



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1555

Appeal MA-010364-1

Township of Southgate



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NATURE OF THE APPEAL:

This is an appeal from a decision of the Township of Southgate (the Township), under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester had sought access to the letter sent to the Township's solicitors regarding an opinion on how to ban biosolids in the Township, as well as the response to that letter.

The Township located several letters from and to its solicitors on the issue identified in the request. In its decision, the Township denied access to the records, relying on the discretionary exemption under section 12 (solicitor-client privilege) of the *Act*.

Mediation through this office did not result in a resolution of the issues, and the matter was referred to adjudication. The Township was sent a Notice of Inquiry, inviting it to make representations on the facts and issues raised by the appeal. It did not make any representations. The requester (now the appellant) was then provided with an opportunity to make representations, and did. I decided that the Township should be given an opportunity to submit reply representations on the issue of waiver of the solicitor-client privilege, raised by the appellant, and to that end, I sent it the appellant's representations. The Township provided me with reply representations on that issue.

RECORDS:

The records consist of a letter from the Township's solicitors to the Township dated May 23, 2001, a faxed memo from the Township to the solicitors (with attachments) dated May 26, 2001, a letter from the solicitors to the Township dated May 28, 2001, a letter from the Township to the solicitors dated July 30, 2001, a faxed memo from the solicitors to the Township dated July 30, 2001, a faxed memo from the Township to the solicitors (with attachment) dated August 10, 2001, and a faxed memo from the solicitors to the Township dated August 21, 2001.

DISCUSSION:

The only issue in this appeal is whether section 12 applies to exempt the records from disclosure.

Section 12 states:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 12 to apply, it must be established that one *or* the other, or both, of these heads of privilege apply to the records at issue. I am satisfied that only solicitor-client communication privilege is relevant on the facts of this case.

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].

The Supreme Court of Canada has described this privilege 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 appellant is a member of the Ad Hoc Advisory Committee on Biosolids, appointed by the Council of the Township to seek out information about biosolids and make recommendations to Council on the issue. The Committee is comprised of the Mayor, two councillors, and four other members, including the appellant. The appellant states that as a member of this committee, he made a request that a legal opinion be sought on how the Township might place a moratorium on the spreading of biosolids in the Township. In fact, it appears from the material before me that

this request was incorporated into the report of the Committee to Council, which report recommends that “Council seek legal and planning advice” on the issue.

Council did make a request to its solicitors for an opinion, and an opinion was provided. This is the record dated May 23, 2001. Following this, there was further correspondence between the Township and the solicitors on the same issue, which is reflected in the other records.

The appellant submits that the Committee of which he is a member is a part of Council, and on that basis, he is entitled to have access to the solicitors’ opinion. Further, he also believes that the Committee, as the source of the request for an opinion, is the client. As a member of that Committee, he is entitled to the same access to the opinion as the Councillors who are members of the Committee.

I am satisfied that the “client” in this case is the Township, and not the Committee. It is apparent from the correspondence that the solicitors’ opinions are addressed to the Township, either to the Mayor and the members of the Council directly, or through the Treasurer-Deputy Clerk. I do not preclude the possibility that a Committee of a Council may be a “client” in a given circumstance, and I do not have to decide whether it is within the powers of an ad hoc committee of Township Council to retain a solicitor to provide a legal opinion. I am satisfied, on the facts of this case, that the Township itself sought out the legal opinion, and that the opinion was provided to the Township and not the Committee. In the overall context, this is not surprising, since it is Council that must decide what action, if any, to take in response to the recommendations of the Committee.

Further, I do not accept the submission that the Committee is a “part” of the Council, and that the members of the Committee are therefore clients of the solicitor on this basis. Under the *Municipal Act*, the powers of municipal corporations, which include Townships, are exercised by councils, which consist of elected members. I have no basis for concluding that by joining an ad hoc committee struck by Council, the appellant has become a member of Council entitled to exercise the same powers and receive the same information given to the elected members of Council.

I find that all of these records form part of the “continuum of communications” between solicitor and client referred to in *Balabel v. Air India*, above. They reflect an exchange of correspondence arising initially out of a request for advice on the question of biosolids. In some of the records, advice is specifically provided by or requested of the solicitor. In other cases, information is passed by one to the other as part of the process of keeping each side informed so that advice may be sought and given as required.

I therefore conclude that the records qualify for the solicitor-client privilege exemption in section 12 of the *Act*. It remains for me to determine whether the Township has waived this privilege.

Waiver

The appellant submits that solicitor-client privilege has been waived in this matter.

Actions of an institution, in this case, the Township, may constitute waiver of solicitor-client communication 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.)].

Strictly speaking, since the client is the “holder” of the privilege, only the client can waive it. However, the client’s waiver of the privilege can be implied from the actions of the client’s solicitor. Legal advisors have the ostensible authority to bind the client to any matter which arises in or is incidental to the litigation, and that ostensible authority extends to waiver of the client’s privilege. [J. Sopinka et al., *The Law of Evidence in Canada* at p. 663. See also: *Geffen v. Goodman Estate* (1991), 81 D.L.R. (4th) 211 (S.C.C.); *Derby & Co. Ltd. v. Weldon (No. 8)*, [1991] 1 W.L.R. 73 at 87 (C.A.)].

Waiver has been found to apply, for example, where a record was disclosed to the requester [Order P-341; upheld on judicial review in *General Accident Assurance Co. v. Ontario (Information and Privacy Commissioner)* (March 8, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.)] and where a record was disclosed to another outside party [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)].

The appellant submits that since his original request in this matter, he has met with the Mayor on two occasions. On both of those occasions, the Mayor told him that he had left a copy of the solicitors’ opinion “on the table” so that it may be read by the press and by the appellant. It is not clear whether the appellant was aware of the Mayor’s actions at the time; in any event, the appellant did not read the opinion and there is no indication that any other person read the opinion.

The Mayor of the Township denies that he made any such statements to the appellant. The Clerk Administrator of the Township further submits that it is policy to discuss solicitors’ letters in closed session, and no copies of these letters are distributed to Council members. The Mayor would have had to obtain a copy of the solicitors’ opinion from her, which he did not.

From the submissions, it appears that the particular record which is the focus of these submissions is the letter of May 23, 2001 from the solicitor to the Township.

Clearly, there is a factual difference here. The appellant asserts that the Mayor intended to provide him with an opportunity to read the solicitors’ opinion, and the Township asserts that this did not happen. After reviewing the matter, however, I am satisfied that it is not necessary

to resolve this factual difference. Even if I accept the appellant's submissions about the Mayor's actions, it is not clear to me that waiver of the privilege has been established.

Even if I accept the appellant's submissions, the facts are that the Mayor at one time had the intention to allow the appellant to read the solicitors' opinion, no actual disclosure was made in accordance with that intention, and the Township subsequently disavowed that intention. Even if the Mayor intended to waive the solicitor-client privilege on behalf of the Township, that intention changed before any disclosure was made. In the appeal before me, the Township takes the position that the record in question is subject to solicitor-client privilege, and that it does not wish to waive that privilege.

I have not been referred to any authorities, either orders of this office or judicial decisions, which have found waiver of solicitor-client privilege in like circumstances. Neither have I become aware of any on my review of the matter. Even if I accept the appellant's version of the events, I would be reluctant to find waiver of such an important privilege in the absence of a more clear foundation in the law.

Without making any general finding, therefore, about the scope of the doctrine of waiver of solicitor-client privilege, and whether it can apply in the absence of any actual disclosure, I am not satisfied that it has been established in the circumstances of this case.

In view of my finding, it is unnecessary for me to make a determination on the Township's submission that the Mayor does not have authority to waive solicitor-client privilege on behalf of the Council. It should be noted, however, that as the designated "head" under the *Act*, the Mayor has the full authority to make specified decisions under the *Act*, including the discretionary decision about whether to apply the solicitor-client privilege exemption (see sections 3 and 12).

ORDER:

I uphold the Township's decision to deny access to the records.

Original signed by: _____
Sherry Liang
Adjudicator

July 4, 2002 _____