



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1785

Appeal MA-020329-1

Township of Ashfield-Colborne-Wawanosh



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NATURE OF THE APPEAL:

On behalf of a residents' association, an individual made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Township of Ashfield-Colborne-Wawanosh (the Township) for access to documents relating to an alleged violation of a particular by-law with respect to land use. Specifically, the individual sought

- a copy of a legal opinion
- the complete copies of all supporting documentation provided to the Township by the Huron County Planning Department (County Planning Department)

The Township forms a part of the County of Huron (the County). The County is considered an upper-tier municipality, while the Township is considered a lower-tier municipality [see section 315(6) of the *Municipal Act, 2001* and Schedule 1 of Ontario Regulation 180/03 under the *Territorial Division Act, 2002*].

The Township did provide access to the latter documents. The Township denied access to the specific legal opinion letter, however, on the basis of section 12 (solicitor-client privilege) of the *Act*.

The individual (now the appellant) appealed the decision.

The parties could not resolve the issue through mediation, so the appeal was moved to the inquiry stage.

I sought and received representations from the Township, which I shared in their entirety with the appellant. The appellant then provided responding representations. In those representations, the appellant asserted that the Township had waived solicitor-client privilege in respect of the legal opinion because it had provided the opinion to a third party, the County. As a result, I sought reply representations from the Township on the issue of waiver. After receiving the Township's reply, I requested further information, and the Township responded to that request. I then sought representations from the County on the issue of waiver and common interest.

CONCLUSION:

The legal opinion letter is exempt from disclosure on the basis of section 12 of the *Act*.

ANALYSIS:

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. Branch 1 includes two common law privileges whereas Branch 2 contains two analogous statutory privileges that apply in the context of institution counsel giving legal advice or conducting litigation. The Township must establish that one or the other (or both) branches apply.

In this case, the Township does not specify upon which branch it relies. It submits that the opinion letter is a solicitor-client communication requested in light of potential litigation and therefore privileged under section 12. I will examine first whether Branch 1 applies.

Branch 1 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

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.)].

Representations

The Township is clear: it submits that the record is exempt from disclosure because it is a legal opinion sought by the Township in response to concerns raised by residents:

The Township's request for a letter of opinion from their Solicitor arose out of [the appellant's] criticism as to the Township's decision to allow the construction of mobile home driveways that would directly access a Township road. There was a suggestion that she felt that the Township was in violation of [its] own by-law. This suggestion was further documented in her September 20th, 2002 Request Form [under the *Act*] in which she writes, "thus appearing to violate the Township's by-laws." The opinion in question, from our Solicitor, was requested with regard to [the appellant's] suggestions, in order that we could determine our position in any possible or anticipated litigation that could result from those suggestions. This was the context within which the opinion was requested and within which the opinion was given.

The appellant initially seems to claim that she is entitled to access to the legal opinion for two reasons:

- she and other residents had raised the legal issue in the first place; and
- the Township indicated that the residents' questions would be answered after the Township had sought a legal opinion

The appellant states:

When we attended Township Council, our intention was to seek clarification and understanding of the application of current bylaws to a pre-existing development that was under expansion. The reeve indicated that he would answer our questions by asking a lawyer for an opinion.

...There was no suggestion at the time that the opinion would be kept from the very people who had requested it, recognizing that the township presumably also thought that the process would have the effect of "clearing the air".

In the initial reply, the Township's solicitor submits:

It is clear that, pursuant to Section 12 of the *Act* [the appellant] is not entitled to a copy of my legal opinion to Council on this issue as it was prepared for the [Township] for use in giving legal advice to Council on this issue.

Findings

In this case, in the context of the legal opinion letter, I find that the client is the Township and the solicitor is outside counsel retained by the Township. The opinion letter from this solicitor is

addressed only to the Township and is marked “personal and confidential”. Furthermore, the County’s representations confirm this fact.

It is apparent from a review of the contents of the letter itself and the representations before me that the letter was sent for the purpose of communicating specific legal advice to the Township about an alleged by-law violation, on a confidential basis. A copy of this letter was never sent to the appellant. There is no evidence that the appellant is a client of this solicitor. Though she expected or hoped to see the legal opinion obtained by the Township, she is not entitled to it on this basis.

The opinion letter is a direct communication between a solicitor and client for the purpose of obtaining professional legal advice, and is marked “personal and confidential”. Absent other considerations, I would therefore find it exempt under section 12 on the basis of solicitor-client communication privilege. The appellant’s arguments, however, raise the question of whether the Township waived any privilege that otherwise might apply when it shared the opinion letter with the County Planning Department.

Waiver and common interest

General principles

As stated in *S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.* (1983), 35 C.P.C. 146 (B.C.S.C.):

Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require.

Waiver may be found not to apply where the record is disclosed to another party that has a common interest with the disclosing party. The common interest exception has been found to apply where, for example

- the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties [*General Accident Assurance Co. v. Chrusz* (above); Order MO-1678]
- a law firm gives legal opinions to a group of companies in connection with shared tax advice [*Archean Energy Ltd. v. Canada (Minister of National Revenue)* (1997), 202 A.R. 198 (Q.B.)]
- multiple parties share legal opinions in an effort to put them on an equal footing during negotiations, but maintain an expectation of confidentiality vis-à-vis others [*Pitney Bowes of Canada Ltd. v. Canada* (2003), 225 D.L.R. (4th) 747 (Fed. T.D.)]

Representations

The appellant submits that the Township has waived any privilege it claims:

In conversation with the Huron County Planning Department, it is our understanding that the document we seek was forwarded to them, hence it is hard to understand how it would be regarded as privileged, and not available to us.

In its additional reply representations, the Township submits:

The Township does not consider the disclosure of the August 6th, 2002 legal opinion to . . . [the] Acting Director of the Huron County Planning Department, to be a waiver of privilege. [The Acting Director] has confirmed that he does indeed have a copy of the subject document, but it is contained in his own personal binder of legal files and a copy was never contained in the general files located at the County Planning Department offices, and is therefore not available for the general public. The Planning Department provides planning services to the township. These services include, but are not restricted to, letters of opinion, planning reports, recommendations and frequent attendance at Council meetings at which planning applications are processed, as well as providing consultations and interpretations upon request. This letter was provided to [the Acting Director], specifically, in confidence.

In the June 12th, 2002 correspondence from [the] Acting Director, . . . addressing the proposed development, it was suggested by [him] that the Township might seek a legal opinion verifying his findings, which the Township did. It was not, in the Township's opinion, considered a waiver of privilege to provide [the Acting Director], from whom we requested a professional opinion, a copy of the Solicitors opinion in support of [the Acting Director's] findings.

The Township therefore maintains that their actions did not constitute a waiver of privilege.

The County strongly argues that the Township did not waive solicitor-client communication privilege because the Township and the County Planning Department have a common interest in the subject matter of the opinion given the nature of their relationship, generally, and the County's specific role in these circumstances.

I believe the record is protected by solicitor-client privilege and the litigation privilege outlined in the Notice [of Inquiry]. The legal advice was obtained on a solicitor-client basis and the (believed) appellant had advised the Chief Building Official and me of potential legal action.

The Township has not waived its privilege by providing me with a copy of the legal opinion for the following reasons.

There exists a strong common interest between the Township and the Planning Department. The County Planning Department provides professional planning services and advice to all local municipalities in Huron County, including the Township of Ashfield-Colborne-Wawanosh. The Township does not have its own planner on staff; the County provides this service and for all intents and purposes, the County Planner *is* the Township Planner. The Planner provides advice on a daily basis to Township staff, meets with Township ratepayers, reports to Township council on planning matters, processes all planning applications in the Township, and occasionally meets with Township Council in closed session to deal with legal issues on planning matters.

In this case, I was asked by the township to provide advice on the compliance of proposed development with the zoning by-law. My advice was given in a written opinion with the recommendation that it be followed by a legal opinion. The Township obtained the legal opinion which was shared with me because I had provided the initial advice. My recollection is that before the legal opinion was written, Township staff and I met with the lawyer in a private meeting to review the case.

This process demonstrated the close working relationship between the County Planner and the township. Most ratepayers would not observe the Municipal-County distinction in the delivery of seamless planning services at the local level.

As a result, I am not an “outside party” as noted in the case law; I am the “Township’s planner”.

...

I consider the client to be the Township, but the planner is an integral component of the Township for planning matters.

...

The relationship between the Township and the Planning Department is exemplified by this case. An allegation was made that the Township had or was about to contravene the zoning by-law. The Township turned immediately to its planner for advice. The advice was provided along with the recommendation that a legal opinion be sought. Such legal opinion was obtained and was provided to the planner because it pertained to and flowed from the exchange of information and advice between the Township and its planner. The planner’s interest in the legal opinion went beyond curiosity; it was necessary to advance the discussion between the Township and the planner related to the proposed development.

Findings

Bearing in mind the various factors indicative of a common interest and the evidence before me, I find, in the circumstances of this case, that the Township and the County have a common interest in the subject matter of the opinion.

It is clear to me that these parties have a common interest given the evidence that the role of the County's Planning Department is to provide planning services and planning advice to the Township. I note that this role has a statutory basis. For the purpose of local planning administration, section 15 of the *Planning Act* reads:

The council of an upper-tier municipality, on such conditions as may be agreed upon with the council of a lower-tier municipality, may,

- (a) assume any authority, responsibility, duty or function of a planning nature that the lower-tier municipality has under this or any other Act; or
- (b) provide advice and assistance to the lower-tier municipality in respect of planning matters generally.

Furthermore, section 2 of the *Municipal Act, 2001* also indicates that where an area of responsibility is assigned to an upper-tier municipality non-exclusively, as is the case with highways, both the upper-tier municipality and its lower-tier municipalities have the power to pass by-laws related to that area.

In the circumstances, it can be concluded that the Township and the County have the selfsame interest in the subject matter of the opinion, *i.e.*, whether the Township was contravening a zoning by-law. I so conclude because the County's Planning Department is ostensibly the Township's own planner and provided the Township with advice on this very matter. Moreover, was this matter ever to proceed to litigation, it would be reasonably possible for the same counsel to represent both the Township's and the County's interests.

It is also clear on the evidence that though they shared the legal opinion between themselves, the Township and the County's Planning Department expected that the opinion would remain confidential as against outsiders.

Accordingly, I find that the Township did not waive privilege in respect of the legal opinion when it disclosed that communication to the County. Therefore, the legal opinion is a privileged communication between solicitor and client under branch 1 of the exemption.

Having found that the legal opinion is exempt from disclosure under Branch 1 solicitor-client communication privilege, it is unnecessary for me to consider the application of Branch 1 litigation privilege, or either of the Branch 2 statutory privileges.

ORDER:

I uphold the decision of the Township.

Original Signed By: _____

Rosemary Muzzi
Adjudicator

_____ April 28, 2004