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

ORDER MO-1707

Appeal MA-020096-2

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, with reference to a Schedule A, "records that identify the following:

- When each document was identified and forwarded to [a named individual] or his department at Niagara.
- When each document was identified and forwarded to [a named firm].
- Copies of all documents that were identified or forwarded and that are not listed on the attached schedule."

The appellant and the Region have been engaged in litigation. Schedule A was produced to the appellant by the Region during the course of the litigation. Initially, the Region issued a decision in which they stated the request was frivolous and vexatious within the meaning of Section 4(1)(b) of the *Act*, and refused to process it. The appellant appealed this decision, and in Order MO-1575, the adjudicator ordered the Region to provide the appellant with a decision regarding access to the requested records.

In response to this order, the Region issued a decision denying access to the records in their entirety under section 12 of the *Act*. The appellant appealed from this decision.

During the mediation of this appeal through this office, the appellant stated that he was not interested in obtaining access to records he had sent to the Region, or the Region had sent to him. Accordingly, a number of records have been removed from the appeal.

I sent a Notice of Inquiry to the Region, initially, inviting it to submit representations on the appeal. This resulted in several new issues being added to the appeal. The Region took the position that the records it had identified are not in fact responsive to the request. Further, the Region provided a new record that contains at least some of the information sought by the appellant. The Region offered to disclose this record to the appellant, as a way of resolving the appeal, but requested a payment of $105.00 from the appellant before disclosing it. Although an offer to settle made during the course of mediation would ordinarily be subject to mediation privilege, in this case, the offer was sent during the course of adjudication, in response to the Notice of Inquiry. The Region did not claim that it was subject to mediation or settlement privilege and, in the circumstances, there is no reason to treat it as so privileged.

The appellant disputed the amount of the fee estimate. He wishes to have access to the new record, without payment of a fee. Subsequently, the Region also claimed the application of section 12 to this new record.

The parties agreed to have access to the new record, as well as the fee estimate, added as issues in this appeal.

Following these developments, I sent a Supplementary Notice of Inquiry to the Region, asking for its additional representations on whether any of the records before me are responsive to the request, and on whether section 12 applies to exempt any of the records from disclosure.

Further, I asked for submissions on the fee claimed by the Region in relation to the new record. I received representations from the Region. These representations were sent to the appellant, with the exception of confidential portions, along with the Supplementary Notice, and the appellant has also provided me with his representations on the issues raised by this appeal.

RECORDS:

There are approximately 30 records in dispute, as listed on the Region's Index of Records, consisting of correspondence, memoranda, notes, draft documents, telephone call records, and reports. In addition, there is a memorandum from the Region's Director of Legal Services to the Regional Clerk, dated January 2, 2003. This memorandum contains information responsive to the first part of the appellant's request.

DISCUSSION:

RESPONSIVENESS

Previous orders of the Commissioner have established that in order to be responsive, a record must be "reasonably related" to the request:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The record itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request [Order P-880; see also Order P-1051].

In Order PO-1730 Commissioner Cavoukian stated:

> In Order P-880, Adjudicator Anita Fineberg determined that records must "reasonably relate" to the request in order to be considered "responsive". She went on to state:
>
> > ... the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the *Act* to assist the requester in reformulating it. As stated in Order 38, an institution may in no

> way unilaterally limit the scope of its search for records. It must outline the limits of the search to the appellant.

Section 24 of the *Act* [the equivalent to section 17 in this appeal] imposes obligations on both requesters and institutions when submitting and responding to requests for access to general records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> ...
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> ...
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

The Region has stated in its correspondence that, apart from the memo of January 2, 2003, "none of the records identified are directly responsive to the specific request". I have reviewed the records listed in the Region's Index of Records. It is not apparent to me why the Region identified them initially as responsive to the request. The request is specifically limited to information about *when* records listed on a Schedule A were forwarded either to the Region's Director of Legal Services, or to outside legal counsel. Rather than searching for this specific information, the Region, it appears, has simply provided copies of some of the records on Schedule A.

However, on my review, it also appears that a few of the records listed in the Index provide the information sought by the appellant. For instance, some records contain date stamps indicating when they were received by the Region's legal department. Some refer to documents in Schedule A as attachments being sent to the Region's Director of Legal Services.

I conclude that some of the records on the Region's Index of Records are responsive to the request. It is unnecessary to list them in detail because of my findings below.

SOLICITOR-CLIENT PRIVILEGE

General principles

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, the "common law" privilege, and the "statutory" privilege. It is unnecessary to consider the application of the statutory privilege separately, as the result in this appeal would be the same under either branch.

Common law privileges

Under the 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.)].

The Index of Records

From my review of the responsive records in the Region's Index of Records, it is apparent that they were sent by employees of the Region to its Director of Legal Services, with the purpose of seeking legal advice. The content of the records establishes the context within which the records

were forwarded to the Director of Legal Services. From that context, I am satisfied that the communications were made under an implicit understanding of confidentiality.

The appellant disputes that the Director of Legal Services acts as a "solicitor" to the Region in the sense encompassed by the solicitor-client privilege. He states that in the context of litigation, the Region was represented by outside counsel, and the Director of Legal Services acted as the contact person between outside counsel and the Region. The appellant submits that the Director of Legal Services is no different than any other regional employee for this purpose and should not be considered the Region's solicitor, or even a solicitor, for the purposes of this request.

I am satisfied that the Director of Legal Services is a legal advisor to the Region, as his title suggests. There is no reason to question that he is employed as legal counsel by the Region, and that at least part of his function is to provide legal services. Further, I find that the circumstances under which the records were forwarded to him involved him in his capacity as legal advisor. Whether or not the Region engages outside counsel for litigation purposes is not relevant to my finding here. It is not uncommon for legal counsel employed by an institution to serve as the contact person where outside counsel is engaged on a legal matter.

The facts of this appeal are distinguishable from those before me in Order MO-1653, in which I did not uphold the application of the solicitor-client privilege to certain meeting notes taken by the Region's Director of Legal Services. In that case, I found insufficient evidence to support the Region's position that the notes were directly related to the seeking, formulating or giving of legal advice. In my decision, I stated that the notes themselves tended to support the appellant's position that the solicitor's presence at the meeting was not related to the purpose of obtaining his legal advice.

In the appeal before me, however, the records demonstrate they were sent to the Director of Legal Services in direct relation to the seeking, formulating or giving of legal advice. It was in this Director's capacity as solicitor to the Region that the records were forwarded to him. I am therefore satisfied that the records are covered by solicitor-client communication privilege, and qualify for exemption under section 12.

I am satisfied that the Region has exercised its discretion appropriately in refusing access to the records in the Index of Records covered by the solicitor-client privilege.

The memorandum of January 2, 2003

I also find that the memorandum of January 2, 2003 qualifies for exemption under the solicitor-client communication privilege in section 12. Although the memorandum was not in itself created for the purpose of giving legal advice, it discloses information about records that were sent in the context of seeking legal advice.

What I must consider, however, is whether the Region has waived the privilege in respect of this memorandum.

Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege

[*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

In this case, the Region has not actually disclosed the memorandum to the appellant. However, it has clearly stated that it is willing to provide a copy of the memorandum to him, upon payment of the fee. It was only after the appellant rejected this offer that the Region claimed the record was exempt from disclosure under section 12. It cannot be said that the Region did not know of the existence of a privilege, since it had already raised the application of section 12 in relation to the records referred to in the memorandum. The Region's actions demonstrate that it did not intend to rely on the privilege, as long as payment of the fee was made. In these circumstances, I am satisfied that the Region's actions constitute waiver of the solicitor-client privilege.

I am supported in my finding by the decision in *Zimmer v. Haaf* (1988), 28 C.P.C. (2d) 317, in which a judge of the Saskatchewan Court of Queen's Bench found a waiver of solicitor-client privilege, stating that "[t]o offer to sell information is to say that there is no desire to keep it secret" (p. 319). This decision has been followed in Ontario, in *Conrad v. Martin*, [1993] O.J. No. 1593 (Gen. Div.).

I therefore find that the Region has waived solicitor-client privilege with respect to the memorandum of January 2, 2003. Section 12 does not apply to exempt this record from disclosure.

FEES

Section 45 of the *Act* provides, in part:

> (1) A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.
>
> (3) The head of an institution shall, before giving access to a record, give the person requesting access a reasonable estimate of any amount that will be required to be paid under this *Act* that is over $25.
>
> (6) The fees provided in this section shall be paid and distributed in the manner and at the times prescribed in the regulations.

The relevant portions of Regulation 823 are:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

In this appeal, the Region asked its Director of Legal Services to review his files in order to respond to the request. The Director did so, and prepared a memorandum containing responsive information extracted from his records. This information relates to the first part of the appellant's request. According to the Director, his search took 3 hours and 26 minutes. The Region has assessed a fee of $105.00, which reflects $7.50 over 3.5 hours.

Having regard to the nature of the request, and the kind of review of files and documents that would be necessary in order to provide information responsive to the request, the amount of time spent by the Director of Legal Services does not seem inappropriate. I find the fee assessed by the Region to be reasonable. The Region is entitled to recover this amount from the appellant.

ORDER:

1. I uphold the fee of $105.00.

2. I order the Region to disclose the memorandum of January 2, 2003 to the appellant, within 15 days of payment of the fee.

3. I reserve the right to require the Region to send me a copy of the record disclosed to the appellant.

Original signed by: November 7, 2003
Sherry Liang
Adjudicator