



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1571

Appeal MA-020058-1

Regional Municipality of Halton



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NATURE OF THE APPEAL:

This appeal concerns a decision of the Regional Municipality of Halton (the Municipality) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had sought access to records relating to flooding that had occurred as a result of a storm in May 2000.

The Municipality identified one responsive record, Report CA-48-00, dated November 9, 2000, issued by the Director of Legal Services and Corporate Counsel and submitted to the Chairman and Members of the Planning and Public Works Committee. The Municipality issued a decision letter denying access to this record pursuant to sections 6(1)(b) (closed meetings) and 7(1) (advice or recommendations) of the *Act*.

Following the issuance of its decision letter, the Municipality located another record – a consultant’s report, dated November 2000, entitled “Flooding Investigations, May 12–13, 2000 Storm Event, Regional Municipality of Halton” (the consultant’s report). The Municipality informed this office that it was denying access to the consultant’s report in its entirety pursuant to sections 6(1)(b), 7(1) and 12 (solicitor-client privilege) of the *Act*.

The appellant appealed the Municipality’s decision to this office.

During the mediation stage of this appeal, the appellant indicated that he was no longer interested in Report CA-48-00. Accordingly, this record is no longer at issue in this appeal.

Also during mediation, the appellant narrowed the information sought in the consultant’s report to those pages that deal specifically with the geographic area set out in the appellant’s request. In addition, the Municipality indicated that it was no longer relying upon sections 6(1)(b) and 7(1) of the *Act* to deny access to the consultant’s report and that it was relying exclusively on section 12 of the *Act* to deny access to it.

I initially sought written representations from the Municipality through a Notice of Inquiry. The Municipality submitted representations that were shared in their entirety with the appellant. I then sought representations from the appellant using the same Notice of Inquiry and the appellant submitted representations in response.

RECORD:

The record at issue consists of four pages of the consultant’s report that deal specifically with the geographic area mentioned in the request.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Introduction

The Municipality claims that the relevant portions of the record are exempt under section 12, 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.

Section 12 encompasses two heads of common law privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. The Municipality submits that the record is subject to litigation privilege because “[t]he ‘dominant purpose’ for the creation of this record was a contemplated or real apprehension of litigation.”.

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 *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth’s: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

The “dominant purpose” test was enunciated [in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169] as follows:

A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

It is crucial to note that the “dominant purpose” can exist in the mind of either the author or the person ordering the document’s production, but it does not have to be both.

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[For this privilege to apply], there must be more than a vague or general apprehension of litigation.

The Municipality submits:

[The Municipality’s] **insurers** hired the consultants in order to determine [the Municipality’s] liability for the sewer back-ups. The intention of the report was to allow the [Municipality’s] insurance adjusters to properly assess whether the [Municipality] was liable to pay all or a part of the claims that the [Municipality] received.

.....

The report was prepared in contemplation of litigation. There was a very strong prospect of litigation at the time [the consultants were] hired (i.e. litigation was not just a vague or theoretical possibility). The [c]onsultant[s] were hired only after numerous claims were made as a result of the May 12-13 storm.

.....

There are two cases being litigated as a result of claims . . . There is still the potential that other legal proceedings will commence as a result of the May 12-13 storm.

The appellant does not address in his representations the merits of the litigation privilege exemption claimed by the Municipality. The appellant states that his request for a copy of the consultant's report is based on the following:

I strongly disagree with the response, regarding liability, received from [the insurance adjuster] . . . I firmly believe that the report that I have requested unequivocally supports my claim for compensation for damages to my property...

...[N]otwithstanding all the referenced cases contained in the [Notice of Inquiry]..., from my vantage point, the report would support my contention that the [Municipality] is liable and should compensate me for the cost of repairs and replacements to the property...

Previous orders of this office have addressed the application of litigation privilege to reports prepared in similar circumstances. In Order M-285, Adjudicator Holly Big Canoe found that reports prepared by an insurance adjuster for the City of Kitchener in response to damage claims for flooded homes by homeowners met the dominant purpose test and fit within the scope of litigation privilege. Adjudicator Big Canoe found that the dominant purpose for the preparation of the reports in that case was to prepare for anticipated litigation between the City and the homeowners. In Order M-502, Adjudicator Donald Hale found that a report prepared by the City of Timmins' Public Works Department following two incidents in which the appellant's home was damaged by a sewer back-up, met the dominant purpose test. In that case, Adjudicator Hale found that the report was intended to inform the adjuster retained by the City's insurer of the occurrence and the possible cause of the problems with the sewer on the appellant's street. As the City had been put on notice by the appellant that a claim was being made, Adjudicator Hale found that there was a reasonable prospect of litigation at the time the report was prepared. Accordingly, Adjudicator Hale concluded that litigation privilege applied.

Consistent with Orders M-285 and M-502, I am satisfied that the consultant's report was prepared on behalf of the Municipality for the dominant purpose of using it in reasonably contemplated litigation against the City. It is clear that the Municipality's insurer sought the report to assess the Municipality's liability, in possible future litigation, for damages caused by

the storm. In fact, some of the contemplated litigation has already come to fruition, and the Municipality has established that there is a reasonable prospect of further claims.

Accordingly, I find that the record falls within the litigation privilege aspect of section 12 of the *Act*.

ORDER:

I uphold the decision of the Municipality to deny access to the record at issue on the basis of section 12 of the *Act*.

Original signed by: _____
Bernard Morrow
Adjudicator

_____ September 23, 2002