



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1653

Appeal MA-020129-2

The Regional Municipality of Niagara



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NATURE OF THE APPEAL:

This is an appeal from a decision of the Regional Municipality of Niagara (the Region), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) sought access to the notes taken by the Region's Director of Legal Services (the solicitor) at a specified meeting.

The Region located one page of notes, and denied access to them citing the discretionary exemption in section 12 of the *Act* (solicitor-client privilege). The appellant appealed from this decision.

I sent a Notice of Inquiry to the Region, initially, inviting it to make representations on the facts and issues in dispute. Those representations were shared with the appellant, who has also provided representations. The Region subsequently submitted reply representations in answer to those of the appellant.

CONCLUSION:

The record is not exempt under the section 12 solicitor-client privilege exemption.

RECORD:

The record consists of a Note to File, dated June 1, 1998. It contains the solicitor's handwritten notes of a meeting involving the solicitor and four other individuals.

DISCUSSION:

The sole issue raised by this appeal is the application of the section 12 solicitor-client privilege exemption to the record.

SOLICITOR-CLIENT PRIVILEGE

Introduction

Section 12 of the *Act* 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 privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. The Region does not claim that the litigation privilege applies to the record.

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].

Advice given by lawyers on matters outside the solicitor-client relationship, however, is not protected. In *R. v. Campbell* [1999] 1 S.C.R. 565, the Supreme Court of Canada discussed the application of the solicitor-client privilege in circumstances where a lawyer may have multiple responsibilities:

It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected. A comparable range of functions is exhibited by salaried corporate counsel employed by business organizations. Solicitor-client communications by corporate employees with in-house counsel enjoy the privilege, although (as in government) the corporate context creates special problems: see, for example, the in-house inquiry into "questionable payments" to foreign governments at issue in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), per Rehnquist J. (as he then was), at pp. 394-95. In private practice some lawyers are valued as much (or more) for raw business sense as for legal acumen. No solicitor-client privilege attaches to advice on purely business matters even where it is provided by a lawyer. As Lord Hanworth, M.R., stated in *Minter v. Priest*, [1929] 1 K.B. 655 (C.A.), at pp. 668-69:

[I]t is not sufficient for the witness to say, "I went to a solicitor's office." ... Questions are admissible to reveal and determine for what purpose and under what circumstances the intending client went to the office.

Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

Representations

In response to the Notice of Inquiry, the Region states that the whole purpose of the meeting on June 1, 1998 was for agents and employees of the Region to directly communicate with the solicitor and obtain his professional legal advice.

In response, the appellant states that the meeting of June 1, 1998 was an internal meeting for the purpose of reviewing the tenders received in response to a public tender. The appellant asserts that the meeting was the first formally organized meeting to review tenders by the Region's tender review team, which includes the solicitor. He submits that "nothing that was discussed at this meeting was used in any legal manner, legal letter, reports, opinions or advice".

Further, the appellant submits that according to evidence given under oath by representatives of the Region, the solicitor was the only person present at the meeting who kept notes, the purpose of the meeting was to generally discuss tenders received on May 12, 1998 for a specified project, none of the witnesses who attended the meeting and testified for the Region said that the meeting

was to strictly obtain legal advice or opinions and that the “gist was that participation by [the solicitor] was normal in any tender review meeting such as this one and that this meeting was a normal tender review meeting which occurs on most tenders and nothing unusual.”

Among other things, the appellant also asserts that the Region’s conduct following the meeting indicates that the meeting was not for the purposes of any legal matters, but for the normal purposes of a tender review. The only actions arising from the meeting were actions by the engineers and the non-lawyer attendees. He states that the meeting was a general meeting to review a tender and was not held merely to obtain legal advice. If any legal advice arose, it was not the predominant purpose of the meeting.

I provided the Region with the appellant’s representations, inviting the Region to respond to them. In my letter to the Region, I also referred it to the passage from *R. v. Campbell*, above. In response, the Region sent a letter in which it set out the views of the solicitor, as follows:

The whole purpose of the meeting on June 1, 1998 was for agents and employees of the Region (my client) to directly communicate with me and obtain my professional legal advice as solicitor for the Region.

I don’t think it could be any clearer that my notes of that meeting fall squarely within the scope of the solicitor-client communication privilege...

I made the note to file as part of a standard risk management procedure of documenting all dealings with my client, whether litigation might follow or not.”

Analysis

It is important to note that the onus of proving the applicability of an exemption rests on the Region. In the case of solicitor-client privilege, communications made for the purpose of legal advice are privileged, as are the solicitor’s working papers directly related to seeking, formulating or giving such advice. However, as discussed in *R. v. Campbell*, above, not every communication between a solicitor and a client is privileged, and whether or not a particular communication is made for the purpose of seeking legal advice depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered. Although the same may apply to private solicitors, it is not uncommon for lawyers employed within government institutions to fulfill a variety of functions, to be called upon to provide advice in both legal and non-legal capacities, and to attend meetings which may not be directly related to the giving or seeking of legal advice.

In applying the solicitor-client privilege in this context, this office has found that the mere presence of a solicitor at a meeting does not imply that the meeting relates to the soliciting, giving or receiving of legal advice, nor does the mere presence of a solicitor at a meeting “automatically spread an ‘umbrella of privilege’ over all of the proceedings”: see Orders P-1363 and Order P-1052.

Accordingly, in this case, the Region must establish that the record at issue is a communication made for the purpose of seeking legal advice, having regard to the nature of the relationship between the solicitor and the Region, the subject matter of the advice sought and the circumstances under which it was sought and rendered.

The solicitor is clearly a legal advisor to the Region, and no doubt is called upon to give legal advice to the Region in his capacity as Director of Legal Services. However, this does not end the matter, for I must examine whether his legal advice was called upon in connection with the matters discussed at the meeting of June 1, 1998. Although the Region states that the “whole purpose” of the meeting on June 1, 1998 was for agents and employees of the Region to communicate with the solicitor and obtain his legal advice, it does not provide any information establishing on what matters the solicitor’s legal advice was sought. The notes themselves do not refer to any legal advice being sought or given at this meeting. Further, the appellant provided information refuting the Region’s assertions about the purpose of the meeting. He referred to evidence given by the Region’s own representatives in other legal proceedings that suggested that the meeting was a normal tender review meeting whose primary purpose was to review tenders. The record itself tends to support the appellant’s view of this meeting, and the Region failed to provide any information which addressed the appellant’s points.

All of this could support a conclusion that the solicitor was in attendance at the meeting of June 1, 1998 *in the event* that legal advice might be required in the course of reviewing the tenders. However, I find that the meeting did not ultimately pertain to the giving or receiving of any legal advice, nor do the notes of that meeting.

Although the Region has not asserted this, the possibility exists that the solicitor took notes of the meeting with a view to giving legal advice at a subsequent time. In Order P-1620, Assistant Commissioner Tom Mitchinson upheld the application of solicitor-client privilege to counsel’s meeting notes where either the contents of the notes or the representations of the parties establish a relationship between the notes and their potential subsequent use in providing legal advice. In the circumstances of this case, however, neither the notes of the meeting nor the representations before me indicate that any legal advice followed from the discussion at the meeting. Further, although the notes refer to one matter of follow-up involving the solicitor, I am not satisfied that this alone proves that the notes were created in the context of the seeking of legal advice.

In sum, it has not been established that the notes are directly related to the seeking, formulating or giving of legal advice. I find that section 12 of the *Act* does not exempt them from disclosure. As no other exemptions have been claimed, I will order their disclosure.

ORDER:

1. I order the Region to disclose the record to the appellant by **June 25, 2003**.

2. In order to verify compliance with my order, I reserve the right to require the Region to provide me with a copy of the record disclosed to the appellant.

Original signed by: _____
Sherry Liang
Adjudicator

_____ May 28, 2003