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

ORDER MO-1949

Appeal MA-040161-2

Town of Oakville

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NATURE OF THE APPEAL:

The Town of Oakville (the Town) received a request for the following information under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> All payments made by Town of Oakville to these individuals (and/or their firms):
>
> (1) [named legal counsel] 1994 to present
> (2) [another named legal counsel] 1985 to present
> (3) [a named realty consultant and his firm, and a named realty appraisal firm] 1985 to 1994

The Town issued a decision letter claiming that the responsive records are exempt under section 12 of the *Act* (solicitor-client privilege) and that the request is frivolous or vexatious under sections 4(1)(b) and 20.1(1) of the *Act*.

The requester (now the appellant) appealed the Town's decision.

During mediation of the appeal, the appellant narrowed the scope of the request to item (3) only. By doing so, the appellant has dropped the portion of the request relating to payments made to lawyers. The named realty consultant and his firm, and the named realty appraisal firm, are affected parties in this appeal.

Meditation did not resolve any further issues, and the file was transferred to the adjudication stage of the appeal process.

I began my inquiry by sending a Notice of Inquiry to the Town, setting out the facts and issues and seeking its representations. The Town did not provide representations. I then sent a Notice of Inquiry to a representative of the affected parties, inviting representations. The affected parties also provided no representations. Under the circumstances, I decided that it was not necessary to seek representations from the appellant.

RECORDS:

Pursuant to the request as narrowed at mediation, and using the Town's numbering system, the records at issue are Record E7 in its entirety, and the parts of Records E8 and E9 that relate to the affected parties.

DISCUSSION:

IS THE REQUEST FRIVOLOUS OR VEXATIOUS?

General principles

The provisions to be considered in determining whether a request is frivolous or vexatious are sections 4(1)(b) and 20.1(1) of the *Act* and section 5.1 of Regulation 823 made under the *Act*.

Section 4(1)(b) of the *Act* specifies that every person has a right of access to a record or part of a record in the custody or under the control of an institution unless the head of an institution is of the opinion on reasonable grounds that the request for access is frivolous or vexatious. The onus of establishing that an access request falls within these categories rests with the institution (Order M-850).

Sections 20.1(1)(a) and (b) of the *Act* go on to indicate that a head who refuses to provide access to a record because the request is frivolous or vexatious must state this position in his or her decision letter and provide reasons to support the opinion.

Sections 5.1(a) and (b) of Regulation 823 provide guidelines for determining whether a request is frivolous or vexatious. They prescribe that a head shall conclude that a request for a record or personal information is frivolous or vexatious if:

> (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
>
> (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

In Order M-850, former Assistant Commissioner Mitchinson observed that these legislative provisions "confer a significant discretionary power on institutions which can have serious implications on the ability of a requester to obtain information under the *Act*", and that this power should not be exercised lightly.

The Town has not provided any representations to support its position that the request is frivolous or vexatious. Given that, as former Assistant Commissioner Mitchinson observes, the frivolous or vexatious provisions confer a significant discretionary power with serious implications that ought not to be exercised lightly, I find it surprising, to say the least, that the Town would make this claim and then provide no representations.

The only basis for the Town's frivolous or vexatious claim is found in its decision letter, in which it states:

> Your request is deemed to be frivolous and vexatious under section 4(1) of [the *Act*.] The records you have requested relate directly to ongoing litigation that is still in process that you are a party to. Attempts to use the provisions of [the *Act*] to gain personal or pecuniary advantage in the ongoing litigation would amount to an abuse of process of the right of access. Furthermore, an attempt to use the provisions of [the *Act*] to obtain information for the sole purpose of using this information against the Town of Oakville in litigation is inappropriate and may be considered as being done in bad faith.

Abuse of Process

The Town refers to the use of the *Act* in the context of litigation as an "abuse of process of the right of access". I will deal with "abuse of the right of access" in my discussion of section 5.1(a) of the Regulation, below. Abuse of process is a common law concept that often refers to repeated or multiple proceedings. In the context of the *Act*, it has been associated with a high volume of requests, taken together with other factors. (See Orders M-618, M-796 and MO-1488). There is no evidence before me to substantiate an allegation of this nature. The use of the *Act* in the context of litigation is addressed in my discussion of section 5.1(b) of the Regulation, below.

Section 5.1(a) of Regulation 823

The allegation of an abuse the right of access appears to be a reference to section 5.1(a) of the Regulation, which requires that the request be part of a pattern of conduct amounting to such an abuse, or that would interfere with the Town's operations. I have no evidence of any such pattern of conduct and I therefore find that the requirements of section 5.1(a) are not made out in this case.

Section 5.1(b) of Regulation 823

Purpose Other than to Obtain Access

It might also be argued that intended use in litigation is "for a purpose other than to obtain access" as referenced in section 5.1(b) of the Regulation. When the appellant initially filed her appeal with this office, she made an apparent reference to litigation between herself and the Town:

> In fact, the request for [the records concerning the realty consultant and consulting firm] should have been provided in "discoveries" in September 2003 and in related "undertakings". They have not yet been received and the OMB Chairman agreed I could make a Freedom of Information request for them.

I addressed an argument that intended use in litigation was "for a purpose other than to obtain access" in Order MO-1924:

> The [institution] also suggests that the objective of obtaining information for use in litigation with the [institution] or to further the dispute between the appellant and the [institution] was not a legitimate exercise of the right of access.
>
> This argument necessitates a discussion of whether access requests may be for some collateral purpose over and above an abstract desire to obtain information. Clearly, such purposes are permissible. Access to information legislation exists to ensure government accountability and to facilitate democracy (see *Dagg v. Canada* (Minister of Finance), [1997] 2 S.C.R. 403). This could lead to requests for information that would assist a journalist in writing an article or a student in

> writing an essay. The *Act* itself, by providing a right of access to one's own personal information (section 36(1)) and a right to request correction of inaccurate personal information (section 36(2)) indicates that requesting one's personal information to ensure its accuracy is a legitimate purpose. Similarly, requesters may also seek information to assist them in a dispute with the institution, or to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by institutions.
>
> To find that these reasons for making a request are "a purpose other than to obtain access" would contradict the fundamental principles underlying the *Act*, stated in section 1, that "information should be available to the public" and that individuals should have "a right of access to information about themselves". In order to qualify as a "purpose other than to obtain access", in my view, the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.

Also in Order MO-1924, I dealt with an argument concerning "expanded discovery" in litigation, which is relevant to the Town's argument that using information obtained under the *Act* in litigation is "inappropriate":

> I note that records protected by litigation privilege are subject to the solicitor-client privilege exemption at section 12. In addition, section 51 expressly addresses the relationship between the *Act* and the litigation process. This section states:
>
> > (1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation.
> >
> > (2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.
>
> The Legislature clearly considered the relationship between the *Act* and the litigation process, and could have chosen to go beyond the section 12 exemption to limit the application of the *Act* where the requester is engaged in litigation with an institution. It did not do so. In my view, the [institution]'s argument on this point is entirely without merit.
>
> Senior Adjudicator David Goodis rejected a similar argument in Order PO-1688. In so doing, he provided a helpful summary of the jurisprudence on this issue:
>
> > The application of section 64(1) [the equivalent of section 51(1) of the *Act* in the provincial *Freedom of Information and Protection of Privacy Act*] was cogently summarized by former Commissioner Sidney B. Linden in Order 48, where he made the following points:

> ... This section makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the [provincial Freedom of Information and Protection of Privacy Act] is unfair ... Had the legislators intended the Act to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. …
>
> …
>
> In Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.), Mr. Justice Lane stated the following with respect to the relationship between the civil discovery process and the access to information process under the [Act] […]:
>
> > […] The Act contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the Act; if so, then so be it; the Rules of Civil Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.

I went on to reach the following conclusion in Order MO-1924:

> Reinforced by the findings in Orders 49 and P-1688, as well as the reasons of Justice Lane in the *Doe* case, I find that any intention on the part of the appellant to use the requested information in furtherance of his dispute or his litigation with the [institution] is not a basis for me to find that there is a "purpose other than to obtain access".

I also dealt with a similar argument in Order M-906:

> In its submissions addressing this aspect of the matter, the City indicates (as noted above) that the appellant seeks access to assist him in taking action against it with respect to a number of land transactions. In the City's view, this means that the request was "for a purpose other than to obtain access". To support its position, the City relies on the appellant's complaints and litigation against it, as outlined

> above under "Pattern of Conduct that Amounts to an Abuse of the Right of Access". The City also refers to media reports that the appellant intends to "fight City Hall".
>
> In my view, the fact that once access is obtained, a requester intends to use the document for a particular purpose, for example, to substantiate a complaint against an institution, does not mean that the request is "for a purpose other than to obtain access" within the meaning of section 5.1(b) of the Regulation.
>
> As I noted in Order M-860:
>
> > ... if the appellant's purpose in making requests under the Act is to obtain information to assist him in subsequently filing a complaint against members of the Police, in my view this does not indicate that the request was for a purpose other than to obtain access; rather, the purpose would be to obtain access **and** use the information in connection with a complaint.
>
> …
>
> Moreover, in my view, to find that a request is "for a purpose other than to obtain access" and thus "frivolous or vexatious" on the basis that the requester may use the information to oppose actions taken by an institution would be completely contrary to the spirit of the Act, which exists in part as an accountability mechanism in relation to government organizations.

In my view, the analysis in these previous decisions is equally applicable here. I find that the appellant's involvement in litigation does not support a finding that the purpose of her request is "other than to obtain access" within the meaning of section 5.1(b) of the Regulation.

Bad Faith

The Town also makes passing reference to the other ground in section 5.1(b) of the Regulation, relating to a request made in "bad faith". Again, the Town apparently takes this position because of an alleged intention to use the records in litigation against it. In Order M-850, former Assistant Commissioner Mitchinson commented on the meaning of the term "bad faith". He indicated that "bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral underhandedness. He went on to conclude that it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with secret design or ill will.

In this case, the fact that the appellant is engaged in litigation is obviously known to the Town, and I find that there is no evidence whatsoever to support any view that the appellant is engaged in "the conscious doing of a wrong because of dishonest purpose or moral underhandedness", or that she is "operating with secret design or ill will". I find that the appellant's request is not made in "bad faith".

Accordingly, section 5.1(b) of the Regulation does not support a finding that the request is frivolous or vexatious.

The Town has failed to meet its onus of demonstrating that the request is frivolous or vexatious, and I find that it is not.

SOLICITOR-CLIENT PRIVILEGE

Section 12 of the *Act* states:

> 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.

The Town has provided no representations on this issue. Its decision letter contains the bare assertion that "your request is exempt under section 12 of the [*Act*], which exempts matters subject to solicitor-client privilege." I have examined the records themselves to determine whether they are exempt under this provision. I note that the appellant has narrowed the request to exclude the parts that relate to payments to lawyers, and the remaining parts relate to payments to realty consultants and a realty appraisal firm.

Section 12 contains two branches as described below. The Town must establish that one or the other (or both) branches apply. For the reasons that follow, I find that it has failed to do so.

Branch 1: common law privileges

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

Solicitor-client communication privilege

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

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

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

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

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

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

The records remaining at issue in this case reveal amounts paid by the Town to realty consultants and a realty appraisal firm. There is no evidence before me that this information has any connection with any solicitor-client relationship. I find that the records are not subject to the solicitor-client privilege aspect of Branch 1.

Litigation privilege

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

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.)].

There is no evidence before me that the records were prepared for the dominant purpose of existing or reasonably contemplated litigation, or selected for inclusion in a lawyer's litigation brief. I find that the records are not subject to the litigation privilege aspect of Branch 1.

Branch 2: statutory privileges

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

- solicitor-client communication privilege
- litigation privilege

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

Statutory solicitor-client communication privilege

This aspect of branch 2 applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice." There is no evidence before me to support the application of this aspect of section 12. I find it does not apply.

Statutory litigation privilege

This aspect of branch 2 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." There is no evidence before me to support the application of this aspect of section 12. I find it does not apply.

Summary of Conclusions re Section 12

I have carefully examined the records at issue and all three records are computer screen prints relating to real estate dealings. I have found that no aspect of the section 12 exemption applies.

ORDER:

1. I order the Town to disclose the records at issue (as described under the heading "Records" on page 1 of this order, above) to the appellant by **September 6, 2005**, but not earlier than **August 30, 2005**. For greater certainty, I will enclose copies of Records E8 and E9 in which the portions that do not relate to the affected parties are indicated by highlighting. The highlighted portions are *not* to be disclosed.

2. In order to verify compliance with the terms of this order, I reserve the right to require the Town to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original Signed by: July 29, 2005
John Higgins
Senior Adjudicator