



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1616

Appeal MA-010200-3

City of Vaughan



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NATURE OF THE APPEAL:

This is an appeal from a decision of the City of Vaughan (the City), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) made a request for access to various records relating, among other things, to work undertaken at specified street addresses in the City.

The background to this request has been described in Order MO-1488. Briefly, the appellant and the City have been engaged in a longstanding dispute which has its origin in changes made to the driveway of the appellant mother's neighbour, and then the construction of a retaining wall by the appellant's mother. The dispute has resulted in legal proceedings, including a charge of contravention of a local by-law against the appellant's mother, building permit processes, and then the initiation of a Small Claims Court action by the appellant's mother against the City. The appellant has been acting as his mother's agent in this action.

Initially, the City issued a decision letter in which it took the position that the request was frivolous and vexatious. That decision was appealed, and Order MO-1488 was issued, in which the City was ordered to provide the appellant with a decision on access. A subsequent appeal on the issue of a fee estimate was settled during mediation. The City then issued a decision granting partial access to the records located, and applying the exemptions found in sections 6(1)(b), 12 and 14 of the *Act* to deny access to the remaining information. The City also informed the appellant that specific records do not exist within certain departments, and that the Mayor's and Councillors' constituency records are not subject to the *Act*.

The appellant appealed the City's decision with respect to certain parts of the request and decision. During mediation through this office, some issues were narrowed or clarified. The only exemption remaining in issue is section 12 of the *Act* (solicitor-client privilege), and its application to about 174 pages of records located in the office of the City Solicitor.

I sent a Notice of Inquiry to the City, initially, inviting it to make representations on the facts and issues in this appeal. The representations of the City were then shared with the appellant, who was also invited to and has made representations in response.

RECORDS:

The records at issue are described in the appendix to the Notice of Inquiry in this appeal, and consist of memoranda, correspondence, material attached to correspondence (such as newspaper articles and draft documents), email messages, meeting minutes, and legal documents.

It should be noted that Record 29 was included in the appendix of records at issue attached to the Notice of Inquiry. However, during the course of mediation, the appellant accepted the application of section 6(1)(b) to those records identified by the City as falling within this exemption, including Record 29. Record 29 is therefore not at issue in this appeal.

DISCUSSION:

The sole issue in this appeal is whether section 12 of the *Act* applies to exempt the records from disclosure.

Section 12 of the *Act* 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.

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].

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].

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.

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.

In Order MO-1337-I, the Assistant Commissioner elaborated on the potential application of the *Nickmar* test:

The types of records to which the *Nickmar* test can be applied have been described in various ways. Justice Carthy referred to them in *General Accident* as “public” documents. *Nickmar* characterizes them as “documents which can be obtained elsewhere”, and [*Hodgkinson*] calls them “documents collected by the ... solicitor from third parties and now included in his brief”. Applying the reasoning from these various sources, I have concluded that the types of records that may qualify for litigation privilege under this test are those that are publicly available (such as newspaper clippings and case reports), and others which were not created with the litigation in mind. On the other hand, records that were created with real or reasonably contemplated litigation in mind cannot qualify for litigation under the *Nickmar* test and should be tested under “dominant purpose”.

Litigation privilege applies only if the document was made or obtained with an intention that it be confidential in the course of the litigation (see Order P-1551).

Representations of the parties

The City has submitted that section 12 applies to exempt all of the records at issue. The City submits that all of the records constitute confidential communications between the City’s solicitor and its outside counsel, retained to defend the City in the lawsuit filed by the appellant. The City also makes specific submissions with respect to some records, which I refer to below. The appellant does not respond to the City’s submissions on the application of section 12, and instead provides his reasons for seeking access to the records. He states, in essence, that the City has treated his mother unfairly, and that he requires access to the records to support the claim brought on behalf of his mother against the City.

Analysis

I am satisfied that, with specific exceptions, all of the records in this appeal meet the requirements for exemption under section 12, in that they constitute confidential communications between a solicitor and client made for the purpose of obtaining professional legal advice, or were created for the dominant purpose of existing or reasonably contemplated litigation.

The background to this request has been described in Order MO-1488, and summarized above. At the time of the request, the appellant had launched an action in Small Claims Court against the City on behalf of his mother. The records at issue are found in the files of the City Solicitor. Many of the records consist of correspondence between the City's solicitors and Council, the City's outside counsel and the City's solicitors, or City staff and its solicitors, or memoranda to others or to the legal file. They either constitute confidential communications between the City and its lawyers (both internal and external) for the purpose of giving or receiving legal advice or were created for the dominant purpose of aiding in the conduct of the litigation between the City and the appellant. I find that these records qualify for exemption under section 12. Further, there is no evidence to indicate that privilege in these records has been waived.

Some of the records consist of accounts submitted by the City's outside counsel. This office has found in previous appeals that a solicitor's statement of account can be characterized as a confidential written communication between a lawyer and client and, as such, qualifies for solicitor-client communication privilege and is exempt from disclosure under section 12 (see Orders PO-1714, PO-1822 and MO-1465). The statements of account are clearly on their face subject to solicitor-client communication privilege. In the absence of any evidence to indicate that the City has waived privilege in these records, I conclude that they are exempt in their entirety under section 12.

I recognize that some of the records which I have found exempt were not originally created with the intention that they be confidential. Examples of this are newspaper clippings, correspondence sent from the appellant to the City, or the City to the appellant, and a record created by the court office. However, to the extent that these have been incorporated into and referred to in communications between the City and its solicitors, or clearly sent between the City and its solicitors, they constitute part of the "continuum of communications" between a solicitor and client for the purpose of giving or receiving legal advice, and are covered by the solicitor-client communication privilege.

The only material to which I have found section 12 does not apply are Records 6 and 28. Record 6 is a letter from the appellant to an official with the City. There is nothing in the material before me or on the face of this record to establish that it forms part of a confidential communication between solicitor and client (or is part of a lawyer's "working papers" under *Susan Hosiery Ltd.*). Record 28 is a letter sent by the City's solicitor to this office in relation to a prior appeal (MA-000369-1) and does not qualify for the section 12 privilege. Whether or not privilege might have attached to it, the privilege has been waived through disclosure to an outside party. It should be noted, in any event, that during the course of that appeal, the appellant was provided with a copy of the letter (see Order MO-1488).

In conclusion, I find that all of the records in dispute qualify for exemption under section 12, with the exception of Records 6 and 28.

With respect to those records which qualify for exemption under section 12, I am also satisfied that the City has exercised its discretion appropriately in refusing access to them.

ORDER:

1. I order the City to disclose to the appellant Records 6 and 28.
2. I uphold the decision of the City to withhold access to the remaining records.
3. Disclosure of the records is to be made by sending a copy of them to the appellant by **March 26, 2003**. In order to verify compliance with the provisions of this order, I reserve the right to require the City to provide me with a copy of the records disclosed to the appellant pursuant to Provision 1.

Original signed by:
Sherry Liang
Adjudicator

February 26, 2003