to result in frivolous or harassing lawsuits by the appellant against each of these firms, thereby harming their competitive position or result in undue loss or gain to them.

Summarizing my findings with respect to the records to which the Municipality has applied the section 10(1) exemption, I find that only Record 11 qualifies under this section.

ORDER:

1. I order the Municipality to disclose Records 6, 7, 10, 20, 21, 22, 42, 43, 44, 45, 46, 48 to 78 and 79 to the appellant by providing him with copies by **February 26, 2002** but not before **February 21, 2002.**

2. I uphold the Municipality's decision to deny access to Records 1, 2, 3, 4, 5, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 23 to 41 and 47.

3. In order to verify compliance with Provision 1 of this order, I reserve the right to require the Municipality to provide me with a copy of the records disclosed to the appellant.

Original signed by: January 22, 2002
Donald Hale
Adjudicator