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

ORDER MO-1678

Appeal MA-020253-1

Municipality of Central Elgin

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NATURE OF THE APPEAL:

The Municipality of Central Elgin (the Municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records maintained by the Municipality or its predecessor, the former Township of Yarmouth, with respect to:

1. the operation of the St. Thomas Dragway or London Motorsports Park; and

2. all complaints regarding or consideration or assessment of noise, dust, light or odour being emitted by the St. Thomas Dragway or London Motorsports Park.

The Municipality located a number of responsive records and granted access to some of them. Access to the remaining records was denied on the basis that they were exempt from disclosure under the discretionary exemptions in sections 6(1)(b), 7 and 12 of the *Act* and the mandatory exemption in section 14(1) of the *Act*.

The requester, now the appellant, appealed the decision to deny access to all of the records.

During the mediation stage of the appeal, the Municipality agreed to disclose additional records to the appellant. In turn, the appellant agreed to limit the scope of his appeal to certain records. As a result, those records to which the Municipality has applied sections 6(1)(b) and 7 are no longer at issue and I need not address the possible application of these exemptions to them. The Municipality prepared an Index of Records and shared it with this office and the appellant. When referring to records in this order, I will use the numbers assigned by the Municipality in its index.

As further mediation was not possible, the matter was moved to the adjudication stage of the appeal process. I requested and obtained the representations of the Municipality initially. I shared the non-confidential submissions of the Municipality, along with a copy of the Notice of Inquiry with the appellant, who also made representations. These submissions were then shared with the Municipality, which provided additional representations by way of reply.

RECORDS:

The records remaining at issue consist of various correspondence, memoranda, legal accounts, draft pleadings, notes, facsimile transmissions and e-mails. They consist of the following:

> Records 5 to 13, 22, 25, 28, 30, 32, 34, 36, 37, 39, 41, 49, 50, 52, 56, 60 to 63, 65, 67, 69, 70, 141, 143 to 147, 149, 150, 153, 156 to 159, 162 to 168, 171 to 173, 178, 179, 182, 192, 193, 195, 197, 200, 203 to 212, 216 to 219, 221, 222, 223, 228, 232, 235 to 239, 242, 245 and 247 to 252.

The records relate to communications and correspondence between the Municipality and two law firms retained to represent a number of ratepayers residing in the Municipality in a nuisance action against the appellant's client.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

General principles

Introduction

The Municipality takes the position that all of the records are exempt from disclosure under the discretionary exemption in section 12 of the *Act*. This section 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, a common-law solicitor-client privilege and a statutory privilege. In the discussion below, I will consider both branches together unless it is necessary to distinguish between the two.

Solicitor-client privilege under section 12 encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

The Municipality submits that a solicitor-client relationship exists between it and the law firms conducting the litigation despite the fact that it is not a party to the litigation. It argues that because that relationship exists, the records at issue are subject to common law solicitor-client communication and litigation privilege. The appellant takes the position that no solicitor-client relationship exists between the Municipality and the law firms with which it has corresponded and that, as a result, no solicitor-client privilege can attach to documents passing between them. Further, it argues that any privilege that may have attached to communications between the solicitors and the plaintiffs to the litigation was waived when it was communicated to the Municipality.

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.)].

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.*].

The purpose of this privilege is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co.*].

Courts have described the "dominant purpose" test 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 [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co.*; see also Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.)].

To meet the "dominant purpose" test, there must be more than a vague or general apprehension of litigation [Order MO-1337-I].

Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if counsel has selected them for inclusion in the lawyer's brief [Order MO-1337-I; *General Accident Assurance Co.*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

Representations of the Appellant

In support of its contention that the records are not subject to exemption under the section 12 solicitor-client privilege, the appellant argues that:

> The Municipality is not currently engaged in any litigation concerning the St. Thomas Dragway or London Motorsports Park. The Municipality cannot properly be privy to any retainer between the plaintiffs in the existing litigation and their lawyers. Past decisions of the Information and Privacy Commission clearly establish that communications the Municipality may have had with lawyers acting for parties to the litigation and copies of communication between the plaintiffs and their lawyers shared with the Municipality lie outside of the scope of section 12 of *MFIPPA*. Conversely, if the Municipality has retained lawyers to consult on the matter, but has shared its deliberations and communications with third parties (i.e. the plaintiffs) any privilege has been waived.
>
> . . .
>
> For a solicitor-client communication privilege to apply there must be a solicitor-client relationship between the Municipality and the law firms with which it has corresponded, **and** the records at issue must have been generated by or for the Municipality for the purpose of seeking or receiving legal advice. While the Municipality cites the law on solicitor-client privilege at length in its response to the Notice of Inquiry, it does not explain how it can make a claim to that privilege based on its relationship with [two named firms]. The Municipality notes in its submissions that a group of citizens from Sparta, Ontario (which it refers to as the plaintiffs) are engaged in litigation concerning matters outlined in my request, and suggests that the correspondence contained in the records under appeal relates in some way to that litigation. It also mentions on page 12 of its submissions that it has a solicitor-client relationship with [a named lawyer]. However, there is no explanation of how or why these facts allow the Municipality to claim solicitor-client privilege in respect of correspondence relating to the litigation. The Municipality is not a plaintiff or a party to any such litigation, and cannot claim privilege based on the retainer between the citizen's group and its lawyers. The Municipality does not claim that it had a solicitor-client relationship with [the first law firm] and although it does state that both the Municipality and the plaintiffs have retained [a named lawyer with a second law firm], it does not explain how the respective retainers with [the second lawyer] allow the Municipality, as a non-party to the litigation, to claim privilege over the plaintiff's documents. If the citizens' group, or their lawyers, wish to involve the Municipality in their discussions and deliberations on the issues in the litigation, they do so at the risk that those discussions may become public upon a request made under the *MFIPPA* legislation. This does not change simply because both have retained the same law firm on unrelated briefs.

The appellant also relies on the decisions of Senior Adjudicator David Goodis in Orders MO-1338 and MO-1413 in which he found that:

> In my view, the solicitor-client privilege exemption is designed to protect the interests of a government institution in obtaining legal advice and having legal representation in the context of litigation, not the interests of other parties outside government. Had the Legislature intended for the privilege to apply to non-government parties, it could have done so through express language such as that used in the third party information and personal privacy exemptions at sections 10 and 14 of the *Act*.
>
> . . .
>
> Thus, where the client in respect of a particular communication relating to legal advice is not an institution under the *Act*, the exemption cannot apply.

The appellant goes on to submit that:

> Whatever the Municipality's (undisclosed) interest in the litigation over the St. Thomas Dragway and/or London Motorsports Park may be, it does not permit the Municipality to claim a section 12 exemption over records exchanged between the Municipality, the Plaintiffs and the Plaintiffs' lawyers. No details of the [two named law firms] retainers have been shared with me. However, I assume that the Municipality is not itself the client of those firms for the purposes of the litigation, since a municipal government's undisclosed involvement as a party to litigation between citizens would constitute the sort of 'officious intermeddling' which the laws of Ontario prohibit as the tort of maintenance. Order MO-1413 makes it clear that no 'joint privilege' claim can be made merely because the Municipality is interested or sympathetic to the legal position of the Plaintiffs.

The appellant concludes his representations by submitting that even if the Municipality is found to be a client of the law firms, "its decision to share its otherwise privileged communications freely with the Plaintiffs would constitute waiver, and the records should nevertheless be disclosed." The appellant adds that:

> Past decisions of the Information and Privacy Commission suggest that only where a municipality and a third party engage in 'joint consultation with a solicitor for their mutual benefit' will solicitor-client privilege attach to their communications. In all other circumstances, the decision of a municipality to share communications with its lawyers with a third party, or vice versa constitutes waiver of privilege.
>
> . . .
>
> Only the party that the [two named law firms] were 'retained by' – the party their professional responsibilities 'relate to' – has the right to claim privilege. Whether

> that is the citizens' group or the Municipality, the lack of any 'joint interest' between the Municipality and the Plaintiffs means that privilege has been waived and all records at issue should be disclosed.

Representations of the Municipality

The Municipality asserts that a solicitor-client relationship exists between it and the law firms for the purposes of the litigation despite the fact that it is not a party to it. As a result, it submits that the records, which it characterizes as communications between itself and the law firms, fall within the ambit of the solicitor-client exemption in section 12.

In its reply submissions, the Municipality sets out in detail a chronology of events surrounding the initiation of the legal proceedings which are the subject of the records at issue. The Municipality submits that a joint retainer was entered into between the first law firm and the citizens' group and itself for the conduct of the litigation. A second, written retainer agreement was entered into between the second law firm on the one hand, and the citizens' group and the Municipality on the other, following a decision to terminate the retainer with the first law firm.

The Municipality takes the position that although it is not a party to the litigation, it has a proper joint retainer with the law firms and that communications passing between them are protected by both solicitor-client and litigation privilege for the purposes of section 12. It argues that a "joint retainer" exists arising from an oral retainer agreement between it, the plaintiffs and the first law firm and a written retainer involving the second firm. These retainer agreements created a solicitor-client relationship involving the law firms and the Municipality. Accordingly, the Municipality argues that communications passing between them are subject to litigation and solicitor-client communications privilege.

Analysis

Solicitor-Client Relationship

Based on the submissions of the Municipality, I find that it had a solicitor-client relationship with both law firms, and therefore, any direct communications between the law firms and the Municipality that relate to obtaining or giving legal advice are subject to solicitor-client communication privilege, and would usually be exempt under section 12 on that basis. In the circumstances of this appeal, the submissions of the appellant raise the question of whether any privilege that otherwise might apply has been waived by sharing the records with the plaintiffs.

"Common Interest" and "Joint Retainer"

As noted, the Municipality's representations assert the existence of a joint retainer of both law firms by it and the plaintiffs. In my view, in order to assess the issue of possible waiver, it is necessary to review the authorities on joint retainer as well as the related but distinct question of common interest. A common interest may exist regardless of which law firm represents the parties, whereas a joint retainer occurs when more than one party retains a single firm to provide joint advice and representation about a legal issue.

"Common Interest"

The starting point for most cases dealing with the question of the "common interest privilege" is the judgement of Lord Denning in the English case of *Buttes Gas and Oil Co. v. Hammer*, [1980] 3 All E.R. 475 (C.A.):

> … I must go on to consider the claim for legal professional privilege. The arguments became complicated beyond belief. Largely because a distinction was drawn between Buttes (who are the party to the litigation) and the ruler of Sharjah (who is no party to it). Such as questions as to who held the originals and who held the copies and so forth. Countless cases were cited. Few were of any help.
>
> I would sweep away all those distinctions. Although this litigation is between Buttes and Occidental, we must remember that standing alongside them in the selfsame interest are the rulers of Sharjah and UAQ respectively. McNeill J thought that this gave rise to special considerations, and I agree with him. There is a privilege which may be called a 'common interest' privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has **other persons standing alongside him who have the selfsame interest as he** and who have consulted lawyers on the selfsame points as he **but who have not been made parties to the action**. Maybe for economy or for simplicity or what you will. All exchange counsel's opinions. All collect information for the purpose of litigation. All make copies. **All await the outcome with the same anxious anticipation because it affects each as much as it does the others. Instances come readily to mind. Owners of adjoining houses complain of nuisance which affects them both equally. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff. An author writes a book and gets it published. It is said to contain a libel or to be an infringement of copyright. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant.**
>
> In all such cases I think the courts should, for the purposes of discovery, **treat all the persons interested as if they were partners in a single firm or departments in a single company.** Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of the anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged.
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> [My emphases in bold.]

In the present appeal, it is clear that although the Municipality and the plaintiffs are all concerned about the noise created by the Dragway, they do not have the "selfsame" interest. For example, the plaintiffs would share in any award of damages, while it appears that the Municipality would not. However, in my view, the fact that the interests are not identical is not a bar to the existence of a common interest in the context of the Canadian authorities.

One such authority is the majority judgement of Carthy J.A. in *General Accident Assurance Co.* (cited above). Mr. Justice Carthy quoted the above passage from *Buttes* with approval, but his later quote (also with approval, at 337-8) from *United States of America v. American Telephone and Telegraph Company*, 642 F.2d 1285 (1980 S.C.C.A. at 1299-1300) indicates that in the context of litigation, "common interest" does not require that those claiming it must be co-parties:

> ... The existence of common interests between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege. **But "common interests" should not be construed as narrowly limited to co-parties.** So long as the transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts. Moreover, with common interests on a particular issue against a common adversary, the transferee is not at all likely to disclose the work product material to the adversary [emphasis added.]

Other Canadian authorities also indicate a broader basis for common interest, which may exist outside the context of litigation privilege and encompass situations involving solicitor-client communication privilege. For example, in *Canadian Pacific Ltd. v. Canada (Competition Act, Director of Investigation and Research)*, [1995] O.J. No. 4148 (Gen. Div.), Farley J. found that common interest privilege could apply to communications by a bank's outside counsel with a third party in the context of a commercial transaction. He formulated the following test for common interest (at para. 27):

> It would also seem to be that a useful test might be whether for there to be a common interest, **would it be reasonably possible for the same counsel to represent both**. It is not necessary that the same counsel actually represent both as there may be, for example, historical reasons not to do so, other interests which might be affected, the desire to have an established loyalty of reporting or perspective, etc.

In *Archean Energy Ltd. v. Canada* (1997), 202 A.R. 198 (Q.B.), common interest privilege was claimed by a group of companies some of whom were shareholders of others, and some of whom were joint venturists with others, in connection with tax advice they had received from a single law firm. The court found that common interest privilege could exist in those circumstances. It stated its finding in this regard as follows:

> I have reviewed each of those documents. **Given that the group of companies shared the law firm for tax advice purposes and so have a common interest in**

> **the privilege claim raised, it is clear that the following documents are privileged as being solicitor client communications, part of a solicitor's brief or the solicitor's work product.** I have heard no claim to waiver or loss of privilege in respect of any these documents. Accordingly, they are privileged . . .
>
> A substantial number of these documents are communications between the law firm which provided the tax advice and other law firms acting for the various clients in their corporate capacities. Such communication does not constitute waiver of privilege in the circumstances of this case. The communication was apparently made for the purpose of obtaining instructions and giving common advice to a common client or group of clients.
>
> I have reviewed the following documents and conclude that they are not privileged. They are not solicitor client communications but are generally reports prepared by one employee of one of the companies in question to a senior employee. …
>
> [My emphasis in bold.]

And in *Pitney Bowes of Canada Ltd. v. Canada*, [2003] F.C.J. No. 311 (T.D.), the court dealt with a situation in which various companies were parties to a complex leasing transaction involving both the purchase and subsequent leasing of railway cars. One law firm represented all the parties at one time or another, "where multiple parties needed legal advice in areas where their interests were not adverse." The Court applied common interest privilege and stated (at para. 18):

> As mentioned above, in these kinds of cases **the real issue is whether the privilege that would originally apply to the documents in dispute has somehow been lost** -- through waiver, disclosure or otherwise. This is a question of fact that will turn on a number of factors, including the expectations of the parties and the nature of the disclosure. I read the foregoing cases as authority for the proposition that in certain commercial transactions the parties share legal opinions in an effort to put them on an equal footing during negotiations and, in that sense, the opinions are for the benefit of multiple parties, even though they may have been prepared for a single client. The parties would expect that the opinions would remain confidential as against outsiders. In such circumstances, the courts will uphold the privilege.
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> [My emphasis in bold.]

In my view, the following factors identified in the foregoing authorities would support a finding of common interest in the circumstances of the present appeal:

- the common of the objectives of the parties;
- the same counsel represents all parties; and

- common interest can apply to both litigation privilege and solicitor-client communication privilege.

In my view, the only factor suggesting that common interest might not apply is the fact that the Municipality is not a party to the litigation. However, this factor is outweighed by the factors favouring a finding that there is a common interest, and I therefore find that the parties do in fact have a common interest in the subject matter for which they retained the two firms.

"Joint Retainer"

As is evident from the foregoing discussion, the existence of a joint retainer, or multiple parties retaining the same law firm for advice on an issue, can be an important factor in finding a common interest. The situation of a joint retainer is explicitly addressed in *obiter* in *Maritime Steel and Foundries Ltd. v. Whitman Benn & Associates Ltd.* (1994), 114 D.L.R. (4th) 526 (N.S. S.C.) The case concerned an engineer's report shared among parties with a common interest who were represented by separate counsel. In the absence of direct authority concerning waiver, the Court reviewed analogous cases and stated:

> … where a solicitor acts for more than one party, communications by either party to such solicitor are privileged and a joint waiver of privilege is required before the contents of such communications may be disclosed. The following quotation from *Corpus Juris Secundum*, 1957, Vol. XCVII at p. 851 illustrates the point:
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> > "Where an attorney's services are rendered to several persons, confidential communications to him with respect to the subject matter of his employment in which all such persons are interested cannot be disclosed unless all join in consenting thereto, and waiver by one defendant does not bind his co-defendant who is represented by the same attorney".

In my view, this authority supports a finding of joint retainer in the present fact situation. I have already found that the Municipality retained both law firms. Having reviewed the circumstances surrounding the retention of the first law firm and the retainer agreement entered into by the plaintiffs and the Municipality with the second law firm, I conclude that the Municipality and the plaintiffs to the action jointly retained the law firms. Therefore, I find that all of them are the clients of the two firms for the purpose of determining whether the solicitor-client exemption in section 12 applies to the records at issue.

What is the impact of a finding that there exists a common interest and a joint retainer?

The appellant relies on the decisions in Orders MO-1338 and MO-1413 to support his contention that any privilege that may have existed in the records in the hands of the client, the plaintiffs, was waived when the information was shared with a non-party to the litigation, the Municipality.

In Order MO-1338, Senior Adjudicator David Goodis reviewed a number of previous orders relating to the question of solicitor-client privilege in situations where privileged information

belonging to a non-institution client is shared with an institution. The following extract is particularly relevant:

> … where the client in respect of a particular communication relating to legal advice is not an institution under the Act, the exemption cannot apply. The only exception to this rule would be where a non-institution client and an institution have a "joint interest" in the particular matter. In Order P-1342, Adjudicator Holly Big Canoe described the principal of "joint interest" as follows:
>
> > It is possible for two or more parties to have a joint interest in a record which could have an impact on solicitor-client privilege. In *Johal v. Billan*, [1995] B.C.J. No. 2488 (B.C.S.C.) the court found that a husband and wife who had consulted the same solicitor for the purpose of drafting wills had waived the privilege between themselves, but maintained this privilege against third parties who did not share a joint interest with one or both of them. This judgement makes reference to this interest being supported by Mr. Justice Sopinka in the text Law of Evidence in Canada, at page 638:
> >
> > > Joint consultation with one solicitor by two or more parties for their mutual benefit poses a problem of relative confidentiality. As against others, the communication to the solicitor was intended to be confidential and thus is privileged. However, as between themselves, each party is expected to share in and be privy to all communications passing between either of them and their solicitor, and accordingly, should any controversy or dispute subsequently arise between the parties, then, the essence of confidentiality being absent, either party may demand disclosure of the communication. ... Moreover, a client cannot claim privilege as against third persons having a joint interest with him in the subject-matter of the communication passing between the client and the solicitor.
>
> Although Adjudicator Big Canoe rejected the joint interest argument in Order P-1342, it has been found to apply in other cases. In Order P-49, for example, former Commissioner Sidney Linden found a joint interest between the Ministry of Community and Social Services and a home for the aged funded by the Ministry in the context of a dispute over the performance of a construction contract.

In his decision in Order MO-1338, Senior Adjudicator Goodis found that the solicitor-client exemption is intended to protect the interests of institutions, unless an institution has a "joint

interest" with another party. And in Order MO-1413, Senior Adjudicator Goodis rejected a "joint interest" argument and commented that "[i]t may be that the Town and the second affected person both shared similar views of what the final outcome of the litigation should be. However, this alone is not sufficient to establish a joint interest as that term has been interpreted in previous cases." In my view, the facts in Order MO-1413 are distinguishable from those in the present appeal for the following reasons:

- the Municipality's interest in the litigation extends far beyond simply a "similar view" of its final outcome;
- the Municipality initiated contact with the first law firm;
- the Municipality is paying the accounts of the law firms; and
- the Municipality clearly maintains a keen interest in the progress of the litigation and continues to be kept apprised of its progress.

I have already stated my conclusion that the Municipality has established the existence of a common interest between it and the plaintiffs and that it has entered into a joint retainer with the plaintiffs for the conduct of the litigation. As a result, I find that the Municipality is asserting its own privilege rather than that of the plaintiffs, as required by Order MO-1338. In the circumstances of this appeal, and in view of the existence of a common interest and joint retainer, I also find that the disclosure of the contents of the records to either the plaintiffs or the Municipality by the law firms did not constitute waiver of privilege because the Municipality stands as a client in the same fashion as do the plaintiffs to the action.

I will therefore now determine whether the records meet the requirements for exemption under section 12 under the "General principles" outlined above at the outset of this discussion.

Are the records exempt from disclosure under section 12?

The Municipality submits that the majority of the records represent confidential communications between its counsel and the Municipality and/or the plaintiffs to the action. These communications consist of correspondence, e-mails, facsimile transmissions and various attachments to them, along with invoices for legal services provided and draft pleadings. It argues that these communications fall within the ambit of the solicitor-client communication privilege as they are direct communications of a confidential nature between solicitor and client made for the purpose of providing or seeking legal advice.

The Municipality goes on to submit that other records satisfy the criteria for litigation privilege as they were specifically created or obtained for the lawyer's brief for existing or contemplated litigation. It indicates that these records were prepared by or for counsel retained by the Municipality for use in giving legal advice, in contemplation of litigation or for use in litigation. It goes on to add that the dominant purpose for the creation of these records was to assist counsel in giving legal advice with respect to the contemplated and later the existing litigation involving the Municipality and the plaintiffs to the action. The Municipality delineated the specific records to which it has claimed both solicitor-client communication privilege and litigation privilege in its initial representations.

As regards the appellant's representations, I have already addressed the common interest and joint retainer issues discussed above. Other than the appellant's argument about maintenance of the plaintiffs' actions by the Municipality, the appellant does not comment on the potential application of section 12 to the records other than to state that the exemption cannot apply to them.

In my view, it is not necessary for me to decide whether the Municipality's actions amount to maintenance, and I expressly decline to do so. In *McIntyre Estate v. Ontario (Attorney General)*, (2002), 61 O.R. (3d) 257, the Ontario Court of Appeal indicates that "champerty and maintenance continue to be actionable in tort in Ontario upon proof of special damages". I have not been provided with any authority to the effect that, even if it were proven, champerty or maintenance would have the effect of barring a person from claiming an otherwise available privilege. In the event of an action for maintenance, it is possible that the Court with carriage of the matter might order production of documents for which privilege had been claimed. In the circumstances of this appeal, however, I find that the appellant's allegations of maintenance are irrelevant to the issue of privilege.

I have carefully reviewed all of the records remaining at issue in this appeal along with the representations of the parties and make the following findings:

- Records 5, 6, 7 (which is the same as Record 162), 8, 9, 10, 12, 22, 25, 28, 30, 34, 37, 39, 41, 49, 50, 56, 60, 61, 62, 63, 65, 67, 70, 141, 143, 144, 145, 146, 147, 149, 153, 156, 157, 158, 165, 166, 168, 171, 172, 178, 192, 193, 197, 204, 207, 208, 209, 211, 212, 216, 217, 218, 219, 235, 237, 239, 245, 247 and 248 are confidential written communications between the solicitors and the Municipality and/or the plaintiffs made for the purpose of giving or seeking legal advice. As such, I find that they fall within the ambit of the solicitor-client communication privilege portion of Branch 1 of the section 12 exemption.

- Records 11, 36, 52, 150, 159, 163, 164 (which is the same as Record 179), 167, 173, 182, 195, 210, 222, 228, 236, 238, 242, 249, 250 and 252 are legal accounts submitted by the two law firms pursuant to their retainer agreements. In Orders PO-1714, PO-1822, PO-2164-I and a decision of the Federal Court of Appeal, *Stevens v. Canada (Privy Council)* (1998), 161 D.L.R. (4th) 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*. I find that each of these records are similarly exempt from disclosure on the basis that they represent confidential communications between a solicitor and client.

- Records 32 and 69 are memoranda to file prepared by the Municipality's Clerk following meetings between the solicitors and the citizens' group prior to the commencement of the litigation. I find that the contents of these records include descriptions of the legal advice received at the meetings from counsel and that their disclosure would reveal the legal advice provided. As such, they are subject to solicitor-client communication privilege. Similarly, the Clerk's memorandum

which forms Record 203 describes both the legal advice received from counsel and the instructions given to counsel by the Municipality in its capacity as the client. I find that this record is also subject to solicitor-client communication privilege and is, accordingly, also exempt under section 12.

- Record 223 is a letter sent by the first law firm to the second law firm describing the legal strategies and advice formulated in the course of the first part of the litigation. I find that this record **consists of or reveals** confidential communications between the first law firm and the Municipality and the plaintiffs respecting the conduct of the litigation and that it is subject to solicitor-client communication privilege. As a result, Record 223 is exempt from disclosure under section 12. Similarly, Record 232 is also a letter from the first law firm to the second attaching a court decision following an unsuccessful motion. I find that this document is subject to litigation privilege as it was created by the original law firm for the dominant purpose of assisting the second firm in the conduct of the litigation.

- Similarly, Record 206 is a covering letter from the second law firm to a law firm in St. Thomas requesting that it **act as that firm's agent for the purpose of filing** certain attached documents with the court in that locality. I find that this record was also created for the dominant purpose of litigation and that it is, accordingly, subject to litigation privilege.

- Records 248 and 251 are e-mails between the Municipality's Clerk and one of the plaintiffs that were copied to the solicitor in which they discuss the appropriateness of a portion of the law firm's accounts. In my view, these communications represent a part of the "continuum of communications" between the solicitor and her clients and as such, fall within the ambit of the solicitor-client communications component of section 12.

These findings dispose of all of the remaining records at issue in this appeal with the exception of Records 13 and 200. I am not persuaded that these records fall within the ambit of the solicitor-client exemption in section 12. As they may contain the personal information of an identifiable individual, I will however evaluate whether they are subject to the mandatory invasion of privacy exemption in section 14(1) of the *Act*.

PERSONAL INFORMATION/INVASION OF PRIVACY

The invasion of privacy exemption in section 14(1) applies only to information that qualifies as "personal information", which is defined in section 2(1) of the *Act* to mean, in part, "recorded information about an identifiable individual". [Order MO-1666]

I have reviewed the contents of Records 13 and 200 and find that they contain the name, address, telephone number and fax number of an identifiable individual. This information qualifies as the personal information of this person under section 2(1)(d) of the definition. In addition, Record 13 outlines a great deal of other personal information about the activities of this individual on

several occasions and the alleged disruption to the enjoyment of his property as a result of noise originating with the dragway. Record 200 also describes certain steps taken by this individual to alleviate the disruption. I find that this information also qualifies as the personal information of this individual within the meaning of section 2(1)(h) of the definition of personal information.

Where a requester seeks personal information of another individual, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies.

In my view, the only exception which may apply in the present appeal is that set out in section 14(1)(f), which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the institution to consider in making this determination. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption.

[Orders PO-2017, PO-2033-I, PO-2056-I and MO-1666]

If none of the presumptions in section 14(3) applies, the institution must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

Neither the Municipality nor the appellant have made specific submissions with respect to the application of either the presumptions under section 14(3) or the considerations under section 14(2) to the personal information contained in Records 13 and 200. The appellant simply indicates that he wishes to rely on the principles and authorities referred to in the Notice of Inquiry. As I have not been provided with any evidence to substantiate a finding that the disclosure of the personal information in these records would *not* constitute an unjustified invasion of this individual's personal privacy, I find that Records 13 and 200 are exempt from

disclosure under section 14(1). In addition, I find that these records are not reasonably severable under section 4(2) in the circumstances.

ORDER:

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

August 26, 2003

Donald Hale
Adjudicator