

# **ORDER MO-1681**

**Appeals MA-020175-1; MA-020176-1 and MA-020177-1**

**Township of Oro-Medonte**

## **NATURE OF THE APPEAL:**

An individual made three requests to the Township of Oro-Medonte (the Township) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to a particular parcel of land. In particular, the appellant wanted access to these records

1. the most recent legal opinion
2. appraisal information
3. a full appraisal report

prepared in relation to the disposal of the land.

The Township refused to provide them to the individual. With respect to Record 1, the legal opinion, the Township claimed the solicitor-client privilege exemption found at section 12 of the *Act*. The Township denied access to Records 2 and 3, claiming the economic and other interests exemption (section 11).

The individual appealed the decisions.

The parties could not resolve any issues through mediation. Instead, two more issues became apparent. First, section 14 (personal privacy) was added as an issue because the records could contain the personal information of others. Furthermore, the individual (now the appellant) was of the view that there was a compelling public interest in the disclosure of the records, so section 16 of the *Act* was also added as an issue.

I sought the representations of the Township first. I shared the Township's non-confidential representations with the appellant who then provided representations in response. The appellant's representations were shared with the Township, which provided a reply. I have carefully considered all representations before me.

## **CONCLUSION:**

Record 1 is exempt from disclosure on the basis of section 12. Section 11(d) applies to exempt Records 2 and 3 from disclosure.

## **ANALYSIS:**

### **SOLICITOR-CLIENT PRIVILEGE**

#### **General**

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 institution must establish that one or the other (or both) branches apply.

The Township relies solely on the first branch – the solicitor-client privilege - to deny access to Record 1, the legal opinion.

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

In particular, the Township claims that the legal opinion is exempt from disclosure because it is a privileged communication between solicitor and client.

### **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.)].

### ***Appellant’s representations***

The appellant claims that she is entitled to see the legal opinion because the Township’s solicitors “represent” her and the other residents with an interest in the land.

The appellant insists that they have become clients of the Township's solicitors because these solicitors have conducted legal business on behalf of them as well as on behalf of the Township. As proof, she provides examples of statements made by the Township about actions to be undertaken by its solicitors.

The appellant also submits that "the municipality who retains the lawyer to work on behalf of other clients for the same legal transaction has the obligation of ensuring that the legal opinion is released to all."

### ***Township's representations***

The Township explains that it received two legal opinions with respect to the subject land. The latter differs from one obtained earlier. The Township submits that both legal opinions were provided in confidence to the Township by the solicitors it retained for the purpose of providing advice about what actions the Township could take in relation to the land.

### ***Findings***

The appellant and the other residents are not clients of the Township's solicitors and are not, therefore, entitled to see the opinion on that basis. There is no evidence before me that the Township's solicitors ever acted on behalf of the appellant and/or the other residents. A solicitor-client relationship between the residents and the Township's lawyers was not created because the Township's solicitors undertook certain actions and the Township agreed to assume certain legal costs to facilitate the transactions between it and the residents. Indeed, many of the documents indicate that the residents sought and obtained *independent* legal advice respecting their rights and interests in the land.

On my review of the material, I am satisfied that the recent legal opinion constitutes direct communications of a confidential nature between a solicitor and client within the framework of obtaining professional legal advice. Therefore, Record 1 qualifies for exemption under section 12, subject to my findings below regarding waiver.

### **Waiver**

The actions by or on behalf of a party may constitute waiver of privilege under either branch [Order P-1342].

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.)].

Waiver has been found to apply where, for example

- the record was disclosed to another outside party [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)]
- the communication was made to an opposing party in litigation [Order P-1551]
- the document records a communication made in open court [Order P-1551]

The appellant contends that the Township has waived any privilege that might apply because the Township has already revealed one solicitor's opinion concerning one of the legal issues related to the disposition of the land. The Township disclosed this opinion in a letter sent to the residents in response to several of their questions about the disposal of the land.

The Township asserts that it never waived confidentiality with respect to the opinions provided to it by its solicitors.

There is no evidence before me that the Township waived privilege at any time. Applying the rationale found in Orders M-1165, MO-1172, MO-1233, I find that the Township disclosed only "the bottom line of the advice" provided to it by its solicitors. In this regard, it is significant that the disclosed statement itself is one sentence long. The actual opinion to which the appellant wants access is a lengthy and detailed document addressing many issues and supported by much documentary evidence. It is evident that the Township disclosed the brief statement in an attempt to maintain the transparency of the process and to provide some meaningful response to the inquiries of residents. Moreover, the evidence is that only Township officials had access to the opinion and that, at all times, the Township treated the opinion as confidential. This type of minimal disclosure in these circumstances does not constitute express waiver of solicitor-client communication privilege.

Therefore, section 12 applies to Record 1.

## **ECONOMIC AND OTHER INTERESTS**

The Township specifically relies on sections 11(d) and (e) of the *Act* to deny access to the Records 2 and 3. These provisions read:

A head may refuse to disclose a record that contains,

- (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution

- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution

Broadly speaking, section 11 is designed to protect certain economic interests of institutions covered by the *Act*. Section 11(d), in addition to (c) and (g), takes into consideration the **consequences** that would result to an institution if a record were to be released. Section 11(e) as well as (a) are concerned with the **type** of the record, rather than the consequences of disclosure. [Order MO-1199-F]

The records to which these exemptions have been applied can be described as follows:

**Record 2** – collectively referred to as the appraisal information, it consists of four separate records

- a Report to Council prepared by the Chief Administrative Officer with five attachments including
  - a Notice of Public Meeting and list of options considered for sale of land
  - letters from two private individuals representing two loose associations of residents (the potential purchasers)
  - the views of these residents as expressed in a position paper with attached signatures of private individuals, and nine other personal letters
  - a plan of subdivision
  - an on site review report
- an appraisal report dated May 25, 2001
- a revised schedule of frontages and uniformed cost sharing estimates
- a Meeting Notice to the Front Lot Residents

**Record 3**

- an appraisal report dated June 7, 2002

**Section 11(d)**

In order to establish the requirements of the section 11(d) exemption, the institution must provide detailed and convincing evidence to establish a reasonable expectation of injury to its financial interests.

In general, the Township argues that both of Records 2 and 3 are considered part of the land negotiations involving the Township and the residents. Disclosure of them would jeopardize negotiations that are still continuing with specific property owners and thereby damage the economic interests of the Township. More specifically, the Township notes that the full costs in the purchase of the land have yet to be agreed to, including the land, survey, appraisal and legal costs incurred by the Township. Therefore, the Township's position is that these dealings are negotiations and, as such, would be harmed by the disclosure of the appraisal.

The Township did, as cited by the appellant, publicly release the appraisal of the property known as “New Park Block A” which related to back lot owners, a copy of which has been provided to the appellant. The Township interprets “negotiations” to be the disposal of surplus lands for compensation. There is no compensation required from residents in the proposed disposition of “New Park Block A”. There is however, compensation required from residents in the proposed disposal of the lands abutting the front lots. For this reason, the Township refused access on the basis of damaging the interest of the Township and jeopardizing negotiations with specific property owners.

Considering first Record 2, I find that all but the Meeting Notice qualify for exemption under section 11(d). Disclosure of the Report to Council, the appraisal report and the revised schedule could be injurious to the financial interests of the Township. I am satisfied that the sale and purchase of the land has not yet been finalised. In accordance with other orders of this office, I find that disclosure of this information prior to a final sale could prove disadvantageous to the Township’s financial interests because it discloses the proposals of the parties, the negotiated terms of the prospective sale and the value placed on the land by the parties. [See Orders PO-1887-I, PO-1894, MO-1645-F, MO-1450]

I also find that Record 3 (and the appraisal report in Record 2) qualifies for exemption under section 11(d) for similar reasons. Indeed, this office has specifically found that the release of appraisal reports could injure the financial interests of an institution because it would weaken the institution’s negotiating position and would interfere with its ability to obtain fair return on the property. [See Order MO-1228]

**Section 11(e)**

For a record to qualify for exemption under section 11(e), each part of the following test must be established:

1. the record must contain positions, plans, procedures, criteria or instructions; and
2. the positions , plans, procedures, criteria or instructions must be intended to be applied to any negotiations; and
3. the negotiations must be carried on currently, or will be carried on in the future; and
4. the negotiations must be conducted by or on behalf of an institution.

[Order M-92]

In Order M-862, former Inquiry Officer Holly Big Canoe described the terms in section 11(e) as “referable to pre-determined courses of action or ways of proceeding”. She distinguished between background information that may have formed the basis for positions taken during

negotiations, and the positions themselves, and found that such background information is not exempt under section 11(e).

The Township contends, without elaboration, that the records contain criteria to be applied to the negotiations that are currently under way.

I am not persuaded by the Township's representations that the record before me contains "positions, plans, procedures, criteria or instructions" intended to be applied to negotiations. As in Order M-862 (followed as well in Order MO-1645-F), while there is much information in the records that may have formed the basis for the positions taken during negotiations, the records themselves do not represent the "positions, plans, procedures, criteria or instructions" applied by the Board.

Accordingly, I find that neither of Records 2 or 3 qualifies for exemption under section 11(e).

### **PERSONAL INFORMATION/ PERSONAL PRIVACY**

In its original decision letter, the Township did not rely on the personal privacy exemption to deny access to any of the records. The Township did argue, however, in response to the Notice of Inquiry, that disclosure of the appraisals would be considered an unjustified invasion of personal privacy under section 14(3)(f) of the *Act* as reference is made to the financial information of individuals.

I have found the appraisals exempt from disclosure under section 11(d), and it is accordingly unnecessary to determine the applicability of section 14 to these records.

Since the personal privacy exemption is a mandatory one, however, and it appears that the Meeting Notice in Record 2, to which no other exemptions have been found to apply, contains the personal information of identifiable individuals, including their names and addresses, I have applied it to that record to exempt it, also, from disclosure.

### **COMPELLING PUBLIC INTEREST**

The public interest override provided by section 16 does not apply to records that qualify for exemption under sections 6, 8, or 12 of the *Act*. Therefore, because Record 1 is exempt from disclosure pursuant to section 12, this concept cannot apply. Section 16 could possibly apply to Records 2 and 3.

For section 16 to apply, however, two requirements must be met. First, there must exist a compelling *public* interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their



government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices (Order P-984).

I have carefully considered the representations of the appellant but find that she has failed to show that there is a compelling public interest in disclosure.

The sale of land by a township is not an insignificant matter and can raise the interest of the public in certain circumstances. Allegations that such a process has been undertaken illegally or inappropriately, for example, might attract the public interest. Such allegations, however, must be at least supported by evidence before I can consider whether a broader public interest has been engaged.

In general, the evidence before me suggests that the subject that gave rise to the request is a matter between the Township and only a particular group of individuals, those residing on the relevant parcel of land. This appellant is clearly unhappy with the possible imminent resolution of the dispute. She would appear to have a "private" interest in the matter. Still, there is insufficient evidence before me to indicate that the public, beyond this appellant, and perhaps the other affected residents, takes a strong interest in this matter, or that the matter itself has a compelling public dimension. [See also, for example, Order PO-1816]

In these circumstances, therefore, I do not find that disclosure of the information would result in a more informed citizenry, or enhance the public's ability to express public opinion or make political choices, as intended by section 16. Accordingly, I find there is no compelling public interest in disclosure of these records.

**ORDER:**

I uphold the decision of the Township.

Original signed by:  
Rosemary Muzzi  
Adjudicator

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August 29, 2003