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

Reconsideration Order MO-1923-R

Appeal MA-030105-1

Order MO-1742
Order MO-1900-R

City of Toronto

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NATURE OF THE APPEAL

This appeal concerns a decision of the City of Toronto (the City) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had made an access request for a copy of a legal opinion sent to the City. The opinion had been prepared for the Cathedral Church of St. James (the Church) by its counsel, and another lawyer for the Church later provided it to the City.

The background to the request is more fully described in my two previous decisions, Orders MO-1742 and MO-1900-R.

I conducted an inquiry into the appeal. After receiving representations from the City and the appellant, I issued Order MO-1742 dated January 19, 2004, in which I upheld the City's decision to withhold the record under section 12.

The appellant then commenced an application for judicial review in Divisional Court seeking to quash the order and to compel the City to disclose the record to him.

Later, the appellant served and filed his factum in this matter.

Having reviewed the factum and having considered the points raised by the appellant, I decided to reconsider my decision in Order MO-1742. I sent a letter to the parties that set out my preliminary findings on the issues raised, and invited the parties to make submissions. The City made representations, while the appellant stated that he was relying on his representations in the appeal as well as in his factum filed in Divisional Court.

Based on my review of the City's representations and the appellant's factum, I issued Order MO-1900-R dated January 24, 2005, in which I found that I had erred in determining precisely which record was responsive to the request. Based on this finding, I concluded that section 12 did not apply to the specific record at issue. I ordered the City to disclose the record to the appellant.

Prior to the due date for disclosure, the Church commenced an application for judicial review in Divisional Court seeking an order quashing Order MO-1900-R and sending the matter back to this office for a new hearing, on the basis that it was not given notice of the appeal.

I granted an interim stay of Order MO-1900-R and, in order to address the Church's concerns, I invited it to submit representations on the issues in the appeal.

Prior to receiving representations from the Church, I received an unsolicited letter from the appellant. In this letter, among other things, the appellant expressed concern about my decision to seek representations from the Church, and made submissions on some of the issues raised by the appeal. The appellant also forwarded copies of this letter to the Church and the City.

Subsequently, the Church submitted representations on the scope of the request and the application of section 12 to this record.

In the circumstances, I decided that it was not necessary to rule on any of the appellant's concerns, or to formally seek submissions from the City or the appellant.

SUMMARY OF CONCLUSIONS

I have set out a detailed analysis below. In brief, I conclude the following:

(i) There are sufficient grounds for me to reconsider my Order MO-1900-R and to consider the representations made by the Church;

(ii) I find no basis to alter my conclusion in Order MO-1900-R that the record at issue is the copy of the six-page legal memorandum sent by the Church's lawyer and received by the City Planner;

(iii) None of the common law or statutory privileges under section 12 of the *Act* is available to the Church with respect to the record;

(iv) None of the common law or statutory privileges under section 12 of the *Act* is available to the City with respect to the record; and

(v) The City must disclose the record to the appellant.

GROUNDS FOR RECONSIDERATION

The reconsideration procedures of the Information and Privacy Commissioner (the IPC) are set out in section 18 of the *Code of Procedure*. In particular, section 18.01 of the *Code* states:

> The IPC may reconsider an order or other decision where it is established that there is:
>
> (1) a fundamental defect in the adjudication process;
>
> (2) some other jurisdictional defect in the decision; or
>
> (3) a clerical error, accidental error or omission or other similar error in the decision.

In the circumstances, I have decided that my failure to notify and seek representations from the Church constituted a fundamental defect in the adjudication process. I will therefore consider the impact of the Church's submissions on my findings in Order MO-1900-R.

SCOPE OF THE REQUEST

In Order MO-1900-R, I made the following findings regarding the scope of the request:

> Having reviewed the relevant material on this point, I have decided to accept the appellant's submissions that his request covers only the 6-page legal opinion

> submitted by [the Church's] law firm to the City of Toronto by facsimile dated September 18, 2002 at 1:28 pm, which means that only pages 5-10 are at issue. I refer to this record as the "legal opinion".
>
> I do not accept the City's submission that the legal opinion submitted to the City "cannot be considered separately" from the subsequent covering memorandum from the senior planner to the City Solicitor sent at 2:49 pm on the same day. The evidence on the face of the records themselves clearly points to the fact that the law firm delivered the covering materials (pages 2-4) and the legal opinion (pages 5-10) directly by fax to the City planner (despite the fact that the covering letter, pages 3-4, is addressed to the City solicitor). The City does not appear to dispute this. The planner then prepared a fax cover sheet with handwritten notes (the City planner's memorandum, page 1), and faxed it together with the law firm's covering materials and the legal opinion to the City solicitor. In circumstances where the appellant's request makes no reference to internal City memoranda or the law firm's covering materials, and where the appellant reiterates that he does not seek such material but only the legal opinion as sent to the City, then I am obliged to conclude that the 6-page record, originally sent by [the Church's] law firm and received by the City planner, is the only record at issue in the appeal.

The Church takes issue with this finding. It submits:

> On September 18, 2002 [the Church lawyer] faxed the Opinion to [the City planner] . . .
>
> It was [the Church lawyer's] intention and understanding with [the planner] that her transmission would be *passed* directly to [the City lawyer] and would not form part of [the planner's] or the Planning Department's records. This intention is borne out in [the Church lawyer's] covering letter to [the City lawyer], which forms the second page of the fax . . .
>
> Clearly, the intention of [the Church lawyer] was to put a copy of the Opinion in the hands of [the City lawyer] *only*. If [the Church lawyer] had intended for [the planner] to first make a copy of the Opinion for the Planning Department and *then* to pass it on to [the City lawyer], it is reasonable to assume that she would have instructed him accordingly. But this is not what [the Church lawyer] instructed.
>
> The approach of the Adjudicator in the Reconsideration Order was to treat the copy of the Opinion in the City Solicitor's brief as a document separate and apart from a copy of the document apparently kept in the files of the City Planning Department. However, this approach is erroneous in that it fails to take into account the intentions of the Church at the time the Opinion was transmitted and leads to a triumph of form over substance, which the principles of privilege law seek to avoid.

> There was no intention on the part of the Church that the Opinion would become part of the Planning Department's brief. For this reason, if the intention of the party asserting privilege is a primary consideration, the only copy of the Opinion that should be considered in this appeal is the copy in the file of [the City lawyer].
>
> While the Church acknowledges that privilege may attach to a record in one entity's hands but not in another, as in the case of Orders PO-1846-F and PO-1848-F, there were no such separate entities in the present case. Both [the planner and the City lawyer] are employees of the City.
>
> In the present case, the Church was entitled to assume that the Opinion would only form part of the Legal Department's brief. That the Opinion was transmitted to [the City lawyer] via [the planner] is no more relevant than if the Opinion had been transmitted to [the City lawyer] via an assistant or even directly. What is relevant is the intention of the Church with respect to whom it disclosed its privileged information. The Church's intention was clear.
>
> The Church will submit that it ultimately does not matter that a copy of the Opinion was made or kept for the Planning Department's files against the express intention of the Church. However, if the Adjudicator holds that this is a relevant consideration, the Church submits that the existence of the Planning Department's copy should not prejudice the Church's right to maintain privilege over the Opinion.
>
> The foregoing demonstrates that the record at issue is not solely the 6 pages of the Opinion, but the entirety of the transmission from [the Church lawyer] to [the City lawyer] that was made on September 18, 2002. The Opinion's privileged nature cannot be examined in a vacuum by severing the Opinion from the rest of the September 18 transmission. To do so strips the transmission of the context necessary to understanding both the privileged nature of the Opinion and how that privilege was not waived by transmission of the Opinion to [the City lawyer].

I am not persuaded that I erred in finding that the sole record at issue is the copy of the 6-page legal opinion originally provided by the Church lawyer to the City planner.

It is not seriously in dispute that a copy of the opinion as originally sent to the planner exists in the City's Planning Department, and that another copy exists in the City's Legal Department. The Church urges me to find that the responsive record should be the one held by the Legal Department, and that the other material attached to the opinion should be included in the scope of the request.

The issue here is what record is responsive to the precise wording of the appellant's request. The appellant clearly sought access to a "legal opinion", and not other related or attached material. It is reasonable to conclude that when a requester identifies a record he or she is seeking by using a term such as "legal opinion", that the requester understands specifically what he or she is

seeking. If the appellant in this case had sought additional material, he could have added specific words to that effect. In my view, it would be unreasonable, and inconsistent with the wording of the request, to conclude that although the request seeks a "legal opinion", in reality the appellant was seeking the legal opinion *plus* additional related or attached material.

The appellant also indicated he was seeking the legal opinion "provided to the City from [the Church's lawyer]." In my view, it is reasonable to conclude that the appellant was seeking the copy that was originally sent to the City (that is, the version held by the Planning Department), as opposed to the secondary copy later forwarded to the City Legal Department with the attached fax cover sheet containing instructions to the City lawyer.

The Church states that its lawyer's intention was to provide the opinion to the planner, so that he in turn would pass it directly to the City lawyer. This submission conflicts with the evidence before me and the surrounding circumstances on September 18, 2002.

On September 18, 2002, the City planner was playing a critical role in the matter of the density transfer proposal. It was the planner who was considering whether to recommend to the East York Community Council that it accept or reject the Church's proposal. On this matter, the planner was the client, being advised by the City lawyer. In my view, the Church's lawyer either knew or ought to have known that the purpose of forwarding the legal opinion to the planner is that it was ultimately for the benefit of the planner, and that the role of the City lawyer was to provide comments or advice on the impact of the opinion on the planner's deliberations. This view is consistent with the planner's handwritten instructions on the fax cover sheet he prepared when sending a copy of the opinion to the City lawyer. (For obvious reasons, I cannot set out the actual text of those instructions.) In these circumstances, given the importance of the opinion to the issue being considered by the planner, it stands to reason that the planner would retain a copy of it for the Planning Department's own records.

Further, had the Church lawyer intended the opinion to be given directly to the City lawyer, she could easily have determined the City lawyer's contact information, such as the direct fax number (for example, by way of a telephone call), and sent the material directly to the City lawyer. In addition, had the Church lawyer intended that the planner *not* review or retain a copy of the opinion, she could have said so in express language in the communication, which she did not.

In any event, the lawyer's intention as to what would happen to the record once faxed to the planner is not sufficient to alter the fact that two copies came to exist in the City, one in each of the two departments, and that the appellant's subsequent request was, in effect, directed to the copy held by the Planning Department. In my view, the Church lawyer knew or ought to have known that, as a City "outsider", she was not in a position to have control over or to dictate the City's record keeping practices.

The Church submits that the fact that the record was provided to the planner is no more relevant than if it had been provided to the City lawyer directly or through the City lawyer's assistant. I

do not accept this submission. Clearly, in light of the circumstances I described above, the planner was more than a mere conduit, and it is artificial to consider him as such.

Even if it could be said that the opinion was provided directly from the Church lawyer to the City lawyer, for the reasons explained below, the opinion would not be exempt.

To conclude, I am not persuaded that I erred in concluding that the sole record at issue is the copy of the six page legal opinion as originally received and held by the City's Planning Department.

I will now address the application of section 12 to the record. I will divide my analysis into two main parts:

- the Church's privilege; and
- the City's privilege.

SOLICITOR-CLIENT PRIVILEGE OF THE CHURCH

Introduction

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. The first branch contains two common law privileges, solicitor-client communication privilege and litigation privilege. The second branch contains two analogous statutory privileges.

Summary of my findings in Order MO-1900-R

In Order MO-1900-R, I found that section 12 did not apply to the record because:

(i) Section 12 is not designed to protect the privilege of non-government parties, based on the wording and legislative history of the provision; and

(ii) even if it could be said that section 12 could apply to protect the privilege of non-government parties, section 12 does not apply to protect the privilege of the Church, since it waived its privilege by disclosing the record to the City.

Below I will determine whether I erred in making these findings in Order MO-1900-R.

Applicability of section 12 to non-government parties

In Order MO-1900-R, I relied on the following passage from Order MO-1338 of Senior Adjudicator David Goodis:

> In my view, the solicitor-client privilege exemption is designed to protect the interests of a *government* institution in obtaining legal advice and having legal representation in the context of litigation, not the interests of other parties outside *government*. Had the Legislature intended for the privilege to apply to non-government parties, it could have done so through express language such as that used in the third party information and personal privacy exemptions at sections 10 and 14 of the *Act*. This interpretation is consistent with statements made by the Honourable Ian Scott, then Attorney General of Ontario, in hearings on Bill 34, the precursor to the *Act*'s provincial counterpart:
>
> > Section 19 is a traditional, permissive exemption in favour of the solicitor-client privilege. The theory here is that in the event the government either commences litigation or is obliged to defend litigation, it should be able to count on the fullest accuracy and disclosure from its employees.
> >
> > . . . . .
> >
> > If you do things to discourage the client from telling the lawyer the true story, then the *government* does not get good legal advice. Again, the judgement is, "Yes, we exclude the information, but because we are protecting this value that is important." It is important that the *government*, which is spending taxpayers' money, should be able to be certain that public servants tell our lawyers the truth. We do not want to discourage public servants from telling our lawyers the truth by saying to them, "Everything you say is going to be open in a couple of days in the newspapers." [emphasis added by the Senior Adjudicator]
> >
> > [Ontario, Standing Committee on the Legislative Assembly, "Freedom of Information and Protection of Privacy Act" in *Hansard: Official Report of Debates*, Monday, March 23, 1987, Morning Sitting, p. M-9, Monday March 30, 1987, Morning Sitting, p. M-4]

Thus, where the client in respect of a particular communication relating to legal advice is not an institution under the *Act*, the exemption cannot apply. The only exception to this rule would be where a non-institution client and an institution have a "joint interest" in the particular matter . . .

The Church has provided me with no basis to doubt the applicability of this principle, subject to the issue of common interest which I will deal with below.

The Church's common law solicitor-client communication privilege

Introduction and general principles

This is the first of two common law heads of privilege under section 12.

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].

Confidentiality is an essential component of the privilege. Therefore, it must be demonstrated 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.) (*General Accident*)].

As a general rule, where an otherwise privileged communication is disclosed to a third party, the intention of confidentiality is negated and the privilege is waived [J. Sopinka *et al.*, *The Law of Evidence in Canada* (2nd ed.), (Markham: Butterworths, 1992), at p. 669; R. Manes *et al.*, *Solicitor-Client Privilege in Canadian Law*, (Markham: Butterworths, 1993), at p. 207; *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)].

Waiver may not apply where the third party is found to have a common interest with the disclosing party [*General Accident* (above); Order MO-1678].

In my Order MO-1900-R, I found that:

- the Church waived its privilege in the opinion when it disclosed it to the City; and
- the Church and the City did not have a common interest in the circumstances existing at the time of the disclosure.

The Church takes issue with my waiver and common interest findings.

Burden of proof

The Church submits:

> The Church has submitted clear evidence that it did not waive privilege when it gave a copy of the Opinion to the City's Solicitor. In contrast, notwithstanding

> his bald allegations of theft and conversion, [the appellant] has given no evidence of waiver. This is a noticeable distinguishing factor from the *WWF* decision, in which Adjudicator Goodis noted that the requester provided "detailed submissions about the extent to which the contents of the record were allegedly disclosed both within and outside the City."
>
> In such circumstances, barring further evidence from [the appellant], the Church submits that [the appellant] has not met the onus of establishing waiver.

The general burden of proof that the exemption applies lies on the City [see section 42 of the *Act*]. Also, at common law, the burden of proof that a document is privileged lies on the party or parties asserting privilege, in this case the Church and the City. In these circumstances, I find that the general burden of proof that the exemption applies lies on both the City and the Church.

I also accept that, initially, the party that asserts waiver (the appellant) has the burden of proving the elements of waiver. Here, it is not in dispute that the Church's lawyer intentionally disclosed the opinion to an outside party, the City. As I stated above, as a general rule, where an otherwise privileged communication is disclosed to a third party, the intention of confidentiality is negated and the privilege is waived [see J. Sopinka *et al.*, *The Law of Evidence in Canada* at p. 669; R. Manes *et al.*, *Solicitor-Client Privilege in Canadian Law*, at p. 207; *Ontario (Attorney General) v. Big Canoe*].

In these circumstances, a *prima facie* case of waiver has been established, and the burden of proof has shifted to the Church and the City to demonstrate that the Church lawyer's actions do *not* amount to waiver.

The Church's introductory submissions

The Church relies on *SNC-Lavalin Engineers & Constructors Inc. v. Citadel General Assurance Co.* (2003), 63 O.R. (3d) 226 (Master), which set out a number of criteria to be considered to determine if solicitor-client privilege has been waived when a privileged communication from a solicitor to his client is shared with another person:

1. Solicitor-client privilege should not be lightly interfered with and should be deemed waived only in the clearest of cases in order to maintain public confidence in a client's right to communicate in confidence with his solicitor. Any conflict with respect to waiving this privilege should be resolved in favour of maintaining the confidentiality.

2. Each case is to be determined on its own unique facts.

3. Did the client intend the communication from the solicitor to remain confidential when copied to a third party? Conversely, did the client intend to waive the privilege?

4. Did the client intend that the third party would maintain the document as confidential in his hands?

5. Was the presence of the third party, or the copying of the communication to the third party, required to advance the client's interests? The standard of what is required to advance the client's interests is not a high one.

6. Does the person to whom the communication is copied have a common interest with the client? What is the nature of the relationship?

7. The interest of fairness must be considered in determining whether solicitor-client privilege over a communication has been waived.

8. Although the onus of establishing solicitor-client privilege is on the party asserting the privilege, the onus of establishing waiver of that privilege is on the party asserting waiver.

The above list provides a useful framework for the waiver analysis. However, not all of the listed criteria are to be given equal weight, and the presence or absence of any of them may or may not be determinative of the waiver question.

In addition, with regard to criterion 8, as I stated above, a *prima facie* case of waiver has been established, and the Church and the City now have the burden of proving that waiver did not occur.

I will address each of the Church's points under headings that correspond to the above-listed criteria, in the order in which the Church presents them.

Intention of confidentiality (criteria 3, 4)

Whether or not a party intended to waive privilege is not determinative of this issue. As stated by J. Sopinka *et al.* in *The Law of Evidence in Canada*, at p. 666:

> . . .[C]lear intention is not in all cases an important factor. In some circumstances, waiver may occur even in the absence of any intention to waive the privilege. There may also be waiver by implication only.
>
> As to what constitutes waiver by implication, Wigmore said [8 Wigmore, *Evidence* (McNaughton rev. 1961), at para. 2327, at 635-36, quoted in *Hunter v. Rogers*, [1982] WW.R. 189 (B.C.S.C.)]:
>
> > Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the element of fairness and consistency. A

> privilege person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.

The Church submits:

> The facts demonstrate that the Church did not intend to waive solicitor-client privilege when it delivered a copy of the Opinion to the [City lawyer].
>
> It is clear that when [the Church lawyer] sent a copy of the Opinion to [the City lawyer], she contemplated the issue of confidentiality and privilege with some care. An acrimonious public meeting, attended by [the appellant] and other members of [his organization], had just taken place at which the Church's authority to enter into the Density Transfer and the legality of the proposed By-laws necessary to affect the Density Transfer were hotly disputed.
>
> These were matters addressed in the Opinion. [The Church lawyer] specifically stated that the Church did not want [the appellant or his organization] to have access to the Opinion and that the Church did not want the Opinion to become part of the public record. This is why [the planner] told [the Church lawyer] to send the Opinion to [the City lawyer], through him. The understanding between the Church and the City was that the Opinion would remain confidential and would become part of the Legal Department's file for use in providing legal advice to the City. There was no intention that the Opinion would become part of the Planning Department's file.
>
> For the same reason, given in the previous discussion, [the Church's] clear intention was that the Opinion would remain confidential in [the City lawyer's] hands.
>
> This intention was evident in [the Church lawyer's] conversation with [the planner] prior to transmission of the Opinion to [the City lawyer] and is also evidenced by the language of the September 18, 2002 fax itself, which states in part:
>
> > This fax is confidential and is intended for the person(s) named below. Its contents may also be protected by privilege, and all rights to privilege are expressly claimed and not waived.

In my view, the evidence before me supports a finding that the Church expressly intended to waive its privilege in the record. I reach this conclusion for the following reasons:

(i) On September 17, 2002, the Church's lawyer indicated to the City planner that she intended to provide the opinion to the City;

(ii) On September 18, 2002, the Church lawyer actually disclosed the opinion to the City;

(iii) There is no evidence that the Church lawyer was acting without the authority of her client [see *Supercom of California Ltd. v. Sovereign General Insurance Co.* (1998), 37 O.R. (3d) 597 (Gen. Div.) and *Great Atlantic Insurance Co. v. Home Insurance Co.*, [1981] 2 All E.R. 485 (C.A.)];

(iii) At the relevant time, the City was an arm's length third party outside the solicitor-client relationship between the Church and its lawyer;

(iv) The Church expressed a desire that the City rely on the opinion in its independent by-law deliberations; and

(v) The City actually relied on the opinion in its independent by-law deliberations.

This express intention to waive privilege applies, whether or not the Church expressly put its mind to this issue or correctly understood the state of the law of waiver. The Church lawyer knew or ought to have known that disclosing the opinion in its entirety to the City would constitute waiver.

The Church's bald assertion that it did not intend to waive privilege is not sufficient to counter the strong evidence of an intention to waive. Moreover, the "boilerplate" statement on the fax cover sheet, while relevant, carries low weight compared to the specific circumstances of the case and cannot be determinative.

Even if it cannot be said that the evidence supports a finding of an express intention to waive privilege, I find that the circumstances are more than sufficient to underpin a conclusion that the Church, through its actions, can be considered to have waived privilege implicitly.

Moreover, even if it could be said that the Church intended to maintain privilege, this factor is not determinative of the waiver question, based on the authorities cited above.

Disclosure to the City required to advance the Church's interests (criterion 5)

The Church submits:

> . . . [T]he presence of the City and the copying of the Opinion to the City was required to advance the Church's interest.
>
> A Density Transfer is a tripartite arrangement between a municipality and two other property owners. In the present case, the City's presence was a fundamental component of completing the Density Transfer, thus furthering the interests of the Church.
>
> Simply put, without the City's active participation and consent, the Density Transfer could not have occurred. The Church would have been unable to sell its excess density to [the developer] for the [amount] necessary to undertake the repairs and refurbishment of Parish House.

I do not accept the Church's submission on this point. In my view, it was not necessary for the Church to disclose the opinion to the City to advance its interest. There is no question that at the time of the disclosure, the Church was seeking to persuade the City that it should accept the density transfer proposal. However, this does not lead to the conclusion that it was necessary for the Church to disclose the opinion in order to persuade the City of the legality of the transfer. Surely, other means would have been available to the Church short of providing the opinion in full. For example, in previous cases this office had found that disclosure of relatively minimal portions of an opinion does not constitute waiver [see Orders MO-1172, MO-1714]. Another option open to the Church would have been to create a new document in the form of a submission, based on the substance of the opinion, and provide it to the City.

Even if it could be said that it was necessary for the Church to submit the opinion to the City, I do not accept that it was necessary for it to do so *confidentially*, just as it is not necessary for a party to make *in camera* submissions to a court to win at trial.

I find that this factor does not advance the Church's position.

Common interest and nature of the relationship between the Church and the City (criterion 6)

The Church submits that it had a common interest with the City at the time it disclosed the opinion:

> The seminal definition of "common interest" was given in the case of *Buttes Gas Oil v. Hammer* ([1981] Q.B. 223 at 243 (C.A.), cited with approval in [*General Accident*], where Lord Denning stated:
>
> > . . . It often happens in litigation that a plaintiff or defendant has other persons standing alongside him who have the selfsame

> interest as he and who have consulted lawyers on the selfsame points as he but who have not been made parties to the action . . .
>
> In all such cases I think the courts should, for the purposes of discovery, treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged.

While the interests of the parties asserting a common interest may be similar, they need not be identical. The test for establishing common interest is "whether the parties are sharing a united front against a common foe." [Order MO-1678, *Supercom of California Ltd.* at 612].

Privilege based on common interest can be upheld where the relationship between the parties is one which, in the opinion of the community, ought to be sedulously fostered [*Supercom* at 613].

The City and Church have a common interest with respect to the legality of the Density Transfer and the By-laws which implemented it. It was the Church, together with [the Developer] that applied for the Density Transfer. The City actively supported and was a party to the agreements that implemented the Density Transfer.

In addition, [the appellant and his organization] are the "common foe" of the Church and the City, as evidenced by the [organization's] current litigation against the Church and the City.

When the Opinion was given to the [City lawyer], litigation in respect of the Density Transfer was more than a vague and uncertain possibility. It was, as evidenced by the [earlier] litigation that had just concluded, a definite prospect and probability. This probability was subsequently borne out by the [organization's] Application to quash the By-laws and rescind the Density Transfer Agreement.

While a partial settlement agreement later released the City . . . from the [organization's] Application, the [organization] continues to allege that the Section 37 Agreement, the Heritage Easement Agreement and the By-Laws are illegal and require amendment.

> [C]onsideration should be given to the nature of the relationship between the Church and the City at the time the Opinion was shared. Specifically, the Church and the City were in the process of entering into substantial and important agreements with one another, which would be carefully scrutinized by adverse outside parties. Significant changes to the City's Official Plan and Zoning By-laws were being contemplated that would directly impact on the Church, [the Developer] and, indirectly, on the surrounding community. In such a situation, it was necessary and prudent for the City to reassure themselves that the proposed transactions were within the law. The sharing of the Church's Opinion with the City was a primary way of accomplishing this goal.

The Church submits that Order MO-1338, which I relied on in my Order MO-1900-R, is distinguishable from the facts of this case, for the reasons outlined in more detail below. The Church also submits:

> . . . [T]he open and cooperative relationship between a municipality and an applicant for changes to that municipality's Official Plan and zoning by-laws is one which ought to be sedulously fostered. Where a municipality requests information from an applicant that would otherwise be protected by the rules of solicitor-client privilege, it is in the interests of society as a whole that the applicant be able to disclose the information without fear of losing its rights to privilege over it as against other parties.

The Church fundamentally misconstrues the City's role and the nature of the relationship between the City and the Church at the time of the disclosure. In September of 2002, the City was considering a density transfer proposal from the Church and the Developer, which would entail City Council passing by-laws under sections 34 and 37 of the *Planning Act*. The City ultimately accepted the proposal and passed the by-laws approximately one year later, in September, 2003.

Both by statute and at common law, a municipality performs a regulatory function and has a duty to act fairly and impartially in a *Planning Act* process. Section 1.1(d), the purpose section of the *Planning Act*, states:

> The purposes of this Act are,
>
> > to provide for planning processes that are fair by making them open, accessible, timely and efficient

Section 34(12) requires a public consultation process prior to passing a by-law:

> Before passing a by-law under this section . . . the council shall ensure that sufficient information is made available to enable the public to understand generally the zoning proposal that is being considered by the council and, for this

> purpose, shall hold at least one public meeting, notice of which shall be given in the manner and to the persons and public bodies prescribed.

At common law, a municipality has a duty to act fairly, impartially and in the public interest in enacting a zoning by-law.

The Supreme Court of Canada, in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)* (2004), 241 D.L.R. (4th) 83 described the municipality's role in this context as follows:

> The decision to propose a draft by-law rezoning municipal territory is made by an elected council accountable to its constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to their own: *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 51. This decision is moreover tempered by the municipality's charge to act in the public interest: *Toronto (City) v. Trustees of the Roman Catholic Separate Schools of Toronto*, [1926] A.C. 81 (P.C.), at p. 86. What is in the public interest is a matter of discretion to be determined solely by the municipality. Provided the municipality acts honestly and within the limits of its statutory powers, the reviewing court is not to interfere with the municipal decision unless "good and sufficient reason be established": *Kuchma v. Rural Municipality of Tache*, [1945] S.C.R. 234, at p. 243 (per Estey J) . . .

Similarly, in Ontario, the Divisional Court has stated that a municipality considering a by-law under the *Planning Act* must act with "fairness, openness and impartiality" [*H.G. Winton Ltd. v. North York (Borough)* (1978), 88 D.L.R. (3d) 733 at 741; see also *R. v. Konakov* (2004), 69 O.R. (3d) 97 at 100 (C.A.)].

Turning to the facts of this case, in the fall of 2002, the City was in the process of weighing the various public interests involved in the density transfer proposal. It is for this reason that the City's East York Community Council conducted public consultations in the community on the issue, in September 17, 2002 and December 12, 2002 (both before and after the Church disclosed the opinion). The City was charged with the responsibility of conducting a fair, open and impartial process in considering whether the proposal should be accepted, in the public interest.

At all relevant times, the Church (with the developer) was and remains a private party, making a proposal to the City that it accept its density transfer proposal. As the public body charged with making zoning decisions, the City stands in the position of public regulator or law maker. The City in this case cannot be considered a private party working in collaboration with the Church, or dedicated to advancing the Church's interests. It would be fundamentally inconsistent with the City's common law and statutory role as impartial guardian of the public interest to consider the City and the Church to have a "common interest" and to represent "a united front against a common foe", that being other members of the public who happen to oppose to the density transfer. In these circumstances, the City must be considered to have nothing closer than an "arm's length" relationship.

Another way of testing whether there can be said to be a "common interest" between two parties is to ask whether it would be "reasonably possible for the same counsel to represent both" [see *Canadian Pacific Ltd. v. Canada (Competition Act, Director of Investigation and Research)*, [1995] O.J. No. 4148 (Gen. Div.), at para. 27). In my view, counsel would be in a conflict of interest situation if he or she were asked to represent both a proponent of the density transfer proposal (the Church) and the municipal government that is deliberating on the matter and deciding whether it is in the public interest to accept the proposal (the City).

Another point which weighs against a finding of common interest is the fact that the City has declined to assert a common interest with the Church, despite the fact that, prior to Order MO-1900-R, I invited the City to comment on (among other things) Order MO-1338, which discussed the principle of common interest in detail.

As noted above, the Church submits that Order MO-1338 is distinguishable. It states:

> In the reconsideration Order, the Adjudicator referred to Order MO-1338 [hereinafter, "*WWF*"] in addressing whether a common interest existed. In *WWF*, the City of Toronto had been in the process of developing a new sewer use by-law for several years when it was approached by the World Wildlife [Fund] ("WWF") regarding pollution prevention initiatives WWF wished to see included therein. The City provided WWF with a draft of the proposed by-law, which WWF ordered its solicitor to given an opinion upon. WWF subsequently sent . . . a copy of the opinion to the City's Works and Emergency Services staff.
>
> However, the present case is distinguishable on several points from *WWF*:
>
> (a) Most importantly, as previously discussed, in this case the Church only intended to provide a copy of the Opinion to the City's Solicitor. No copy of the opinion was to remain in the Planning Department's hands. This is very different from *WWF*, where the opinion was given to the City's Works and Emergency Services staff with no apparent instructions to give it directly to the City's Solicitor.
>
> (b) The litigious context present in this case, including the Application by the Society against the City and the Church, is a feature noticeably lacking in *WWF*. Unlike *WWF*, the evidence in this case is clear that both parties perceived a "common foe" to the agreements they proposed to enter into and reasonably anticipated that litigation would be the result.
>
> (c) The requester in *WWF* asserted that the Opinion "was intended to be used at . . . public meetings." No such allegation has been made by [the appellant] in the present proceeding. In fact, the confidential nature of the Opinion is a source of some apparent frustration for [the appellant]. Moreover, in the present case, [the Church lawyer] explicitly informed the

> City of the Church's intention that the Opinion was not to be made public, prior to disclosing it to the City's Solicitor. No such evidence was raised in *WWF*.
>
> (d) The relationship and the relevant by-law amendment in *WWF* were substantively different than those at issue in the present case. While the by-law in *WWF* was one of general application and had been contemplated prior to WWF's involvement, the By-laws by which the Density Transfer was implemented were undertaken specifically at the request of and to benefit the Church and [the Developer].

I do not accept that Order MO-1338 is distinguishable from the present case. In that case, the basis of the adjudicator's decision was that there was no common interest between the City, in its by-law enactment process, and a public interest group, the WWF:

> . . . The WWF is a public interest organization with a focus on conservation and environmental issues, and in this case was seeking to ensure that the City adopted a by-law which was sensitive to these issues. Although it may be said that the City also had an interest in adopting an environmentally sound by-law, the WWF was acting as an arm's-length public interest group. I am not convinced that the interests of the WWF and the City in regard to the adoption of an environmentally sound by-law are sufficiently connected to be accurately characterized as a "joint interest".

Those essential facts are present here.

As to the Church's specific points:

> (a) For the reasons expressed above, the record at issue is the copy of the opinion provided by the Church lawyer to the City planner; therefore, this point does not assist in distinguishing Order MO-1338;
>
> (b) The fact that there may have existed a threat of litigation does not alter the nature of the relationship between the Church and the City in September 2002; in any event, I will consider the application of litigation privilege below;
>
> (c) The common interest finding in Order MO-1338 did not turn on whether the record was intended to be used at public meetings;
>
> (d) It may be the case that the City began to consider the by-laws at the behest of the Church and the Developer; however, this does not change the nature of the public by-law process and the legal framework at the relevant time, which were not significantly different from the process at issue in Order MO-1338.

In light of the above, I conclude that the Church and the City did not have a common interest at the time the Church disclosed the opinion to the City.

Fairness (criterion 7)

The consideration of "fairness" is relevant where there is a finding of implied waiver (as opposed to express waiver) [see R. Manes *et al.*, Solicitor-Client Privilege in Canadian Law, at p. 191].

The Church submits:

> There are no fairness grounds in favour of [the appellant and his organization] with respect to disclosure of the Opinion. [The appellant and his organization] have baldly asserted that the Church and the City have acted illegally in respect of the Cathedral Lands and even that the Rector and Churchwardens have attempted to convert the proceeds of the Density Transfer to their own uses. [The appellant] has even gone so far as to state [in his representations to the adjudicator] that "the legal opinion submitted is to justify theft."
>
> These allegations are presently before the Court in the Application [to quash the by-laws] and have been vigorously disputed by the City and the Church. [The appellant] has been afforded every substantive and procedural right in those proceedings. [The appellant] could have requested a copy of the Opinion in the context of the Application but failed or was unwilling to do so. [The appellant] could have addressed the privileged status of the Opinion before the Court during the hearing of the Society's Application on November 18 and 19, 2004 but failed or was unwilling to do so.
>
> The avowed purpose of [the appellant's organization], if successful, in obtaining access to the Opinion is to use it as a pretext for gaining a second hearing before Justice Ducharme, either before or after he releases his decision in the Application, further delaying a final resolution in this matter and further delaying the ability of the Church to start the refurbishment and renovation of the Parish House. Such an outcome would be patently unfair to the Church.
>
> In contrast, fairness dictates that the Church's Opinion should be exempt from disclosure. The Church disclosed the Opinion to the City under the reasonable assumption that the Opinion would remain confidential and exclusively in the hands of the City's Solicitor. The Church had no intention of waiving privilege and the Church's relationship with the City in the context of the Section 37 [of the *Planning Act*] Agreement and the Heritage Easement Agreement is one which ought to be sedulously fostered.
>
> . . . . .

> . . . [P]articularly given the unique circumstances under which the Opinion was given to the City's Solicitor in the first place, if there is a conflict between [the appellant's] right to access the Opinion and the Church's right to confidentiality, it should be resolved in favour of the Church.

I am not persuaded that it would be unfair to conclude that the Church waived privilege.

First, this is not a case where the party disclosed the opinion through mistake or inadvertence.

Second, I am not satisfied that any significant prejudice will accrue to the Church if the record is disclosed. For example, there is no evidence that disclosure will result in the Church being exposed to new litigation.

The Church is concerned about the impact of disclosure on the existing litigation before the Superior Court of Justice. I do not accept that it would be "unfair" for a member of the public to legitimately pursue his rights. Even if it could be said that the appellant may have been able to obtain disclosure of the opinion through an order of the Superior Court in the by-law litigation, it is a well-entrenched principle of law that the availability of a document through litigation procedures does not affect its availability under the *Act* [see section 51 of the *Act*, Order PO-1688 and *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.).

In addition, I am not persuaded that disclosure could ultimately be prejudicial to the Church in the Superior Court litigation. I note that as a general rule, an expert's opinion on the ultimate issue to be decided (in this case, the legality of the density transfer) is not admissible [see *R. v. Century 21 Ramos Reality Inc.* (1987), 57 O.R. (2d) 737 at 751-752 (C.A), leave to appeal refused (1987), 62 O.R. (2d) ix (note)]. Even if the Superior Court were to decide that the opinion is admissible, the Court is capable of addressing any fairness concerns, both on the issue of admissibility and in the context of the overall litigation.

The Church submits that it disclosed the opinion "on the reasonable assumption that the Opinion would remain confidential." For the reasons stated above, this assumption was not reasonable.

Finally, while it is not determinative of the waiver issue, I note that in *Canadian Municipal and Planning Law*, (Toronto: Carswell, 1983), Stanley M. Makuch articulated the public interest in fair and transparent municipal processes as follows (at pp. 267-268):

> This chapter deals with the legal requirements for access to information, notice, hearings, and conflict of interest provisions at the municipal level. The reasons for such requirements are numerous . . .
>
> [A] sense of "fairness" often demands openness in local government. Municipal governments affect the lives of their citizens in many direct and important ways. The rezoning of a particular area of a municipality can have an important impact on property values . . . Although decisions affecting these matters generally are

> not viewed as determining legal rights and thus do not require notice and a hearing, they do affect "rights" in the popular sense. It is important, therefore, that an opportunity to participate in the shaping of one's community should be provided. Access to information and decision-making is a pre-requisite for such participation while conflict of interest legislation can help to ensure that decisions are not made for private gain.
>
> Finally, it is clear that municipalities in rezoning individual parcels of land . . . can be performing quasi-judicial functions and affecting rights in the narrower legal sense. In such cases, traditional legal values reflected in the rules of natural justice and in the concept of procedural fairness demand due process protection.

For all of the reasons set out in the discussion above, I find that the "fairness" criterion does not favour the Church's position.

Conclusion on waiver

I found above that:

- there is evidence to support an express intention to waive privilege, or at a minimum an implied intention to waive privilege
- it was not necessary for the Church to disclose the full opinion to advance its interests
- there was no common interest between the Church and the City at any of the relevant times
- fairness indicates that the opinion should be disclosed

Accordingly, I find that when the Church disclosed the opinion to the City on September 18, 2003, it waived its common law solicitor-client communication privilege in the record.

The Church's common law litigation privilege

Introduction and general principles

This is the second of two common law heads of privilege under section 12.

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident*].

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*].

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*; 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*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

The Church's submissions

The Church submits:

> . . . [T]he Opinion was written with the reasonable prospect in mind of litigation pertaining to the Density Transfer. Litigation was more than simply a "vague or general apprehension". [Named individual] had already commenced criminal proceedings against [named Church officials] relating to the archaeological excavations on the Cathedral Lands necessary to inform the restoration funded by the Density Transfer. Furthermore, defamation litigation was being contemplated against [named individual]. Finally, at community consultations regarding the proposed Density Transfer, members of the [appellant's organization] had alleged that the proposed Transfer was an illegal theft.
>
> . . . [T]he Opinion was created for the dominant purpose of litigation and hence enjoys the litigation privilege unless waiver is established by [the appellant].
>
> All papers and materials created or obtained specially for the lawyer's litigation brief, whether the litigation is existing or contemplated, are privileged [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27 at 33].

In *Susan Hosiery*, the Court held that the policy behind the "lawyer's brief" rule was as follows:

> . . . under our adversary system of litigation, a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that contemplated when they were prepared. What would aid in determining the truth when presented in the manner contemplated by the solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. If lawyers were entitled to dip into each other's briefs . . . the straightforward preparation of cases for trial would develop in a most unsatisfactory travesty of our present system . . .

. . . [E]ven if the Opinion was not created for the dominant purpose of litigation, the Opinion became privileged following the [appellant's organization's] commencement of litigation against the City and the Church, at which time the Opinion was included in both the Church's and the City's Litigation Brief.

As previously discussed, it is the obvious intention of [the appellant and his organization] to use the Opinion for prejudicial purposes warned against in *Susan Hosiery*. [The appellant and his organization] have had full opportunity to make their legal argument before the Court as to the legality of the Density Transfer and the By-Laws. They should not now be allowed to cherry-pick the Church's and the City's legal briefs for the purposes of obtaining a new hearing or bolstering their appeal.

The Church then submits that I should follow Order MO-1475 of this office:

> The facts of this case are similar in this respect to those found in Order MO-1475. In that case, the requester sought access . . . to any correspondence from individuals who were in his employ at the time his contract with the [Dufferin-Peel Catholic District School Board] terminated. A copy of the correspondence at issue in the appeal had been forwarded to the Board's legal counsel, "together with a request for legal advice". The Board's legal counsel subsequently relied on the correspondence in terminating the appellant's contract.
>
> In the Reconsideration Order, the Adjudicator held that Order MO-1475 was distinguishable from the present case because, "it appears from the reasons . . . that the specific record at issue was the copy that was sent by the Board to its legal counsel together with a request for legal advice."

> This distinction is problematic. First there is no indication that the copy of the correspondence in issue in Order MO-1475 was the copy of the record that was sent by the Board to its legal counsel. In fact, the decision suggests the opposite. The appellant made his request to the *Board*, presumably for the copy of the correspondence that was in the possession of the Board. There is no indication in Order MO-1475 that the request was made for the copy of the correspondence in the hands of the Board's solicitor.
>
> Moreover, even if the request in MO-1475 was made for the copy of the correspondence in the hands of the Board's solicitor, which is denied, the distinction is irrelevant. There is no distinction in the case law between copies of privileged information in the hands of the client vs. copies of the same information in the hands of the client's solicitor. Such a distinction would undercut the very policy of open communication between the solicitor and client that the privilege seeks to uphold. Once the solicitor applies its knowledge and skill to include a document in its litigation brief, that document is privileged. It is irrelevant whether a copy of the document is subsequently sought from the client or the solicitor, the principle or the agent. The two, for the purposes of protection of the privilege, are one.
>
> Similarly, in this case, it is irrelevant whether [the appellant] seeks the copy of the Opinion in the hands of the Planning Department or the copy in the hands of the City Solicitor. If the litigation privilege applies, there is no case law to support a proposition that the solicitor's copy is privileged and the planning department's copy somehow is not. Again, while the Church recognizes the principle in Orders PO-1846-F and PO-1848-F, those Orders are entirely distinguishable from the present facts, as per the arguments above.

These submissions on Order MO-1475 are directed more at solicitor-client communication privilege than litigation privilege, but I will nevertheless deal with them below.

Regarding the issue of waiver, the Church states that it relies on its submissions made above in the context of solicitor-client communication privilege.

Findings

Common law litigation privilege under section 12 of the *Act* is not available to the Church in these circumstances for two reasons:

(i) Section 12 does not apply to protect the interests of non-government parties, for the reasons expressed above; and

(ii) Common law litigation privilege ceases to apply where the party waives privilege by disclosing it to an outside party with whom it has no common interest [*General Accident*], and in this case, the privilege has been waived

> for the reasons outlined above under solicitor-client communication privilege.

Even if common law litigation privilege were available to the Church, I find that it would not apply in these circumstances.

In my view, based on the actual sequence of events, litigation was no more than a vague or theoretical possibility at the time the opinion was prepared by the Church's lawyer. At that time, the City was contemplating whether to accept the Church's proposal. The City had not yet made any decision in this respect, and the by-laws and contracts were not put into effect until over one year later. At that point, it was far from certain whether the density transfer would take place at all, let alone whether there might be litigation on the issue.

In addition, even if litigation was reasonably contemplated, I am not satisfied that potential litigation was the *dominant* purpose for preparation of the opinion, as required by the case law [see *Waugh* and *General Accident*, above]. The opinion itself, and the surrounding circumstances, indicate that the dominant purpose for the preparation of the opinion was to advise to the Church on the legality of the density transfer, so that the Church could decide whether or not to proceed with its proposal to the City. An additional, secondary purpose for obtaining the opinion was to allow the Church to use it as a basis to persuade the City of the legality of the transfer, in the event that the opinion supported this position.

The Church argues that the opinion formed part of the Church's "lawyer's brief" in the Superior Court litigation. In my Order MO-1900-R, I stated the following with respect to a similar argument from the City:

> Under the *Nickmar* principle, copies of such 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. Generally speaking, this aspect of litigation privilege is applicable to a collection of documents to which a lawyer's expertise was applied. The mere fact that a record appears or may appear in a lawyer's brief for litigation is not sufficient. Here, the City has not supplied the kind of evidence and argument to support its claim that the single record at issue would attract the *Nickmar* principle. In any event, only the copy in the lawyer's brief would become privileged under this principle, and even if such a copy were to exist, it would not be the subject of the appellant's request.

Similarly, based on the Church's representations and the other material before me, I am not satisfied that the opinion was selected for inclusion in the lawyer's brief "through research or the exercise of skill and knowledge" as required by *Nickmar*.

The Church submits that Order MO-1475 is not distinguishable from the facts of this case. I do not accept this submission.

The Church misconstrues my reasons regarding the earlier decision in Order MO-1900-R. I stated:

> In my view, Order MO-1475 is distinguishable from this case. There, the requester was not seeking the letter as received by the institution. It appears from the reasons in Order MO-1475 that the specific record at issue was the copy that was sent by the Board to its legal counsel, together with a request for legal advice. Here, although a copy of the record was sent to the City's legal counsel, the specific record at issue is the copy of the legal opinion that was sent from the outside party to the City planner. Therefore, I see nothing inconsistent between Order MO-1475 and a finding here that the record is not subject to common law solicitor-client communication privilege.

The key distinction between Order MO-1475 and the present case is that different records were requested in different circumstances. In Order MO-1475, it appears that the record at issue was the Board's copy of the letter from the member of the public *together with the Board's copy of the document it prepared that requested legal advice from its legal counsel.* This accounts for why the adjudicator stated:

> I have reviewed record A5 and it is a letter to the Board signed by several of the appellant's former employees. The materials before me indicate that the Board faxed a copy of this letter to its legal counsel, *together with a request for legal advice.* [emphasis added]

Thus, the adjudicator in that case found that the letter, as part of the complete package, that is, as attached to the request for legal advice, constituted a confidential communication between a lawyer and a client made for the purpose of seeking legal advice.

By contrast, the sole record at issue here is the six-page opinion sent by the Church's lawyer to the City planner, prior to any request for legal advice from the City lawyer. Unlike Order MO-1475, the record here, being the Planning Department's copy, does not appear in the context of any covering materials seeking legal advice. Therefore, the two cases are significantly different on their facts.

The Church erroneously submits that "There is no distinction in the case law between copies of privileged information in the hands of the client vs. copies of the same information in the hands of the client's solicitor", and that "there is no case law to support a proposition that the [City] solicitor's copy is privileged and the planning department's copy somehow is not."

In *General Accident*, Mr. Justice Doherty stated (at p. 361):

> . . . A non-privileged document should not become privileged merely because it is copied and placed in the lawyer's brief. I would not, however, go so far as to say that copies of non-privileged documents can never properly be the subject of litigation privilege.

Doherty J.A. then goes on to discuss and endorse the *Nickmar* lawyer's brief rule. Under that rule, documents that are themselves not privileged (for example, as held by the client) may become privilege *in the hands of counsel*, if through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the brief. If the document is found to be privileged under the *Nickmar* rule, that does not cloak the otherwise non-privileged document in the client's hands with privilege. Thus, it is clear that the same document may be privileged in the lawyer's hands, but non-privileged in the client's hands.

In this case, I found that the record in the City lawyer's hands is not subject to litigation privilege, because privilege was waived and, in any event, the record does not meet the "dominant purpose" or "lawyer's brief" tests. Even if it could be said that the record in the City lawyer's hands was subject to litigation privilege, that does not mean that the copy in the planner's hands would necessarily be privileged, based on the principles articulated in *General Accident*.

To conclude, I find that the Church's common law litigation privilege does not apply here.

Statutory solicitor-client communication privilege

This is the first of two statutory privileges under section 12. These privileges parallel but are not necessarily identical to the two privileges available at common law. 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.

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

The Church submits:

> Where the client in respect of the record is not an institution under the *Act*, the exemption under the second branch of s. 12 does not apply unless a non-institution and an institution have a joint or common interest in the particular matter [*WWF*].
>
> As previously discussed, the Church and the City have a common or joint interest in the Density Transfer, by virtue of Section 37 and Heritage Easement Agreements they entered into with each other, and the "common foe" of [the appellant and his organization] that they shared at the time the Opinion was disclosed.
>
> The Church therefore submits that the record in question, being the 9-page transmission to the City's Solicitor, . . . on September 18, 2002, was prepared by the [Church lawyer] for [the City lawyer] so that [the City lawyer] could provide

> the City with legal advice. This is exactly what [the City lawyer] did, using the Opinion, among other things to satisfy herself that the Density Transfer was in fact a legal transaction.

The branch 2 solicitor-client communication privilege is clearly designed to protect an institution's privilege, not that of an outside party. The record here was not "prepared by or for counsel employed or retained by an institution for use in giving legal advice." It was prepared by counsel retained by the Church for use in giving the Church legal advice. In the absence of a common interest, branch 2 does not apply to protect the Church's solicitor-client communication privilege.

I will consider below whether the City's statutory solicitor-client communication privilege may apply in the circumstances.

Statutory litigation privilege

This second head of the statutory privilege applies to a record that was prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation."

The Church submits:

> For the reasons discussed under the common law litigation privilege section of these submissions, the Church submits that the Opinion was prepared by [the Church lawyer] for [the City lawyer] for the dominant purpose of contemplated litigation. This litigation subsequently manifested itself in proceedings before the Ontario Municipal Board and the Ontario Superior Court of Justice. The latter proceeding is presently pending.
>
> Alternatively, if the adjudicator finds that the Opinion was not created for the dominant purpose of contemplated litigation or does not otherwise meet the test for statutory litigation privilege under Branch 2 of the Section 12 test, the Church submits that the Opinion is litigation privileged by virtue of inclusion in the City's solicitor's litigation brief.

The Church then cites and relies upon the *Nickmar* lawyer's brief principle as part of litigation privilege. The Church continues:

> In *Ottawa-Carleton v. Consumers Gas* [(1990), 74 O.R. (2d) 637 at 643 (Div. Ct.)] the Court discussed the policy reasons behind this privilege. It held:
>
> > Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel . . . if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forego conscientiously investigating his own case in the hope he

> will obtain disclosure of the research investigations and thought processes compiled in the trial brief of opposing counsel.
>
> This policy is particularly relevant in this case. [The appellant and his organization's] sole objective is to obtain the disclosure of the research investigations and thought processes that support the legal position of the Church and the City in respect of the present litigation before the Courts.

The branch 2 litigation privilege is clearly designed to protect an institution's litigation privilege, not that of an outside party. The record here was not "prepared by or for counsel employed or retained by an institution in contemplation of or for use in litigation." It was prepared by counsel retained by the Church. Therefore, in the absence of a common interest, branch 2 does not apply to protect the Church's litigation privilege. I also rely on my reasons set out above regarding the Church's common law litigation privilege.

The Church submits that the appellant intends "to obtain the disclosure of the research investigations and thought processes that support the legal position of the Church and the City in respect of the present litigation before the Courts." Accepting for the moment that the opinion, which contains conclusions of law, would be admissible in evidence [see above discussion of the "ultimate issue" rule], that purpose is the whole point of the discovery process. If the intended use in litigation by the opposite party drove the result, everything sought to be discovered in the litigation process would always be privileged.

Even accepting that the appellant may seek to use the opinion to advance his interests in the litigation with the Church and the City, this has no bearing on the application of statutory litigation privilege to this record.

Conclusion

For the reasons set out above, none of the heads of privilege under section 12 is available to the Church.

Below I will consider the application of section 12 to the City's privilege, in light of the Church's submissions.

SOLICITOR-CLIENT PRIVILEGE OF THE CITY

The City's common law solicitor-client communication privilege

In Order MO-1900-R, I found that the City's solicitor-client communication privilege did not apply to the copy of the record in the hands of the Planning Department, since it does not constitute a communication between a City lawyer and a City client made for the purpose of giving or receiving legal advice.

The Church disputes my characterization of the scope of the request, and I have dealt with this issue above.

I see no basis for revisiting my finding that the record at issue is the record held by the City's Planning Department.

The Church argues that the record should be considered a direct, Church lawyer to City lawyer communication and that the record is privileged because it forms part of the City lawyer's working papers used to formulate legal advice. As I stated above, the evidence indicates that the record was not provided directly by the Church lawyer to the City lawyer. However, even if I am wrong in this regard, the record still would not be subject to solicitor-client communication privilege.

In *General Accident*, Mr. Justice Doherty discussed the law as it applies to third party communications (at pp. 352-353):

> The authorities . . . establish two principles:
>
> - not every communication by a third party with a lawyer which facilitates or assists in giving or receiving legal advice is protected by client-solicitor privilege; and
>
> - where the third party serves as a channel of communication between the client and solicitor, communications to or from the third party by the client or solicitor will be protected by the privilege as long as those communications meet the criteria for the existence of the privilege.
>
> . . . . .
>
> The second principle described above extends client-solicitor privilege to communications by or to a third party who serves as a line of communication between the client and solicitor. Thus, where a third party serves as a messenger, translator or amanuensis, communications to or from the party by the client or solicitor will be protected. In these cases the third party simply carries information from the client to the lawyer or the lawyer to the client.
>
> The privilege also extends to communications and circumstances where the third party employs an expertise in assembling information provided by the client and in explaining that information to the solicitor. In doing so, the third party makes the information relevant to the legal issues on which the solicitor's advice is sought. For example, in *Susan Hosiery Ltd. v. M.N.R.*, ([1969] 2 Ex. C.R. 27), the client's financial advisers who communicated with the lawyer were intimately familiar with the client's business. At the client's instruction, they met with the solicitor to convey information concerning the business affairs of the client. They

> were also instructed to discuss possible arrangements of those affairs presumably to minimize tax consequences. In a very real sense, the accountants served as translators, assembling the necessary information from the client and putting the client's affairs in terms which could be understood by the lawyer. In addition, they served as a conduit of advice from the lawyer to the client and as a conduit of instructions from the client to the lawyer.

Here, the argument is that the third party communication from the Church lawyer to the City lawyer is privileged in the hands of the City lawyer.

As Doherty J.A. explains, there are only two circumstances in which such a third party communication may be said to be privileged:

> (i) where the third party (the Church lawyer) serves as a messenger or channel of communication between the client (the City planner) and the solicitor (the City lawyer); and
>
> (ii) where the third party (the Church lawyer) employs an expertise in assembling information provided by the client (the City planner) and explaining that information to the solicitor (the City lawyer).

First, under the Church's scenario, the opinion was transmitted from the Church lawyer to the City lawyer. In no way could the Church be described as a messenger between the City lawyer and her client, the planner. Therefore, privilege cannot be said to apply under this principle.

Second, in no way could it be said that the Church lawyer could be considered an expert advisor employed or retained by the City for the purpose of assembling information provided by the City Planner and explaining that information to the City lawyer.

For these reasons, solicitor-client communication privilege is not available to the City.

The City's common law litigation privilege

I considered the City's submissions on the application of litigation privilege in my Order MO-1900-R, and found that it did not apply.

The Church submits that litigation privilege applies because the record forms part of the City's litigation brief.

I am not persuaded by the Church's submissions that I erred in my findings on this issue in Order MO-1900-R. My comments above regarding *General Accident* and third party communications are also applicable here. For similar reasons, I find that common law litigation privilege does not apply from the perspective of the City.

Therefore, I find that the common law litigation privilege is not available to the City.

The City's statutory solicitor-client communication privilege

In Order MO-1900-R, I stated:

> In this case, City counsel clearly did not prepare the record. Further, I find that the specific record at issue was not prepared for City counsel; rather, it was prepared by an outside law firm for an outside client, [the Church]. Therefore, Branch 2 solicitor-client communication privilege does not apply.

The Church has not provided any evidence or argument sufficient to doubt the correctness of this finding.

Therefore, this head of statutory privilege does not apply.

The City's statutory litigation privilege

In my Order MO-1900-R, I stated:

> . . . [T]he record was not prepared by or for counsel for the City. The record was prepared by an outside law firm for an outside client and, therefore, it cannot be said that it was prepared by or for City counsel "in contemplation of or for use in litigation".

The Church submits:

> There is no question that the Opinion in issue has played an important role in the City's decision to proceed with the Density Transfer as well as the City's legal position in the subsequent litigation. Clearly, through the exercise of its skill and knowledge, the City's Solicitor has used the Opinion to aid in the formulation of its own legal opinion on the legality of the Density Transfer. This is reflected in the Affidavit of [the City Planner] sworn July 13, 2004 submitted on behalf of the City of Toronto in response to the application of [the appellant's organization] to strike down the Density Transfer and the By-laws:
>
> > I am advised by the City Solicitor's office and do verily believe, that in response to the applicant's concerns that certain restrictions in the original Crown Patent for the Cathedral Lands would be violated as a result of the by-laws, the City Solicitor satisfied herself that there was no impediment to the enactment by City Council of the by-laws. I am further advised by the City Solicitor's Office and do verily believe, that the City Solicitor is satisfied that all of the Section 37 Agreements and the [Heritage Easement Agreement] have been properly executed and registered on Title and that the above noted public benefits that are required by the by-laws have been properly secured.

> The mere fact that a record appears or may appear in a lawyer's brief for litigation is not sufficient to establish litigation brief privilege. However, that is not the case here. The Opinion has been an important component of the City Solicitor's legal analysis of the legality of the Density Transfer and the associated By-laws. It has also been an important component in the formulation of the City's legal opinion with respect to subsequent litigation undertaken by the requester and the Society. For these reasons, the Church submits that litigation brief privilege applies to the Opinion.

The Church further submits that the opinion was prepared by its counsel for City counsel in contemplation of or for use in litigation. First, I do not accept that the purpose for which it was prepared was reasonably contemplated litigation, for the reasons set out above under the Church's common law litigation privilege. Second, for the reasons set out above and in Order MO-1900-R, I do not accept that the "lawyer's brief" rule, to the extent that it is enshrined in the statutory litigation privilege, attaches to the opinion.

In any event, the Church has not provided any evidence or argument sufficient to doubt the correctness of my finding that statutory litigation privilege does not apply because the records were not prepared "by or for" counsel for the City.

Therefore, I find no reason to revisit my finding that the City's statutory litigation privilege does not apply to the opinion.

CONCLUSION

For all of the reasons set out above, I find that section 12 does not apply to the opinion.

ORDER

1. I order the City to disclose the record to the appellant no later than **May 16, 2005**, but not before **May 11, 2005**.

2. To verify compliance with provision 1, I order the City to provide me with a copy of the material disclosed to the appellant.

Original Signed By: May 4, 2005
Bernard Morrow
Adjudicator