



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-1830**

**Appeal MA-030437-1**

**City of Sarnia**



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## **NATURE OF THE APPEAL:**

The City of Sarnia (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a specified report prepared by City staff to City Council for a council meeting held on October 26, 1999.

In its initial decision letter, the City advised the requester that no council meeting took place on that date. However, the City subsequently identified a Report to Council, prepared for the October 26, 1998 council meeting, as the responsive record. The City originally denied access to this record, claiming the application of the discretionary exemption in section 6(1)(b) of the *Act* (closed meeting).

The requester, now the appellant, appealed the City's decision to deny access to the record.

During the mediation stage of the appeal process, the City issued two further decision letters. The City's first revised decision letter, issued within the time period prescribed by the Confirmation of Appeal for raising additional discretionary exemptions, raised the possible application of the discretionary exemptions in sections 7(1) (advice or recommendations) and 12 (solicitor-client privilege) of the *Act*. The second revised decision letter granted access to portions of the record, denying access to the remainder pursuant to sections 6(1)(b), 7(1) and 12.

I sought and received the representations of the City, a complete copy of which were provided to the appellant, along with a Notice of Inquiry. The appellant also provided me with representations.

## **RECORD:**

The sole record at issue consists of the undisclosed portions of pages 2, 3 and 4 of an eighteen-page report to Council dated October 21, 1998.

## **DISCUSSION:**

### **SOLICITOR-CLIENT PRIVILEGE**

The City takes the position that the undisclosed portions of the record, a report prepared for City Council by the City Solicitor, is exempt from disclosure under the discretionary exemption in section 12, 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 as described below. The City must establish that one or the other (or both) branches apply.

## **Branch 1: common law privileges**

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

The City’s arguments under Branch 1 are directed only towards the solicitor-client communication privilege component of section 12.

### ***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.)].

## **Branch 2: statutory privileges**

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

Again, the City's arguments focus only on solicitor-client communication 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.

***Statutory solicitor-client communication privilege***

Branch 2 applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice."

***Is the record exempt under section 12?***

The City submits that the undisclosed portions of the record qualify for exemption under both branches of section 12. It submits that the report was prepared by the City's in-house solicitor for his client, the City Council for use at its meeting on October 26, 1998. It states that:

This report was made solely for the purpose of giving professional legal advice to Council. Such advice included an analysis of relevant case law and its applicability to the issues before Council.

The City goes on to note that the record was stamped "In Camera Confidential", indicating Council's understanding of the existence of solicitor-client communication privilege in the document.

The appellant does not address this aspect of the solicitor-client privilege issue in his representations but rather focuses his attention on whether the privilege was waived by the City.

I find that the undisclosed portions of the record clearly qualify for exemption under the solicitor-client communication privilege component of Branch 1 of section 12. Based on my review of the contents of the record, I find that the undisclosed information represents a confidential communication between a solicitor and his client, the City Council, made for the purpose of giving professional legal advice.

As regards waiver, the appellant submits that, in a letter to him dated November 19, 1998, the City's solicitor revealed the legal advice contained in the report that is the record at issue, thereby waiving the City's privilege in this document.

The City, on the other hand, counters by submitting that the November 19, 1998 letter:

. . . contains in general terms the directions of Council and its position on the matter. It does not disclose counsel's more detailed review of relevant case law and its application to the matters before Council, nor does this letter detail the potential for future lawsuits arising from action by the City nor the strengths and weaknesses of the City's position with respect to [a named company]. The

disclosure of a portion of legal advice should not be taken as an intention to waive the privilege. The provision of information to the Appellant through the letter of [the City's Solicitor] and the disclosure of the bulk of the report in issue speaks more to the intent for transparency rather than detracting from the protection for the City of its solicitor-client privilege.

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]

In my view, the City has provided sufficient evidence to establish that it has not waived the privilege that exists in the record at issue. I find that the letter of November 19, 1998 did not contain the kind of detailed information respecting the legal position of the City that is contained in the report which is the subject of this appeal. The information in the solicitor's letter to the appellant does not include the kind of detailed legal advice contained in the record at issue. Similarly and for the same reasons, I find that the disclosure of the majority of the record at issue to the appellant does not operate to waive the City's privilege in the undisclosed portions of it. I find that the City made a conscious decision to disclose only those portions of the report that do not contain the legal advice of its solicitor to City Council. As a result, I conclude that it has not waived the privilege that it holds in the remaining undisclosed portions of the report.

Because I do not accept the arguments of the appellant that the City has waived its privilege in the undisclosed portions of the record, I find that this information is subject to exemption under the solicitor-client privilege component of section 12.

Because of the manner in which I have addressed the application of section 12 to the record, it is not necessary for me to determine if it is also exempt under sections 6(1)(b) and 7(1).

**ORDER:**

I uphold the City's decision to deny access to the record.

Original signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_ September 13, 2004