



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-1925**

**Appeal MA-040160-1**

**City of Burlington**



Tribunal Service Department  
2 Bloor Street East  
Suite 1400  
Toronto, Ontario  
Canada M4W 1A8

Services de tribunal administratif  
2, rue Bloor Est  
Bureau 1400  
Toronto (Ontario)  
Canada M4W 1A8

Tel: 416-326-3333  
1-800-387-0073  
Fax/Téloc: 416-325-9188  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

The City of Burlington (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) from a lawyer on behalf of two individuals, co-owners of a specific property. The request was for copies of certain records related to that property, identified by the requester by its street address in Burlington, Ontario. Specifically, the request was for the records concerning the following events:

- a) The development of the Van Acres Court residential subdivision in or about 1967 and 1968 including without limitation all water drainage issues referable to that subdivision;
- b) The granting of an easement on the [named property owner] lands to the City on August 26, 1968 (the “existing easement”);
- c) The construction on the [named property owner] lands, and/or on the adjoining lands to the north which were then owned by [named adjacent property owner] in or about 1968, of a storm water drainage system consisting of a catch basin and storm sewer pipes (“the existing drainage system”);
- d) The construction of the existing drainage system on the [named property owner] lands off of the existing easement;
- e) The claims made by the [named property owner] against the City since 1968 referable to the granting of the existing easement;
- f) The granting of an easement to the City on the [named adjacent property owner] lands to accommodate the construction of a catch basin and/or storm water drainage system on the [named adjacent property owner] lands which connects in to the existing drainage system on the [named property owner] lands;
- g) The application or applications brought by the owners of the [named adjacent property owner] lands to sever the [named adjacent property owner] lands since 1968;
- h) The applications brought by the owners of the [named adjacent property owner] lands to register a plan of the subdivision for the [named adjacent property owner] lands since 1968;
- i) The transference of a strip of land at the rear of the [named property owner] lands by [named individual] to the [named property owner] in or about November of 1994;
- j) The removal of the existing drainage system from the [named property owner] lands and the construction of a new drainage system on the [named property owner] lands within the existing easement.

The City located records responsive to the request and granted partial access to them. The City denied access to the remainder of the records pursuant to sections 7(1) (advice or recommendations), 11(c), (d), and (e) (economic and other interests) and 12 (solicitor-client privilege) of the *Act*.

The requester, now the appellant, appealed the City's decision.

During mediation of the appeal, the City issued a revised decision letter granting access to a number of records that had previously been withheld. The City granted full access to the records it identified as records 9(d), 9(g), 9(h), 9(i), 9(j), 9(k), 9(n), and 9(s), and partial access to Record 9(a). After reviewing those records, the appellant confirmed that he still sought access to the following records: the undisclosed portions of 9(a) as well as records 9(b), 9(c), 9(e), 9(f), 9(l), 9(m), 9(o), 9(p), 9(q), 9(r), 9(t), 9(v), 9(w), 9(x), 9(y), 9(z), 9(aa), 9(bb), and 9(cc) in their entirety.

As further mediation was unsuccessful, the file was transferred to former Assistant Commissioner Tom Mitchinson for adjudication. With Assistant Commissioner Mitchinson's retirement, I have taken over responsibility for the adjudication of this appeal.

Assistant Commissioner Tom Mitchinson initiated this Inquiry by sending a Notice of Inquiry to the City, setting out the facts and the issues on appeal and requested the submission of representations. He received representations in response. In its representations, the City stated that it had revised its position with respect to two records, and that it waived its right to make submissions on the application of the section 11 exemption given that it is prepared to disclose records 9(z) and 9(bb) to the appellant. The City has now disclosed those records to the appellant, and section 11 is no longer at issue.

Also in its representations, the City abandoned its claim that section 12 applied to Record 9(y). Accordingly, Record 9(y) is no longer at issue in this appeal and has been disclosed to the appellant.

Finally, in its representations, the City noted that the record identified in the Notice of Inquiry as 9(i) should actually be identified as Record 9(l). Record 9(i) was released during mediation. The Notice of Inquiry was modified to reflect the changes and a copy sent to the appellant, along with the City's representations, inviting the appellant's representations. The appellant, the lawyer acting on behalf of the property owners, provided representations in response.

## **RECORDS:**

The records that remain at issue in this appeal, and the exemptions claimed, are outlined in the table below:

<b>Record number</b>	<b>Exemption claimed</b>	<b>Description of record</b>
9(a)	section 12	Assistant City Solicitor's hand-written notes on a letter from the appellant's representative, dated January 21, 1993 (3 pages). The letter itself has been disclosed, remaining at issue are the hand-written notes.
9(b)	section 12	Report from the Assistant City Solicitor to Planning & Development Committee, dated July 6, 1993 (3 pages)
9(c)	section 12	Assistant City Solicitor hand-written notes to the file, dated June 23, 1993 (3 pages)
9(e)	section 12	City Solicitor's memorandum to the Director of Engineering and Executive Director of Civic Operations, dated July 25, 1994 (1 page)
9(f)	section 7(1) section 12	Report from the Manager of Realty Services to Community Development Committee, dated November 17, 2003 (11 pages)
9(l)	section 12	Solicitor's hand-written notes, dated January 12, 2004 (4 pages)
9(m)	section 12	Fax Confirmation and Fax Cover Page from Legal Department, dated January 16, 2004 (2 pages)
9(o)	section 12	Fax Cover Page from Legal Department, dated January 14, 2004 (1 page)
9(p)	section 12	Solicitor's hand-written notes, dated January 14, 2004 (3 pages)
9(q)	section 12	Solicitor's hand-written notes, dated January 6, 2004 (1 page)
9(r)	section 12	Correspondence from City Solicitor to various City staff, dated December 23, 2003 (2 pages)
9(t)	section 12	Correspondence from Manager of Inspection & By-Law enforcement to City Solicitor, dated December 23, 2004 (6 pages)
9(v)	section 12	City Solicitor's hand-written notes, dated July 9, 2002 (2 pages)
9(w)	section 12	Solicitor's hand-written notes, dated December 12, 2002 (1 page)
9(x)	section 12	Solicitor's hand-written notes, dated November 14, 2001 (1 page)
9(aa)	section 12	Legal Department Inter-office Memorandum, dated July 25, 1994 (3 pages)
9(cc)	section 12	Solicitor's hand-written note, dated December 3, 2001 (1 page)

## **DISCUSSION:**

### **SOLICITOR-CLIENT PRIVILEGE**

#### **General principles**

The City takes the position that the hand-written notes on Record 9(a) and all of the remaining records at issue are exempt from disclosure under the discretionary exemption under section 12 of the *Act*, which reads:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 contains two branches of privilege. Branch 1 applies to records that are subject to solicitor-client privilege at common law. The term solicitor-client privilege encompasses two types of privilege:

- Solicitor-client communication privilege; and
- Litigation privilege

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

To claim an exemption, the City must establish that one or the other (or both) branches apply. In the context of this appeal, the City submits that all of the records qualify for exemption under both solicitor-client communication privilege and litigation privilege within both branches of the section 12 exemption. I shall first consider the application of the Branch 1 privileges; solicitor-client communication privilege and litigation privilege at common law.

#### **Solicitor-client communication privilege**

##### ***General Principles***

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to “a continuum of communications” between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

### ***Representations***

The City submits that solicitor-client communication privilege applies to all of the records at issue in this appeal:

With respect to all of the records, the City relies on the notion that there is a continuum of communications between a solicitor and client to which the communications branch of the exemption applies and in particular the scope of the privilege as referenced earlier in Order PO-1855. The matter at issue between the City and the Appellant’s clients has been on-going continuously from 1980 to the present day, where the parties are engaged in a formal litigation. As will be discussed below in greater detail, the tone of the communications sent to the City by the Appellant on behalf of his client have been, adversarial, accusatory, and threatening litigation since 1983. City staff, and in particular the City Solicitor have treated this matter as one that would likely result in litigation, unless otherwise settled. All of the records remaining at issue are records that were created in this environment for the purposes of giving or receiving legal advice on this contentious issue. Referencing again PO-1855: “...*legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.*” The City submits that all of the documents represent a continuum of communication of the type referenced in PO-1855.

Addressing certain records specifically, the City submits more detailed representations on how solicitor-client communication privilege might apply:

9(a) These notes were made in the course of preparing the City’s case for an Ontario Municipal board hearing. ...

9(b) This report was made for the purpose of a solicitor communicating with her client so as to provide advice and seek instruction. It was also part of the preparation of the City's case for submission to the Ontario Municipal Board. Both branches of the section 12 exemption apply to this record on grounds of solicitor-client communication privilege and litigation privilege.

9(c) These notes were prepared for the purpose of ensuring accurate communications with a solicitor's client and for the purpose of preparing the City's case for submission to the Ontario Municipal Board. The section 12 exemption applies to this document on ground of solicitor-client communication privilege and litigation privilege.

9(e) This document was prepared by the City's solicitor to prepare the City's case for presentation before a Court, namely the case that ultimately was filed by the Appellant on behalf of [the named property owners] on December 18, 2003.

9(f) The City claims that this record is also subject to the exemption provided by s.12 in addition to the submissions previously made in respect of s.7(1). In reviewing this document the Inquiry Officer is requested to bear in mind that the Manager of Realty Services reports to the City solicitor and that the report clearly contains legal advice. The report was prepared in response to the Appellant's clients appearing before City Council requesting settlement of their claim. A copy of their submission is enclosed. The City submits that this report is exempt from disclosure pursuant to section 7(1) and 12 of the Act as it contains both legal advice and advice and recommendations of staff. ...

9(v), (w), (x), (aa) and (cc) Each of these notes and memoranda were made by the City's solicitor for the purpose of preparing the City's case for contemplated litigation.

In his representations, the appellant addresses each record individually and focuses on the litigation privilege component of solicitor-client privilege:

Record 9(a)

The City should be limited to the exemption sought in its letter of April 13, 2004, that is, for solicitor-client privilege only. No litigation privilege is claimed. The City states that its solicitor created the notes for use in giving advice.

In the City's representations, a different exemption, and a different reason for the exemption, is maintained, that is, litigation privilege with reference to an OMB hearing.

In light of the conflicting statements made, and grounds asserted, it is submitted that neither have been borne out. This record must be disclosed.

In any event, there was no OMB hearing in which the [named property owners] were parties or objectors.

Record 9(b)

In the City's decision letter of April 13, 2004, it claims solicitor-client privilege and the provision of a recommended course of action based on legal considerations. No litigation privilege is claimed. The City must be held to its original claim of solicitor-client privilege only.

There is no allegation that the report was delivered in confidence to its recipient, nor that the recipient or recipients were clients of the solicitor. The Subject matter of the report is the [named adjacent property owner] subdivision, not the construction of the storm sewer off of the easement, which is admitted by the City in any event. This document must be disclosed.

Record 9(c)

The decision letter of April 13, 2004 raises an exemption for solicitor-client privilege on the basis of giving advice. No exemption for litigation privilege is sought.

The easement was acquired by the City in 1968; thus notes made on June 23, 1993 cannot be with reference to easement acquisition. Neither is it suggested that such notes were communications of a confidential nature, nor is a client disclosed. The notes appear to contain no legal advice.

The reasons expressed in the City's representations on appeal are to ensure "accurate communications". This is not the giving of legal advice, and solicitor-client privilege does not apply. The record must be disclosed.

Record 9(e)

The decision letter of April 13, 2004 claims an exemption for solicitor-client privilege for giving advice concerning easement acquisition. No litigation privilege is claimed.

The City's representations on appeal claim an exemption for litigation privilege, and not solicitor-client privilege. The claims and the explanations are mutually contradictory and the document must be disclosed. In the alternative, the memo is



not expressed to be confidential and no client is identified. The memo is not a communication for the purpose of giving legal advice.

Records 9(f)

The City's decision letter of April 13, 2004 claims an exemption for advice or recommendations. No claim for litigation or solicitor-client privilege is made.

...

Record 9 (l)

The City has made no representations regarding this document.

Records 9(m), 9(o), 9(p), 9(q), (9r), 9(t)

The City claims litigation privilege for these documents. To successfully assert such a claim, the City must establish that these documents were created for the dominant purpose of giving or receiving legal advice in reasonably anticipated litigation. It is insufficient, for the purpose of establishing litigation privilege, that the documents were prepared in part for the purpose of obtaining legal advice in anticipated litigation.

None of these documents meet the dominant purpose test. Although they may have been prepared in part for the purpose of obtaining legal advice, they were also prepared or obtained for the purpose of recording facts, recording information and communicating same. Each of these documents must be disclosed.

Records 9(v), 9(w), 9(x), 9(aa) and 9(cc)

The City claims an exemption for litigation privilege. Once again, the City has not established that these documents were prepared for the dominant purpose of giving or receiving legal advice in reasonably anticipated litigation. These records must be produced.

***Analysis and findings – solicitor-client communication privilege***

Records 9(c), 9(l), 9(p), 9(q), 9(v), 9(w) and 9(x) consist of handwritten notes prepared by various in-house lawyers acting for the City Solicitor in the matter to which the appellant's request for information is related. I have reviewed the information contained in these records and it reflects conversations and meetings between various in-house lawyers and other staff employed by the City client, as well as the lawyers' opinions, suggestions and possible courses of action as discussed in those meetings. Record 9(a) is a letter from the appellant, to the City's

Assistant City Solicitor, dated January 21, 1993, which contains handwritten notes and markings by the Assistant City Solicitor. The letter, having been drafted by the appellant himself, has been disclosed but the Assistant City Solicitor's annotations remain at issue. The annotations briefly note further information about particular points raised in the letter, including information as to what type of response might be advisable. Each of these records represents a legal advisor's working notes directly related to the seeking, formulating or giving legal advice and in my view, are accurately described as "working papers" as the term is used in *Susan Hoisery*, cited above. Moreover, given the subject matter and the context in which they have been written, I accept that they were prepared with a certain expectation of confidentiality. Accordingly, I find that the hand-written notes on Record 9(a), and the information contained in records 9(c), 9(l), 9(p), 9(q), 9(v), 9(w) and 9(x) in their entirety, satisfy the requirements of common law solicitor-client communication privilege.

Record 9(b) is a legal memo dated July 6, 1993, prepared by the Assistant City Solicitor for the Planning and Development Committee for the purpose of providing legal advice about the subdivision and easement to which the request for information is related. The record is clearly of a confidential nature as it provides both legal advice and recommendations to City decision-makers and was prepared for the purpose of giving professional legal advice. Record 9(e) and the first page of 9(aa) are duplicate copies of a memorandum from the City Solicitor to the Director of Engineering and the Executive Director of Civic Operations that provide legal advice on how to deal with a matter arising from a letter from the appellant dated July 11, 1994. Page 1 of Record 9(aa) is annotated with hand-written notes from another City staff member commenting on the contents of the memo. In my view, records 9(b), 9(e) and page 1 of Record 9(aa) are communications of a confidential nature between a solicitor and his client pertaining directly to the provision of legal advice and are therefore, clearly subject to solicitor-client communication privilege.

Pages 2 and 3 of Record 9(aa) consist of a copy of a letter from the appellant lawyer addressed to a City legal assistant dated July 11, 1994. Given that pages 2 and 3 of Record 9(aa) were drafted and sent by the appellant himself, they cannot be subject to solicitor-client communication privilege or litigation privilege.

Record 9(f) is a memorandum prepared on stationary bearing the letterhead of the City's Corporate Services Division Legal Department. The City describes it as a report dated November 17, 2003, from the Manager of Realty Services prepared for the Community Development Committee regarding an underground storm sewer. The record consists of a four-page memorandum or report with three appendices and a final page detailing the Committee's decision on how to proceed. The report itself reiterates legal advice provided to the Manager of Realty Services by legal counsel and puts forward a recommendation for Council to approve and uphold, based on that legal advice. In the circumstances of this report, the legal advice is being relayed through a City staff member. In my view, this has no impact on privilege and based on the content of the record, I am satisfied that it would reveal direct communications of a confidential nature between a solicitor and client, or their agents or employees, prepared for the purpose of providing professional legal advice. Similarly, disclosure of the Committee's

decision on how to proceed would reveal legal advice provided by the City Solicitor. Therefore, I find that the report portion of the record, as well as the final page of the record, falls within the continuum of communications as discussed in *Balabel*. Appendix A is a registered plan for the property at issue and other adjoining property. Such plans are available to the public at local land registry offices for a fee. Accordingly, this page cannot be subject to solicitor-client privilege and as the City has not claimed section 15 (information publicly available), I will order the City to disclose it to the appellant. Appendix B to the report is a copy of the legal memorandum identified as Record 9(b), which I have already found to be subject to privilege as a communication between solicitor and client. Appendix C is a copy of a letter from the appellant lawyer addressed to a lawyer for the City dated May 25, 2001. Given that Appendix C is a copy of a letter drafted by the appellant himself, it cannot be subject to solicitor-client privilege and I will order it disclosed. Having reviewed Record 9(f) closely, I find that disclosure of the report and the final page of the record, and the legal memorandum in Appendix B, would reveal communications between a lawyer and a client made for the purpose of giving and receiving legal advice. Accordingly, I find these Record 9(f) forms part of the "continuum of communications" as described in *Balabel* and qualifies for solicitor-client communication privilege under section 12. The remaining portions of the record, Appendix A and C, do not qualify for solicitor-client communication privilege.

Records 9(r) and 9(t) are internal email chains containing communications passing between City lawyers and other staff, seeking and collecting information from various City departments in order for the lawyers to provide legal services to their client. Record 9(cc) is a handwritten memo from the desk of the Deputy City Solicitor requesting information from a City employee required by the lawyers in their provision of legal advice to the City. By their nature, these records are clearly confidential communications that form part of the City's gathering of information for the provision of legal advice to the City by the in-house counsel working on its behalf. In my view, these records represent part of the continuum of communications passing between the City's solicitor and its client and, therefore, fall squarely within the section 12 exemption as records protected by solicitor-client communication privilege.

Record 9(m) is a fax cover sheet and confirmation page. Record 9(o) is a fax cover sheet. Both cover sheets were sent to an outside insurance company. The City's representations do not deal specifically with either of these records. Neither of these records, on their face, appears to be a confidential communication between a solicitor and client. The recipient of the faxes appears to be an individual employed by an insurance company. Based on their content, and in the absence of sufficient evidence or representations from the City to establish the requirements of solicitor-client communication privilege, in my view, these records cannot accurately be described as confidential communications between a solicitor and client, nor do they fall under the rubric of "lawyer's working papers" as described in *Susan Hosiery*. Accordingly, I find that records 9(m) and 9(o) do not qualify for exemption under the solicitor-client communication privilege component of section 12 of the *Act*.

As record 9(m), 9(o) do not qualify for solicitor-client communication privilege, I will go on to determine whether those records qualify for exemption under common law litigation privilege.

## **Litigation privilege**

### ***General principles***

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

The purpose of this privilege is to protect the adversarial process by ensuring that counsel for a party has a “zone of privacy” in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co.*].

Courts have described the “dominant purpose” test as follows:

A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co.*; see also Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.)].

To meet the “dominant purpose” test, there must be more than a vague or general apprehension of litigation [Order MO-1337-I].

Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer’s brief [Order MO-1337-I; *General Accident Assurance Co.*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

### ***Representations***

The City submits generally:

...that every one of the dispute documents was created by or for a solicitor engaged in preparing his or her clients position for presentation in an adversarial forum...It is the City’s position that litigation has been contemplated in this matter since July 15, 1980.

...

The Statement of Claim was issued December 18, 2003. There can be no question that the documents produced by the City's advocate after that date are protected by the litigation privilege. Each of these documents was prepared for the purpose of preparing the City's case for presentation to the Court. The documents in this category are: Documents 9(i), **9(m), 9(o)**, 9(p), 9(q), 9(r), 9(t). [Emphasis added]

The appellant's submissions on how litigation privilege applies to Records 9(m) and 9(o) are included in the portions of his representations reproduced above under solicitor-client communication privilege.

*Analysis and findings with respect to litigation privilege*

Although both records are dated January 2004, following the appellant's filing of a Statement of Claim, I am not persuaded that records 9(m) and 9(o) were created for the dominant purpose of litigation. As described above, to qualify for litigation privilege the document must have been produced or brought into existence with the dominant purpose of using its contents in order to conduct or aid in the conduct of litigation. My review of the records reveal that they consist of 2 fax cover sheets and a confirmation page that contain little information other than identity of the sender and the recipient and brief notes as to the matter to which the attached fax relates. Record 9(m) identifies the document attached as a copy of a letter from the appellant dated May 25, 2001, to which the appellant has access. Record 9(o) identifies that a copy of record 9(f) is attached. Given the information that these records contain, in my view, it is not reasonable to conclude that the fax cover sheets and confirmation page were prepared for the dominant purpose of using their contents in the conduct of existing or contemplated litigation. Therefore, I find that records 9(m) and 9(o) do not qualify for the litigation privilege component of solicitor-client privilege under section 12 of the *Act*.

I have found that Records 9(m) and 9(o) do not qualify for either solicitor-client communication privilege as part of the continuum of communications or for litigation privilege having not been prepared for the dominant purpose of litigation. Although not claimed by the City, I also find that pages 2 and 3 of Record 9(aa) and Appendix A and C of Record (f) do not qualify for the litigation privilege component of solicitor-client privilege under section 12.

Similarly I also find that none of these record 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 and therefore do not qualify as privileged under Branch 2 of section 12.

## Loss of privilege through waiver

### *General Principles*

The actions by or on behalf of a party may constitute waiver of privilege under either branch [Order PO-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.)].

The courts have held that where there is voluntary waiver of part of a record, waiver of the rest of the record may be implied where fairness requires this. Adjudicator Anita Fineberg discussed this in Order M-260:

Only the client may waive the solicitor-client privilege. Waiver of the solicitor-client privilege may be express or implied.

In the recent text *Solicitor-Client Privilege in Canadian Law*, R.D. Manes and M.P. Silver, (Butterworth's, 1993) at pp. 189 and 191, the authors distinguish between the two types of waiver:

Express waiver occurs where the client voluntarily discloses confidential communications with his or her solicitor.

Generally waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. Fairness is the touchstone of such an inquiry.

In *S & K Processors* (1983), 35 C.P.C. 146 (B.C.S.C.) McLachlin J. noted:

However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require...

In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. (pp. 148-149)

### ***Representations***

The appellant maintains that any claim that the City may have had for solicitor-client privilege has been waived. He submits:

[T]he release of some documents to which solicitor-client and litigation privilege might apply, amounts to a waiver of the privilege, and mandates the release of all documents for which the privilege is maintained. Waiver occurred, on the part of the City, when it released some of the documents in its solicitor's file, pursuant to its letters of May 5, 2004 and of May 28, 2004. Thus, all documents for which solicitor-client and litigation privilege is claimed, must be released on the basis of waiver by the City.

In *Wigmore on Evidence* (McNaughton rev., 1961), vol. VIII, at 635-635, the following commentary is provided:

“What constitutes a waiver by implication?”

Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also 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 decision in *K.F. Evans Ltd. v. Canada (Minister of Foreign Affairs)*, [1996] F.C.J. no 30 at paras. 15-17, 23-24 (T.D.) contains a useful discussion of the issue of when a waiver by the disclosure of some privileged documents becomes a complete waiver of the privilege, requiring disclosure of the entirety of the records over which the privilege is sought.

Partial disclosure by the City is misleading, and in the interests of consistency and fairness, the City must be considered to have waived all solicitor-client and litigation privilege.

*Analysis and findings with respect to loss of privilege through waiver*

In Order MO-1172 Adjudicator Laurel Cropley stated:

In my view, it is often necessary or desirable for a public body to refer to the crux of the advice its solicitors provide to it in order to carry out its mandate and responsibilities. In many cases, the public body will intend to retain the privilege, while at the same time provide a minimal degree of public disclosure to ensure the proper discharge of its functions. In the usual case, this should not of itself constitute express waiver of the privilege attaching to the underlying solicitor-client communications. (Order P-1559).

This issue was recently addressed by the Federal Court of Appeal in *Stevens v. Canada (Prime Minister)* (1998), 161 D.L.R. 94<sup>th</sup> 85 at pp. 108-109. In this case, pursuant to an access request under the federal Access to Information Act, a federal institution provided partial access to legal accounts severing out the narrative portion of the accounts while providing access to the dollar amount of the accounts. In dealing with the issue of waiver in the freedom of information context, Linden, J.A. stated on behalf of the Court:

In *Lowry v. Can. Mountain Holidays Ltd.* [(1984, 59 B.C.L.R. 137 (S.C.), at p. 143] Finch J. emphasized that all the circumstances must be taken into consideration and that the conduct of the party and the presence of an intent to mislead the court or another litigant are of primary importance.

...

I would add, with respect to the release of portions of the records, that, in light of these reasons, the Government has released more information than was legally necessary. The itemized disbursements and general statements of account detailing the amount of time spent by Commission counsel and the amounts charged for that time are all privileged. But it is the government qua client which enjoys the privilege; the Government may choose to waive it, if it wishes, it may refuse to do so. By disclosing portions of the accounts the Government was merely exercising its discretion in that regard. **As I mentioned earlier, a government body may have more reason to waive its privilege than private parties, for it may wish to follow a policy of transparency with respect to its activity. This is highly commendable; but the adoption of such a policy or such a decision in no way detracts from the protection afforded by the privilege to all clients.** [Emphasis added]



Although the matter in Stevens arose in the context of disclosure under the federal Act, in my view, the Court's rationale may be similarly applied to the disclosure, generally, made by government institutions of information in their custody or control. This is not to say that an institution can never be found to have waived solicitor-client privilege by partial disclosure of a privileged document. Rather determining this issue, a decision-maker must be cognizant of the environment in which institutions operate and their responsibilities with respect to the public interest, which may include maintaining a "policy of transparency" regarding information which is used in the decision-making process.

I do not accept the appellant's position that the City's release of some documents to which solicitor-client and litigation privilege might apply amounts to a waiver of the privilege entirely and mandates the release of all documents for which the privilege is maintained. As in Order P-1559, referred to in Order MO-1172 above, in my view, this is a case where the public body intends to retain the privilege, while at the same time provide a minimum degree of public disclosure to ensure the proper discharge of its function.

As discussed by Adjudicator Fineburg in Order M-260, privilege belongs to the client and the client alone. Only the client may waive the solicitor-client privilege. This is not a circumstance where the City has waived or attempted to waive its privilege with respect to portions of a record while claiming privilege for other portions of the same record or where waiver of all of the information in the solicitor's file can be implied. In the circumstances of this appeal, the City has deliberately waived its privilege in some records by disclosing them, while retaining privilege with respect to others which contain more detailed information respecting the City's legal position. Fairness and consistency do not require the implication of waiver to all of its records in this circumstance. In my view, the City should not be penalized through the application of waiver to all the records in this case as a result of their laudable attempt to provide at least a minimum level of disclosure and transparency.

In summary, I find that the undisclosed portions of Record 9(a), portions of Record 9(f), the first page of Record 9(aa), as well as records 9(b), 9(c), 9(e), 9(l), 9(p), 9(q), 9(r), 9(t), 9(v), 9(w), 9(x), and 9(cc) in their entirety, fall within the scope of the solicitor-client privilege component of Branch 1 of section 12. I also find that the fact that the City disclosed some records which might have been withheld subject to solicitor-client privilege, but not others, does not negate the application of the section 12 exemption claim.

As I have found that Record 9(f) is exempt from disclosure under the section 12, it is not necessary for me to determine whether section 7(1) applies to that record.

**ORDER:**

1. I order the City to disclose to the appellant Appendix A and Appendix C of Record 9(f), pages 2 and 3 of Record 9(aa), and records 9(m) and 9(o) in their entirety by **June 20, 2005**.
2. I uphold the City's decision to deny access to the remaining records at issue in this appeal.
3. In order to verify compliance with Provision 1 of this order, I reserve the right to require the City to provide me with a copy of the records that are disclosed to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_  
Brian Beamish  
Assistant Commissioner

\_\_\_\_\_ May 20, 2005