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

ORDER MO-1736

Appeal MA-010377-2

District Municipality of Muskoka

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NATURE OF THE APPEAL:

The appellant, a construction company, made a request to the District Municipality of Muskoka (the Municipality) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to payments made by the Municipality to a list of 11 claimants who had registered liens and claim money owing from the appellant, including records disclosing all such payments, and any documents exchanged relating to such payments.

In its decision letter, the Municipality stated that no responsive records exist. The appellant appealed this decision.

During the mediation stage of the appeal, the Municipality identified responsive records, and issued a new decision granting partial access to the records. The Municipality advised that it was denying access to records on the basis of the exemptions for third party information (section 10) and solicitor-client privilege (section 12). The appellant takes the position that the withheld records are not exempt from disclosure.

I sent a Notice of Inquiry to the Municipality and seven companies (I was unable to locate an additional four companies), initially, outlining the facts and issues and requesting written representations. Only the Municipality and one of the companies (the affected party) submitted representations in response. The affected party advised that it consented to the disclosure of the records relating to it. I then sent a copy of the non-confidential portions of the Municipality's representations and the Notice to the appellant, who in turn provided representations.

RECORDS:

There are 51 records at issue, as described in an index prepared by the Municipality and provided to this office and the appellant.

By way of background, in October 1999 the Municipality accepted a tender from the appellant to construct a water treatment plant in Port Carling, Ontario. The project was not completed. As a result, many sub-trades registered liens under the *Construction Lien Act* [the *CLA*] against the Municipality's property and issued statements of claim against the Municipality and the appellant. In a number of its statements of defence in the lien actions, the appellant pleaded:

> [The appellant] states that [the lien claimant's] right to receive payment of any holdback it might be entitled to under the [*CLA*] is conditional upon [the Municipality's] prior release of the statutory holdback owing to the [appellant]. [The appellant] states that [the Municipality] is in possession of the holdback under the prime contract and therefore, that payment of the holdback must come from the [Municipality].

The Municipality explains:

> The holdback that [the appellant] states must come from [the Municipality] is the statutory holdback under the [*CLA*] that is in issue here . . . The purpose of the [*CLA*] is to keep a certain percentage of the job proceeds out of the hands of contractors so that subtrades to that contractor are paid at least some portion of the

amounts owed to them . . . On or about August 31, 2000, [the appellant] requested payment of the order of $600,000.00 for equipment supplied by [two named subtrades/lien claimants].

. . . . .

. . . It is the "general contractor fails to pay its subtrades notwithstanding receipt of funds by the general contractor from the owner" circumstance that the statutory holdback under the [*CLA*] is designed and intended to address. Under the [*CLA*], the Owner (in this instance [the Municipality]) is obliged to retain the statutory holdback for the benefit of the subtrades (in this instance the lien claimants). The general contractor (in this case [the appellant]) is thus prevented from taking the funds received from the Owner and not in turn paying his subtrades. The general contractor would only have a claim to funds if:

1. all liens are fully resolved; and
2. all issues between the Owner and the general contractor are resolved

In the present instance, there are over $1.2 million in liens registered and [the Municipality] is suing [the appellant] for over $5,000,000.00 for default of contract. [The appellant] has no claim to the statutory holdback . . .

As [the Municipality] attempted to negotiate a completion contract for completion of the work, it was made clear by [the appellant's] . . . subtrades that they would not complete the work without an arrangement being made. In order to mitigate its damages, [the Municipality] had an obligation to use the existing subtrades, if possible. [The appellant] is fully familiar with the concept of mitigation and, in fact, put [the Municipality] on notice of the desirability of utilizing existing subtrades . . .

Thus, [the Municipality] was faced with three items:

1. an entitlement by the unpaid lien claimants to a pro-rata distribution of the statutory holdback (section 80(1)(b) – [*CLA*]
2. pleadings by [the appellant] in the lien actions that [the Municipality] was obliged to pay the statutory holdback to the lien claimants; and
3. an obligation to mitigate through use of the existing subtrades in the completion contract if possible.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

General principles

The Municipality claims that all of the records at issue qualify for exemption under section 12 of the *Act*, which 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 solicitor-client privilege, which includes both solicitor-client communication privilege and litigation privilege, and two analogous statutory privileges. The Municipality appears to be relying on the litigation privilege aspect of branch 1 and 2.

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. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (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, through research or the exercise of skill and knowledge, 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

The Municipality submits:

> [The Municipality], through its counsel, negotiated with the various lien claimants. A key issue was what percentage of the holdback each lien claimant was entitled to. It is important to note that under the lien actions, [the Municipality] and the lien claimants are all opposing parties and the

correspondence in issue are discussions between litigants with a view towards resolving the lien claimants' claims to the statutory holdback. The concept of litigation privilege is explored at length in [*I. Waxman & Sons Ltd. v. Texaco Canada Ltd.*, [1968] 1 O.R. 642, affirmed [1968] 2 O.R. 452]. At page 644 Fraser J. states:

> It has long been the law that generally speaking correspondence carried on without prejudice between parties to an action or dispute when carried on a bona fide effort to reach a settlement between the parties is privileged. That rule is subject to certain exceptions some of which will be mentioned but in the present case it does not fall within any of these exceptions as between the plaintiff and the other party to the correspondence.

There are exceptions to the rule (such as the use of "without prejudice" as an attempt to shield threats as was found to be the case in [*Underwood v. Cox* (1912), 26 O.L.R. 303 (Div. Ct.)]. All 51 of the records in issue are correspondence back and forth between the solicitors for the lien claimants and the solicitors for [the Municipality] on a confidential, privileged and without prejudice basis with a view towards resolving the lien claimants' claims to the statutory holdback. All documents are clearly marked CONFIDENTIAL, PRIVILEGED and WITHOUT PREJUDICE. It is important to note that the correspondence is not just privileged as between [the Municipality] and each lien claimant. The lien claimants are competing against each other for a limited amount of money. Any deficiency between the claims (approximately $1.2 million) and the statutory holdback (only $300,000.00) must be paid by [the appellant] and [the appellant] may or may not have funds to pay those amounts.

. . . . .

The discussions were successful and resulted in Conditional Minutes of Settlement (copy of typical documentation enclosed). Copies of the Conditional Minutes of Settlement and related documentation (i.e. Letters of Direction and partial assignments of lien, cheques and cheque requisitions) have been provided to [the appellant].

Accordingly, all documents are covered by litigation privilege and are exempt under section 12 of the *Act*. Further it is of note that the negotiations did result in settlements.

. . . . .

Even though the [two named subtrades] liens have been resolved, it would cause irreparable damage to the justice system if the privileged and confidential without prejudice letters had now to be disclosed. Such a finding would strongly discourage litigants to attempt to settle matters through the use of such techniques. This is particularly true in the present case in that:

1. [The Municipality] is a public agency and, if anyone can obtain without prejudice correspondence after litigation is concluded, [the

> Municipality] could never provide ongoing litigants with the assurances of confidentiality that are necessary to resolve disputes in an economical and mutually satisfactory way; and
>
> 2. Disclosure of the documentation regarding [two named subtrades] at this time would serve no useful purpose. The matters were settled with the consent of all the parties ([the appellant], the lien claimant and [the Municipality) and it would be against public policy to deprive those subject to [the *Act*] and those who deal with such agencies of basic rights afforded all other litigants with no apparent gain.

Enclosed is a copy of the decision of Master Garfield in [*U-Buy Discount Foods Ltd. v. Molinaro,* [1992] O.J. No. 4211 (Gen. Div.)]. Note at page 4 where the Master applies the following extract from Sopinka and Lederman, Law of Evidence:

> In Sopinka and Lederman, Law of Evidence in civil cases (1974), reading thus at pages 96-97:
>
> > It has long been recognized as a policy interest worth fostering that parties be encouraged to resolve their private disputes without recourse to litigation, or, if an action has been commenced, encouraged to effect a compromise without resort to trial. In furthering these objectives, the courts have protected from disclosures communications made with a view to reconciliation or settlement. *In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession that they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming*." [Master Garfield's emphasis]
>
> *The Corporation of the County of York v. The Toronto Gravel Road and Concrete Co.* (1883), 3 O.R. 584 at p. 593-594 (Ch. D.)
>
> > The rule I understand to be that overtures of pacification, and any other offers or propositions between litigating parties, expressly or impliedly made without prejudice, are excluded on grounds of public policy. And the offers in this case were of that character, for the purpose not only of putting an end to existing litigation, but to obtain an amicable arrangement between the parties for the future.

. . . . .

> Thus, it is submitted that the documents are subject to privilege and exempt from disclosure.

The appellant makes extensive submissions on why he disagrees with the Municipality's position that the records are subject to litigation privilege. I agree with the appellant's overall submission that the records are not exempt under section 12, but I do not agree with his reasons. In the circumstances, I find it unnecessary to describe the appellant's submissions.

Analysis

The essence of the Municipality's position is that the records are subject to settlement privilege and, therefore, the litigation privilege aspect of solicitor-client privilege under section 12 applies to them.

In Order PO-2112, after a careful analysis, Adjudicator Donald Hale ruled that settlement privilege does *not* form a part of litigation privilege. His reasons included the following:

> In my view, settlement privilege (also known as "without prejudice privilege") exists for different reasons from, and does not form a part of, litigation privilege.
>
> In Order PO-2006, Senior Adjudicator David Goodis discussed the purpose of litigation privilege as follows:
>
> > . . . litigation privilege is meant to protect the adversarial process by preventing counsel for a party from being compelled to prematurely produce documents to an opposing party or its counsel.
>
> By contrast, settlement privilege exists for the purpose of encouraging parties to settle their disputes without recourse to litigation. As stated by Sopinka *et al.* in *The Law of Evidence in Canada* (above, at page 719):
>
> > It has long been recognized as a policy interest worth fostering that parties be encouraged to resolve their private disputes without recourse to litigation, or if an action has been commenced, encouraged to effect a compromise without a resort to trial. In furthering these objectives, the courts have protected from disclosure communications, whether written or oral, made with a view to reconciliation or settlement. In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession that they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming . . .

Sopinka *et al.* set out the conditions that must be present for the privilege to be recognized (at p. 722):

> (a) a litigious dispute must be in existence or within contemplation;
>
> (b) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and
>
> (c) the purpose of the communication must be to attempt to effect a settlement.

Generally speaking, settlement privilege ceases to apply once an unconditional and complete settlement has been achieved (see, for example, *Begg v. East Hants (Municipality)* (1986), 33 D.L.R. (4th) 239 (N.S.C.A.).

There are several exceptions to settlement privilege. Prior to discussing these exceptions, Sopinka *et al.* explain the basis for them, and shed more light on the rationale for settlement privilege (at page 728):

> . . . The exceptions to the rule of privilege find their rationale in the fact that the exclusionary rule was meant to conceal an offer of settlement only if an attempt was made to establish it as evidence of liability or a weak cause of action, not when it is used for other purposes.

In *Mueller Canada Inc. v. State Contractors Inc.* (1989), 71 O.R. (2d) 397 (H.C.J.), Doherty J. (as he then was) adopts the passage from Sopinka *et al.* at page 728 and states:

> The reference to establishing "liability or a weak case" must refer to liability in relation to matters which are the subject of the settlement . . . Where documents referable to the settlement negotiations or the settlement document itself have relevance apart from establishing one party's liability for the conduct which is the subject of the negotiations, and apart from showing the weakness of one party's claim in respect of those matters, the privilege does not bar production . . .

Similarly, in the leading decision in *Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737, the House of Lords stated:

> The "without prejudice" rule is a rule governing admissibility of evidence and is founded on the public policy of encouraging

> litigants to settle their differences rather than litigation them to a finish . . .
>
> . . . [T]he underlying purpose of the rule . . . is to protect a litigant from being embarrassed by an admission made purely in an attempt to achieve settlement.

I note also that Sopinka *et al.* discuss litigation privilege and settlement privilege in two separate and distinct sections of the text. The former is discussed under the heading "Confidential Communications within Special Relationships – Solicitor and Client – Materials Obtained and Prepared in Anticipation of Litigation", while the latter is explained under the separate heading "Communications in Furtherance of Settlement".

In summation, litigation privilege is meant to protect the adversarial process, by preventing counsel for a party from being compelled to prematurely disclose "the fruits of his work" (*i.e.*, research, investigations and thought processes) to an opposing party or its counsel. By definition, the documents in question are not known to the other side or to the world at large, and the rule establishes a "zone of privacy" around the party.

On the other hand, settlement privilege, a rule of admissibility of evidence, is meant to encourage settlement of disputes. It does so by precluding the admission into evidence of certain settlement communications, where the communication is being introduced to establish it as evidence of liability or a weak cause of action, or to "embarrass" the other party before the court. Although by definition both sides are aware of the contents of the settlement communication, the rule states that it cannot be put before the judge.

Put in the context of the *Act*, there is a strong policy rationale for interpreting the phrase "solicitor-client privilege" as including the two common law concepts of "solicitor-client communication privilege" and "litigation privilege". In both cases, disclosure to a party outside the solicitor-client relationship is deemed to cause some type of harm: in the former case, harm to the public interest in allowing individuals to consult privately and openly with their solicitors; in the latter case, harm to the adversarial system of justice.

However, there can be no comparable harm from disclosure in the case of settlement privilege. That privilege is designed to prevent a party from putting certain communications into evidence in a proceeding before a court or tribunal. A determination of whether the *Act* requires disclosure of the material is in no way determinative of the issue of admissibility before a court or tribunal, an issue that would be determined by a decision-maker in that other forum.

Applying this analysis here, I find that the records are not subject to litigation privilege solely by virtue of the fact that they may be subject to settlement privilege. I note also that, to the extent

that settlement discussions in this case ultimately lead to settlement of the litigation, settlement privilege would cease to apply in any event (see *Begg v. East Hants (Municipality)*, above).

Further, I am not persuaded that the records otherwise qualify for litigation privilege. Regarding similar settlement discussion records, in Order PO-2112, Adjudicator Hale stated:

> I accept that at some point in time litigation was contemplated and was ultimately commenced by way of a notice of action issued by the affected party and served on the Ministry and/or OPC on March 14, 2001. However, Records 4, 5, 9, 10, 11 and 12 are communications between the opposing parties in the contemplated litigation. Therefore, they cannot qualify for litigation privilege since the "zone of privacy" rationale cannot exist.
>
> The remaining records to which litigation privilege could apply are Records 7, 8 and 13. In my view, the Ministry has failed to establish that the dominant purpose of the preparation of these records was for use in the contemplated litigation. Record 13 clearly was created for the purpose of developing a communications strategy for the Ministry in regards to the dispute and ultimate settlement. Record 7 appears to have been created by the OPC for the purpose of keeping the Minister informed of the matter and, in the absence of specific representations from the Ministry on this point, I am unable to conclude that it was created for any other purpose, in particular for use in contemplated litigation. Similarly, Record 8 appears to have been created primarily for the purpose of verifying the amount of the termination payment owing to the affected party under the contract. Again, in the absence of representations to explain the purpose of the creation of this record, I am not in a position to conclude that it was prepared for the dominant purpose of contemplated litigation.
>
> In addition, for similar reasons, I find that the records were not prepared by or for Crown counsel in contemplation of, or for use in, litigation.

In my view, these principles apply here. All of the 51 records at issue are communications between opposing parties and do not qualify for litigation privilege since the "zone of privacy" rationale cannot exist. Therefore, none of the records qualify for litigation privilege under section 12 of the *Act*.

Conclusion

None of the records at issue qualify for exemption under section 12 of the *Act*.

THIRD PARTY INFORMATION

General principles

The Municipality claims that all of the records qualify for exemption under section 10(1)(a), (b) and (c) of the *Act*, which state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1) to apply, the Municipality and/or the affected parties must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b) and/or (c) of section 10(1) will occur.

Part 1: type of information

The Municipality claims that the information in the records is "commercial" or "financial" or information. The definitions of those terms have been discussed in prior orders, as follows:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have

> monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

More specifically, the Municipality submits:

> . . . [A]ll documents contain financial or commercial information in that all the correspondence deals with the valuation of services or equipment supplied to [the Municipality's] water treatment plant project for the purposes of calculation and pro rata distribution of the holdback. In this regard, it is important to note that the claims of the lien claimants are not limited to the amounts negotiated with respect to distribution of the statutory holdback. The statutory holdback applies only to goods and services supplied to the project. The lien claimants may very well have supplied goods and services to [the appellant] for the project but were not on site at the time [the appellant] left the site . . .
>
> . . . Further, to the extent that there is a shortfall between the funds available from distribution of the statutory holdback and the amount owed to the lien claimants by [the appellant], [the appellant] must pay those amounts out of its own resources. [The Municipality] has no interest or right in that aspect of the lien actions. [The Municipality's] sole interest and obligation in the lien actions is limited to the valuation of the goods and services supplied to the project and the distribution of the statutory holdback based on that valuation.

As indicated above, the sole affected party that submitted representations consents to disclosure of its records and makes no submissions on the application of section 10.

The appellant also makes no specific submissions on section 10.

I accept the Municipality's submissions that the records relate to the buying, selling or exchange of merchandise or services and, therefore, part one of the three-part test is met.
In the circumstances, I have decided to proceed directly to part 3 of the three-part test.

Part 3: harms

To meet this part of the test, the Municipality must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The Municipality submits:

> . . . Disclosure of those records would irreparably prejudice [the Municipality] and the lien claimants in bringing the myriad of court actions surrounding [the appellant] to an end without going through long, drawn out and expensive trials. In this regard, at a recent case management conference, ten weeks of examinations for discovery and 60 to 90 days of trial time were agreed as the expected time required should the matter proceed to trial . . . Disclosure of such records would seriously impair the ability of [the Municipality] to receive such information in the future . . .

As indicated above, only one affected party submitted representations, and that affected party consents to disclosure of information relating to it.

In my view, the material before me falls short of the kind of detailed and convincing evidence that is required to establish a reasonable expectation of harm.

Regarding the harms under sections 10(1)(a) and (c), the affected parties are in the best position to provide evidence and argument explaining why it is reasonable to expect disclosure will result in prejudice to those companies' competitive position, interfere significantly with their negotiations or result in undue loss to them. The only affected party to submit representations clearly has no such concerns. I also find it significant that the remaining affected parties, although notified, chose not to submit representations. In my view, this undermines the "harm" arguments of the Municipality, although I do not take the absence of representations from the other affected parties constitute their consent to disclosure (see Order PO-1791). In the end, I am left with little if any guidance as to how the information in the records would be useful to a competitor or otherwise could reasonably be expected to cause section 10(1)(a) or (c) harm.

The Municipality suggests that disclosure of the records to the appellant under the *Act* will undermine settlement and lead to unnecessary litigation. As indicated above, settlement privilege is concerned with prejudice to the parties should certain settlement discussions be submitted to an adjudicator. Disclosure to the appellant under the *Act* cannot be equated to the information being submitted to the court in this case and, therefore, I am not persuaded that disclosure of the records could reasonably be expected to result in the undermining of settlement negotiations or unnecessary litigation.

Therefore, I conclude that the records are not exempt under section 10(1)(a) or (c).

Regarding section 10(1)(b), in my view, the Municipality's argument must fail for essentially the same reasons as the section 10(1)(a) and (c) arguments. The Municipality's position seems to be that because disclosure of the information could reasonably be expected to cause competitive harm or undue loss under section 10(1)(a) or (c), it stands to reason that affected parties would be reluctant to disclose information to the Municipality in the course of future settlement negotiations. However, as I explained above, the evidence under section 10(1)(a) and (c) is not persuasive. Given that finding, I am not satisfied that it reasonable to expect that companies will

no longer supply similar information to the Municipality during settlement negotiations. I find that the threshold for section 10(1)(b) has not been met.

Conclusion

The records do not qualify for exemption under section 10(1) of the *Act*.

ORDER:

1. I order the Municipality to disclose the records at issue to the appellant no later than **February 10, 2004**, but not earlier than **February 5, 2004**.

2. In order to verify compliance with provision 1, I reserve the right to require the Municipality to provide me with a copy of the material disclosed to the appellant.

Original Signed By: January 7, 2004
David Goodis
Senor Adjudicator