



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1688

Appeal MA-030028-1

Municipality of the Township of Tiny



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NATURE OF THE APPEAL:

A resident asked the Municipality of the Township of Tiny (the Township) for information relating to specific property. She wanted

- complete detail review/search of a named law firm's research on the beach and area surrounding a particular plot of land owned by a named family
- any other information from land surveyors, lawyers, etc. with regard to the above
- any original copies (possibly on microfilm) of a particular Plan

The Township's initial decision was to deny the resident the information she sought on the basis of the section 12 solicitor-client privilege exemption under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act). The Township applied this exemption because it claimed to be involved in litigation related to the property.

The resident (now the appellant) appealed the refusal.

During mediation of the appeal, a number of issues were resolved or clarified.

- The appellant withdrew her request for access to the Plan.
- The Township issued a supplementary decision in which it applied sections 6(1)(b) (closed meetings) and 7(1) (advice or recommendations) to some of the records. The Township also provided an index of records to the appellant.
- The appellant removed eleven identified records from the scope of the appeal.

The parties did not resolve any other matters through mediation so the appeal moved to the adjudication stage.

I initially sought and received representations from the Township. I then sought and received representations from the appellant. I have carefully reviewed all of the representations before me.

RECORDS:

There are 37 records at issue in this appeal. They consist of letters, memoranda, notes, reports and faxes.

DISCUSSION:

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. Branch 1 includes two common law privileges:

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

Branch 2 contains two analogous statutory privileges that apply in the context of institution counsel giving legal advice or conducting litigation.

In this case, the Township relies on section 12 to exempt Records 1, 3, 6, 7, 10, 11, 16, 19-27, 29-42, 44 and 46. It does not specify upon which branch of section 12 it relies. It submits, however, that all of these records consist of correspondence from and to the Township solicitors, who provided the Township with legal advice in preparation for a court action that began in April 1999 and has yet to be resolved.

The appellant makes no specific representations about this issue.

In the circumstances, I will review both branches to determine the extent to which the records are exempt under section 12.

Common law 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.)].

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.)].

Analysis

In this case, I find that the client is the Township and the solicitors are outside counsel retained by the Township to assist with the litigation related to the relevant property.

It is evident from the jurisprudence that not every communication between a solicitor and client is privileged. Privilege attaches only to that communication made for the purpose of giving or seeking legal advice. Clearly, the nature of the relationship and the surrounding circumstances will determine whether or not a particular communication is made for the purpose of giving or seeking legal advice.

Records 1, 3, 6, 7, 10, 11, 16, 19-22, 24-25, 30-34, 36-38, 40-42 and 44 consist of correspondence in the form of letters and memos or faxes exchanged between the Township's representatives and outside counsel. All of these records form part of the "continuum of communications" between the Township and its solicitors as described in *Balabel*, above. Much of the correspondence is for the purpose of obtaining or providing legal advice in relation to the disputed property matter. Some of it is "part of the continuum aimed at keeping both parties informed so that advice may be sought and given as required". In all cases, I am satisfied that the correspondence was to be kept confidential between the Township and its solicitors.

Records 26 and 27 are the written notes made by the Township's Acting Administrator/Clerk during the course of meetings with the Township's solicitors. The notes clearly record advice requested and provided, as well as other communications made to inform the parties. As such, the section 12 solicitor-client communication privilege still applies.

Records 39 and 46 are correspondence exchanged between the Township's representative and counsel in relation to the issue of retainer. These records also meet the test for solicitor-client communication privilege [see Orders PO-1946, PO-2154].

Record 29 is not exempt from disclosure on the basis of section 12 because it is a letter exchanged between *opposing* solicitors in the dispute. Clearly, a letter between opposing parties cannot be said to be a confidential communication between a lawyer and a client for the purpose of giving or receiving legal advice [see Order PO-1999].

Records 23 and 35 are "confidential administrative reports" prepared by the Township's Administrator/Clerk for consideration by members of Council. These records do not consist of confidential communications between a lawyer and client made for the purpose of giving or

receiving legal advice. Therefore, they do not qualify for solicitor-client communication privilege.

To summarize, Records 1, 3, 6, 7, 10, 11, 16, 19-22, 24-27, 30-34, 36-42, 44 and 46 qualify for solicitor-client communication privilege under Branch 1. Records 23, 29 and 35 do not.

Common law litigation privilege under Branch 1

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, 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.)].

Having examined Records 23, 29 and 35, and having considered the surrounding circumstances, I am not satisfied that they were prepared for the dominant purpose of existing or reasonably contemplated litigation, or that they would have formed part of the lawyer’s brief in the litigation in question.

Statutory privileges under Branch 2

Branch 2 is a statutory solicitor-client privilege that is available in the context of institution counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

Having found that Records 23, 29 and 35 do not qualify for either of the two common law privileges, in the absence of representations on this point, I am not persuaded that these records would somehow qualify for the similar statutory privileges under Branch 2.

Conclusion

I find that Records 1, 3, 6, 7, 10, 11, 16, 19-22, 24-27, 30-34, 36-42, 44 and 46 qualify for exemption under section 12, while Records 23, 29 and 35 do not.

ADVICE TO GOVERNMENT

The Township applied section 7 to Records 2, 9, 28, and 5. The Township argues that the Township Surveyor provided professional advice to Township Council in Records 2, 9, and 28. The Township contends that Record 5 is exempt under section 7 because it contains legal advice given to the Township by one of its solicitors. I note that the Township did not claim that Record 5 is exempt under the discretionary section 12 exemption.

Again, the appellant makes no specific representations about the application of this section of the *Act*.

I find that section 7 applies only in part to Records 2 and 9. It does not apply to Records 5 and 28.

General principles

Section 7(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

“Advice” and “recommendations” have a similar meaning. In order to qualify as “advice or recommendations”, the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-1894, PO-1993].

Advice or recommendations may be revealed in two ways

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders P-1037, P-1631, PO-2028]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Orders P-434, PO-1993, PO-2028, PO-2115, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.)].

Analysis

Bearing these principles in mind, I find that only portions of Record 2 and 9 can be exempted under this section. Otherwise, section 7 does not apply to these records.

Records 2 and 9 are memoranda from the surveying consultant to various officials of the Township. The memoranda appear to encompass the surveying consultant's historical review of the property's legal status as well as his opinions or views of the issues to be litigated and other matters. Virtually all of the information in these records squarely falls within one or more of these categories

- background information
- evaluative and analytical information
- the author's professional opinions (views)

Because portions of the second to last paragraph of Record 2 and the last paragraph of Record 9 suggest a course of action that the Township can accept or reject, they can be called advice or recommendations.

Record 5 is a communication from the Township's solicitors to the Township. Record 28 is correspondence from the surveying consultant, in this case sent to the Township's solicitors, in response to the solicitors' request for information from the Township about the land at the center of the dispute. Neither record contains advice or recommendations as contemplated by section 7.

To summarize, portions of Records 2 and 9 qualify for exemption under section 7. The remaining portions of Records 2 and 9, and Records 5 and 28, are not exempted under section 7.

CLOSED MEETING

Section 6(1)(b) states:

6. (1) A head may refuse to disclose a record,
 - (b) that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

The Township applied section 6(1)(b) to Record 45 only. Its representations are simply these:

Yes, Section 6(1)(b) of the *Act* was properly applied, as Record 45 was a Confidential Administrative Report dated August 24, 1000 (sic) authored by the then Administrator-Clerk...The confidential report was presented at the August 30, 1999 Committee of the Whole during an in-camera session under Motion 688/99 (Appendix 1).

The appellant makes no specific representations on this issue.

Section 6(1)(b)

In order to qualify for exemption under section 6(1)(b), the Township must establish that:

1. a meeting of a council, board, commission or other body or a committee of one of them took place; and

2. that a statute authorizes the holding of this meeting in the absence of the public; and
3. that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

[Orders M-64, M-98, M-102, M-219 and MO-1248]

Analysis

The first and second parts of the test for exemption under section 6(1)(b) require the Township to establish that a meeting was held and that it was held in camera. [Order M-102]

The Township provided me with a copy of the Motion from the August 30, 1999 meeting resolving that the Committee of the Whole meet in closed session to deal with, among other things, "litigation or potential litigation...affecting the municipality" and "the receiving of advice that is subject to solicitor-client privilege, including communications necessary for that purpose". Record 45 itself indicates that it went to Council on August 30, 1999. Accordingly, I am satisfied that a meeting was held and that it was held in camera. Part one of the test has been met.

Former Assistant Commissioner Irwin Glasberg defined the term "substance" as the "theme or subject of a thing" and the word "deliberations" to mean, "discussions conducted with a view towards making a decision" (Orders M-184 and M-196).

Based on my review of the record and the Township's representations, I am also satisfied that disclosure of Record 45 would reveal the substance of the deliberations of that meeting. Therefore, I find that part three of the test has also been met.

The Township, though, does not indicate on what authority it relied in order to meet in closed session.

Sections 239(2)(e) and (f) of the *Municipal Act* appear to be the authority for the holding of meetings in camera where the subject matter being considered is litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board, and advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

Record 45 relates to the legal dispute about the relevant property and the legal representation of the Township's interests in that dispute. Accordingly, I am satisfied that the Board was authorized to hold this meeting in the absence of the public. In my view, the record relates to litigation affecting the municipality and pertains to advice subject to solicitor-client privilege. Therefore, I find that section 6(1)(b) applies to Record 45.

ORDER:

1. I order the Township to disclose to the appellant Records 5, 23, 28, 29 and 35 in full by **October 10, 2003**.
2. I order the Township to disclose to the appellant the portions of Records 2 and 9 that have not been highlighted in the copies of these records included with the Township's copy of this order. To be clear, the Township shall not disclose the highlighted portions of these records.
3. I uphold the Township's decision to withhold the remaining records or portions of records.

Original Signed By: _____

Rosemary Muzzi
Adjudicator

_____ September 18, 2003