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

ORDER MO-1677

Appeal MA-010286-3

The Regional Municipality of Niagara

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NATURE OF THE APPEAL:

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

> Copies of all invoices, letters, memos, e-mail, notes, reports and records of any kind dealing in any way with complaints, both contemplated and made to the Law Society of Upper Canada against [a named individual].

The requester provided the Region with a signed consent from the named individual authorizing the disclosure of his personal information to the requester.

The Region initially refused to process the request on the basis that it was frivolous and vexatious under section 4(1)(b) of the *Act*. The requester appealed this decision. On June 11, 2002, I issued Order MO-1548 in which I did not uphold the Region's decision that the request was frivolous and vexatious and ordered it to issue the requester a decision letter respecting access to the requested information. Order MO-1548 resolved Appeal Number MA-010286-1, as well as several other appeals involving the same parties. The Region then refused to issue the requester a decision letter until such time as it received an updated consent form from the named individual. The requester provided the Region with the consent form and thereby resolved Appeal Number MA-010286-2.

On November 12, 2002, the Region issued the decision letter ordered in Order MO-1548, denying access to the records on the basis that they were subject to the solicitor-client privilege exemption in section 12 of the *Act*. The Region also provided a fee estimate in the amount of $107.66.

The requester, now the appellant, appealed the Region's decision, arguing that the records are not subject to the exemption in section 12 and that the quantum of the fee estimate was inappropriate.

During the mediation stage of the appeal, the Region agreed to reduce the amount of the fee to $100.15. The appellant also took issue with the completeness of the search for responsive records undertaken by the Region. Accordingly, this issue was added to the appeal at the mediation stage.

I decided to seek representations from the Region initially as it bears the onus of demonstrating the application of the exemption claimed for the records, the appropriateness of the fee estimate and the reasonableness of its search. In response to the Notice of Inquiry, the Region made submissions that were shared in their entirety with the appellant. He in turn also made representations in response to the Notice. The Region was then given the opportunity to provide me with reply representations, and it did so.

The records at issue consist of memoranda, correspondence and legal accounts rendered by the Region's outside counsel.

DISCUSSION:

PRELIMINARY ISSUE:

ARE RECORDS 1, 2, 3 AND 4 RESPONSIVE TO THE REQUEST?

Records 1, 2, 3 (covering page only) and 4 are memoranda from the Region's Director of Legal Services to its Deputy Clerk and Corporate Records Manager. These memoranda recount the efforts made by the Director to locate records responsive to the appellant's initial request in this matter. In my view, these records do not relate to the subject matter of the request and were intended solely to advise the Deputy Clerk as to results of the searches undertaken by the Director for responsive records.

As a result, I find that Records 1, 2, 4 and the covering page to Record 3 are not responsive to the request as they are not "reasonably related" to the subject matter of the request as originally framed by the appellant. Rather, these records represent internal documentation created by the Region in response to the appellant's request.

In my view, these documents fall outside the scope of the request and I will not address them further in this order. I will now proceed to address the application of section 12 to the attachments to Record 3, Records 5, 6, 7, 8, 9 and the legal accounts which comprise Record 10.

SOLICITOR-CLIENT PRIVILEGE

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 contains two branches as described below. The Region must establish that one or the other (or both) branches apply. The Region submits that the records qualify for exemption under section 12 on the basis that they are subject to common law solicitor-client communication privilege.

Branch 1: common law privileges

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- 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 or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

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 privilege applies to "a continuum of communications" between a 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 [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also 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].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Branch 2: statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of institution counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice."

Representations of the parties

In its initial representations, the Region submits that the records at issue represent part of the "continuum of communications" between it and its counsel. It argues that these records are confidential communications between a solicitor and client, or their agents or employees, made for the purpose of obtaining legal advice. It submits that all of the records were "created or received by agents and employees of [the Region] to directly communicate with the solicitor and to obtain professional legal advice."

In 1999, the appellant commenced a legal action against the Region. This litigation concluded in December 2002. From the middle of 1999 until September 2001, the appellant was represented by counsel. A number of complaints were initiated by the Region's solicitors to the Law Society of Upper Canada about the manner in which the appellant's counsel was conducting himself. The appellant submits that because so much of his counsel's time was being spent responding to these complaints about his professional conduct, he was unable to properly represent the appellant. As a result, the appellant was required to retain other legal representation.

The appellant submits that, contrary to the assertions of the Region that its solicitors were not acting at the Region's instructions in bringing these complaints to the attention of the Law Society, the costs of doing so must have been passed on to the Region by its solicitors. The appellant adds that:

> I am attempting to obtain independent verification by a review of records that none of the costs incurred pursuing professional complaints against [the appellant's counsel] were passed on to the Region of Niagara by the fees claimed by the law firm. Further, I wish to determine for myself through an independent review of records that Niagara was not instructing or condoning the pursuit of these unmeritorious professional complaints against [his counsel], at my expense and at the expense of my case.

The appellant's submissions on this issue conclude by stating:

> Any responsive records should not be governed by Solicitor-Client privilege since no such relationship existed relating to the complaints to the Law Society according to Niagara and their solicitors. According to both of them, the Solicitors were acting on their own accord and not under instructions to make complaints. Therefore, no records should exist. If records do exist then they are not Solicitor-Client related and relate directly and solely to [his former counsel] personally (and to [the appellant] financially) and should be disclosed.
>
> Niagara is currently seeking these legal fees from my company as well as against [his former counsel]. Niagara has produced its solicitors time dockets and waived privilege on those documents. I have asked for the production of the original

> dockets submitted at the time each fee was invoiced, which should be responsive records contained within document #12 on the schedule of documents produced.

In its reply submissions, the Region responded to the appellant's statements as follows:

> While the Region did not retain, instruct or pay the solicitors to make the complaint to the Law Society, and while the solicitors were indeed acting on their own in respect of the complaint, the complaint arose strictly out of the actions of the named individual [the appellant's counsel], including records he generated, were part of the litigation and impacted the Region and the Region's relationship with its solicitors. All records that were part of the litigation were (and still are) subject to solicitor-client communication privilege. The solicitors were obliged to communicate with the Region in respect of the litigation. Some of that communication of necessity dealt with the actions of the named individual and records relating to those actions. All such communication was part of the litigation and part of the solicitor-client relationship. [Region's emphasis]

Findings

Attachments to Record 3

One of the attachments to Record 3 is an affidavit sworn on March 9, 2000 by the Region's counsel and filed in support of several motions brought before the Court seeking its directions in resolving several contentious issues surrounding the taking of evidence at the Examinations for Discovery in the action referred to above. The other attachment to Record 3 is a copy of the consent order issued by the Court on May 15, 2000 resolving these issues.

The Region has not provided me with any evidence referable to these attachments which would indicate they were provided to it by counsel in the context of its solicitor-client relationship. By their very nature, I find that these attachments are public documents which are readily available in the court file pertaining to this action. I have not been provided with any evidence to substantiate a finding that the attachments to Record 3 are subject to solicitor-client communication privilege and will order that they be disclosed to the appellant.

Records 5 and 6

Records 5 and 6 are handwritten notes taken following several telephone conversations between the Region's Director of Legal Services and its outside counsel. These notes relate in detail the nature of the communications which took place on January 10 and 24, 2000. Based on the contents of the notes, I am satisfied that their disclosure would reveal confidential communications between a solicitor and client which relate directly to the provision of legal advice. As such, I find that they fall squarely within the ambit of solicitor-client communication privilege and are, accordingly, exempt from disclosure under section 12.

Records 7, 8 and 9

Records 7, 8 and 9 are letters dated February 10, 22 and 24, 2000 from the Region's counsel to staff with the Law Society of Upper Canada. The letters were copied to the Region's Director of Legal Services. At the time the letters were written, the Region had retained the services of counsel to assist in the conduct of the litigation described above. In my view, the letters which form Records 7, 8 and 9 in this appeal represent part of the "continuum of communications" between a solicitor and client as contemplated by the decision in *Balabel*. These communications were intended to keep the Region "informed" as to the status of the complaints to the Law Society involving the appellant's counsel. The complaints arose as a result of the Region's counsel's concerns about the conduct of the appellant's counsel and the manner in which he was conducting the appellant's lawsuit. As a result, I find that the letters formed part of the on-going communication of information between solicitor and client, regardless of the fact that they were addressed to the Law Society. In my view, these communications are subject to solicitor-client communication privilege and are, therefore, exempt under section 12.

Record 10

Record 10 represents a number of invoices rendered by the Region's outside counsel for the legal services which it provided relating to the litigation involving the appellant. The appellant indicates that, as part of the Region's efforts to obtain payment of its costs following the conclusion of the litigation, he has been provided with the law firm's time dockets. The appellant has provided me with copies of two pages of the 97 pages of dockets which were disclosed to him. I note, however, that while the dockets are similar to the legal accounts which comprise Record 10, they do not contain identical information.

Access to legal accounts prepared by outside counsel have been the subject of a number of recent decisions of the Commissioner's office. In Orders PO-1714, PO-1822 and a decision of the Federal Court of Appeal, *Stevens v. Canada (Privy Council)* (1998), 161 D.L.R. (4^{th}) 85, it was found that bills of account sent to an institution by a solicitor were subject to solicitor-client communication privilege under section 19 of the provincial *Act*, which is substantially similar to section 12 of the Act. On this basis, I find that each of the legal accounts which comprise Record 10 are similarly exempt from disclosure as they represent confidential communications between a solicitor and client.

The appellant argues that because he has obtained access to copies of the law firm's time dockets as a result of the Region's efforts to collect the costs awarded to it in the litigation, any privilege which may exist in the legal accounts rendered by the law firm has been waived by the Region. As noted above, the time dockets disclosed to the appellant are similar in nature but not identical to the legal accounts rendered to the Region by the law firm during the course of its retainer. In my view, the disclosure of similar information in the form of time dockets by the Region to the appellant does not constitute waiver of the privilege which exists in the legal accounts. I have found that the legal accounts are confidential communications between the solicitors and the Region and are subject to solicitor-client communication privilege. I do not agree that the

disclosure of time dockets containing similar information for the purpose of collecting the Region's costs represents a waiver of privilege in other documents, in this case the accounts.

I conclude by reiterating that Records 5, 6, 7, 8, 9 and 10 are exempt from disclosure under section 12. The attachments to Record 3 do not, however, qualify for exemption under this section and I will order that they be disclosed to the appellant.

FEE ESTIMATE

The Region provided the appellant with a fee estimate of $100.15 to cover the cost of processing the request. This fee includes:

- 2.75 hours of search time at $30 per hour for a total of $82.50;
- 0.5 hours to prepare the records for disclosure for a total of $15;
- photocopying charges of $1.60; and
- mailing costs of $1.05

The appellant has paid the sum of $63.50 leaving a balance of $36.65 outstanding.

The appellant objects to having to pay for search time to locate records which were received from or sent to his counsel, as these records fall outside the scope of the request. He also objects to being required to pay a fee for records relating to the Region's response to his request. I found above that these records fall outside the scope of this appeal and they do not form part of the records remaining at issue.

The Region submits that it located 52 records in the office of its Director of Legal Services which are responsive to the request. Access was granted to six records and denied to a further 46 documents, which were later reconfigured and renumbered as Records 1 to 10. The Director states that the requested records were not filed specifically with reference to the appellant's counsel or the litigation. "Accordingly, knowledgeable staff had to search through the possible files to locate records specifically responsive to this request. That search took 2.75 hours."

The Region goes on to indicate that the records retrieved were then examined to determine whether the information they contained was subject to any of the exemptions in the *Act* and that this activity, which it describes as preparing the record for disclosure, took a further half-hour. Additional minimal fees for photocopying and mailing charges were also included.

Based on the submissions of the Region and my review of the records, I find that the fees charged for the initial search, photocopying and mailing costs were reasonable. The records were not retrievable without conducting a search, owing to the manner in which they were filed. Contrary to the assertions of the appellant, the responsive records do not include correspondence to and from his counsel and relate directly to the requested information.

I do not, however, uphold the Region's charge for decision-making as part of its preparation time. In Order 4, former Commissioner Sidney Linden made the following observations about charges for preparation of records for disclosure:

> The fee estimate for preparation included costs associated with both decision making and severing, and I feel this is an improper interpretation of subsection 45(1)(b). In my view, the time involved in making a decision as to the application of an exemption should not be included when calculating fees related to preparation of a record for disclosure. Nor is it proper to include time spent for such activities as packaging records for shipment, transporting records to the mailroom or arranging for courier service. In my view, "preparing the record for disclosure" under subsection 45(1)(b) should be read narrowly.

Accordingly, I will reduce the amount of the allowable fee by $15 to reflect this finding, leaving a balance of $21.65 remaining. I uphold the Region's decision to charge a fee in this amount only.

REASONABLENESS OF SEARCH

The appellant argues that additional records beyond those identified by the Region ought to exist. He submits that "no e-mail records are identified though I understand that the institution uses e-mail extensively for general communication" and that "no drafts of letters are identified, though I am aware that the institution uses marked-up drafts extensively before arriving at final produced documents."

The Region submits that its search was conducted by the Director of Legal Services as he was in the best position to "understand the actions or functions which the responsive records support." It submits that "It was reasonable to assume that no other office within [the Region] would hold responsive records based on the information requested."

Based on my review of the original request, the representations of the Region and the records themselves, I am satisfied that the searches conducted by the Region were reasonable. The scope of the original request was quite specific and I find that the Region has identified records which respond to it. While other responsive records may exist in the files of its outside counsel, they may not have been shared with the Region and will not, accordingly, be included in its record-holdings. I conclude that the Region's search for responsive records was reasonable and I dismiss that part of the appeal.

ORDER:

1. I order the Region to disclose the attachments to Record 3 to the appellant by providing him with a copy by **September 15, 2003.**

2. I uphold the Region's decision to deny access to Records 5, 6, 7, 8, 9 and 10.

3. I uphold the Region's decision to charge a fee in the amount of $85.15.

4. I find that the Region conducted a reasonable search for records responsive to the request and dismiss this part of the appeal.

5. I find that Records 1, 2, 4 and the covering memorandum to Record 3 fall outside the scope of the request.

August 25, 2003

Donald Hale
Adjudicator