



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1660

Appeal MA-020371-1

Regional Municipality of Niagara



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BACKGROUND:

In 1998, the appellant, a construction company, was an unsuccessful bidder for two construction projects undertaken by the Regional Municipality of Niagara (the Region). As a result, the appellant commenced civil proceedings against the Region.

The appellant later made requests to the Region, under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for access to a variety of records related to the civil action. The Region denied the appellant's requests, taking the position that they were frivolous or vexatious under section 4(1)(b) of the *Act*. The appellant appealed these decisions.

In Order MO-1548, dated June 11, 2002, Adjudicator Donald Hale allowed the appeals and ordered the Region to issue access decisions to the appellant. On July 9, 2002, the Region brought a judicial review application against this office, seeking an order quashing Order MO-1548. Shortly after, on July 22, 2002, the Region abandoned its application.

In December 2002, the appellant's civil action against the Region concluded.

NATURE OF THE APPEAL:

In August 2002, the appellant submitted a request to the Region for access to records relating to the Region's judicial review application described above.

The Region located responsive records, and denied access to them on the basis of the solicitor-client privilege exemption at section 12 of the *Act*.

The appellant appealed the Ministry's decision to this office.

During the mediation stage of the appeal, the Region decided to disclose a number of responsive records to the appellant.

Mediation was not successful in resolving all of the issues in the appeal, and the matter was streamed to the adjudication stage of the process.

I sought and received written representations from both the Region and the appellant.

RECORDS:

There are 13 records at issue in this appeal, as described in the following table.

Record Number	Description
3	Legal account from a law firm to the Region dated August 30, 2002
4	Letter from a law firm to the Region dated August 1, 2002, enclosing letter dated July 29, 2002 from the Information and Privacy Commissioner to the appellant
5	Legal account from a law firm to the Region dated July 31, 2002
9	Solicitor's notes to file of closed meeting of Council dated July 18, 2002

11	Solicitor's notes to file of closed meeting of Corporate and Financial Services Committee dated July 17, 2002
12	Internal Region e-mail dated July 16, 2002 attaching list of issues to address at meeting of Corporate and Financial Services Committee dated July 17, 2002, and attaching e-mail from a law firm to the Region dated July 15, 2002
13	Internal Region e-mail dated July 16, 2002
14	Solicitor's notes to file of meeting dated July 4, 2002
15	Memorandum to Region Chair from solicitor dated July 2, 2002
16	Two internal Region e-mails dated June 25, 2002
17	Memorandum to Region Chief Administrative Officer from Region Clerk dated June 2, 2002
18	Solicitor's notes to file of telephone conversation with law firm dated June 14, 2002
19	Legal account from a law firm to the Region dated June 20, 2002

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Introduction

The Region claims that all of the records at issue are exempt under section 12 of the *Act*.

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. Branch 1 includes two common law privileges:

- solicitor-client communication privilege; and
- litigation privilege.

Branch 2 contains two analogous statutory privileges.

Here, the Region relies on solicitor-client communication privilege under both branches. The Region does not rely on litigation privilege under either branch. I will first consider the application of common law solicitor-client communication privilege under Branch 1.

Solicitor-client communication privilege under Branch 1

General principles

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.)].

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.)].

Representations

The Region submits that the records “were all created or received by agents and employees of the [Region] to directly communicate with the solicitor and to obtain professional legal advice.”

The appellant provides detailed background regarding the nature of his civil action against the Region, and submits:

The trial was concluded in December 2002, and there currently can be no further issue about whether records can affect the civil action or litigation, since the trial is now over. Legal ramifications or legal consequences, if any, arising from these records are now outside of civil proceedings.

The appellant makes additional submissions that are not relevant to the specific issues in this appeal.

Findings

Based on my review of the records, the representations and the surrounding circumstances, I am satisfied that, with one exception, all of the records at issue in this appeal consist of confidential communications between the Region and its lawyers, or their agents or employees, made for the purpose of giving or receiving legal advice with respect to the conduct of the judicial review

litigation described above. All of these records can be described as forming part of the *Balabel* “continuum of communications” aimed at keeping the lawyer and the client informed. In addition, Records 3 and 5, consisting of legal accounts, are clearly privileged [Order MO-1465; *Stevens v. Canada (Privy Council)* (1998), 161 D.L.R. (4th) 85 (Fed. C.A.)].

Solicitor-client communication privilege does not end with the completion of the matter about which advice was sought [*Ontario (Attorney General) v. Big Canoe* (2002), 62 O.R. (3d) 167 (C.A.)]. Therefore, the fact that the records may no longer have any “ramifications” or “consequences” for the now ended civil proceedings does not alone negate the privilege.

In summary, I find that all 13 records qualify for exemption under section 12 of the *Act*. Accordingly, it is not necessary for me to consider the statutory solicitor-client privilege under Branch 2 of section 12.

ORDER:

I uphold the Region’s decision to deny access to the records at issue.

Original Signed By: _____
David Goodis
Senior Adjudicator

_____ June 11, 2003