



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-1991**

**Appeal MA-050134-1**

**Township of West Lincoln**



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## **NATURE OF THE APPEAL:**

The Township of West Lincoln (Township) received a request under *the Municipal Freedom of Information and Protection of Privacy Act (Act)* for access to the following:

1. Minutes of meeting of December 15, 2004; and
2. Solicitor's report to Township and all supporting documentation regarding his findings on the zoning By-law and a [named] waste facility

The Township located the records and granted access to the minutes that were responsive to part one of the request. Access was denied to the record responsive to part two of the request on the basis that it was exempt from disclosure under section 12 of the *Act* (solicitor-client privilege).

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

During the mediation stage of the appeals process, the appellant advised that she was seeking access to the "Solicitor's Report" and a specific Planning Department Report only. The Township subsequently issued a second decision letter advising that access was denied to the Planning Department Report pursuant to sections 7(1) (advice or recommendations) and 12 of the *Act*. Further mediation was not possible and the appeal was transferred to the adjudication stage. Initially, I sought and received the representations of the Township, the non-confidential portions of which were shared with the appellant, who also submitted representations. I then provided the Township with a copy of the appellant's submissions and received additional representations from the Township by way of reply.

## **RECORDS:**

The two records at issue consist of:

- a letter from the Township's solicitor, dated November 17, 2004 (6 pages); and
- Planning Department Report, dated December 6, 2004 (2 pages)

## **DISCUSSION:**

### **SOLICITOR-CLIENT PRIVILEGE**

As noted above, the Township has applied the discretionary exemption in section 12 to both of the records at issue. This section 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.

Section 12 contains two branches as described below. The Township must establish that one or the other (or both) branches apply.

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

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

- solicitor-client communication privilege
- litigation privilege

### **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.)].

### **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.*].

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.)].

## **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**

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.”

### **Statutory litigation privilege**

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.”

**Are the records subject to section 12 of the Act?**

The Township submits that Record 1, a letter dated November 17, 2004 addressed to its Chief Administrative Officer/Treasurer from its legal counsel, represents a confidential communication between a solicitor and his client about a legal issue. It argues that the letter was prepared by the Township's counsel in response to a request for advice from the CAO/Treasurer and contains a legal opinion with respect to a specific matter affecting the legal interests of the Township. As a result, it argues that this record is exempt from disclosure under the solicitor-client communication aspect of Branch 1 of section 12. The Township further submits that the record was prepared in contemplation of litigation and qualifies for exemption under the litigation privilege head of Branch 1, as well.

With respect to Record 2, a specified Planning Report, the Township argues that because it refers to the legal advice given by counsel in Record 1, it too qualifies for exemption under the solicitor-client communication privilege component of Branch 1 of section 12.

The appellant submits that the correspondence from the Township's solicitor is not privileged because "its primary purpose was to establish conformity of land use in accordance to the permitted uses of the M1 zone, and not for litigation – potential, assumed or otherwise."

In my view, both Records 1 and 2 contain information that qualifies for exemption under the solicitor-client communication privilege aspect of Branch 1 of section 12. Each of these documents contains information whose disclosure would reveal the subject matter of a confidential communication between a solicitor and his client about a legal issue involving the Township and its legal interests. I find that the records contain all the necessary hallmarks of a confidential solicitor-client communication and they therefore qualify for exemption under Branch 1 of section 12.

**Waiver**

The actions by or on behalf of a party may constitute waiver of privilege under either branch [Order P-1342]. Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege

[*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane*

*Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.).

Waiver has been found to apply where, for example:

- the record is disclosed to another outside party [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)]
- the communication is made to an opposing party in litigation [Order P-1551]
- the document records a communication made in open court [Order P-1551]

The appellant takes the position that regardless of whether privilege may exist in the documents, it was lost when the contents of the solicitor's opinion to the Township were "discussed at the Regional Planning Services Committee meeting on Feb 23<sup>rd</sup>/05 through [an identified] Report" (a copy of which was attached to her representations). In support of her contention that any privilege that may have existed in the solicitor's communication has been waived, the appellant specifically quotes from Page 7 of that Report in which the Township's Commissioner of Planning and Development states that:

The Township, to answer the citizens concerns, sought a legal opinion. The Township's solicitor reviewed the matter and concluded that the facility, in fact, complied with the by-law so long as it was not obnoxious by reason of emissions of odour, dust, smoke, gas, fumes, noise, cinders, vibration, refuse matter and water waste. It was also the solicitor's opinion that it was the responsibility of the Ministry of the Environment to make a determination whether the use was in fact obnoxious. The Ministry, at this time, has not made this determination.

Previous orders have addressed the issue of whether partial disclosure of a legal opinion can be regarded as the waiver of privilege. In Order MO-1172, which was more recently applied in Order MO-1714, Adjudicator Laurel Copley examined this issue in some detail. After reviewing a number of authorities respecting the issue of waiver of solicitor-client privilege, Adjudicator Copley found that the institution in that appeal (the City of Vaughan) did not intend to waive privilege with respect to a record by making the relatively minimal disclosure of a small portion of the "bottom line" of the legal advice contained in the record. The relevant portion of that order states:

Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive the privilege (*S.&K. Processors Ltd. V. Campbell Avenue Herring Producers Ltd.*, [1983] 4 W.W.R. 762, 45 B.C.L.R. 218, 35 C.P.C. 146 (S.C.) at 148 - 149 (C.P.C.)).

...

I have reviewed page 3 of Report No. 18 of the Committee of the Whole. I find that it contains a small portion of the “bottom line” of the advice provided to Council from the City’s solicitor. It very briefly outlines the City Solicitor’s view of what the City is entitled to do and what is required in order for it to do so. The bulk of the legal opinion deals with other aspect of this issue. 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 communication (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. (4th) 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, or 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.** [Adjudicator Cropley’s emphasis]

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, in 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.

In the circumstances of the current appeal, I am satisfied that in making the relatively minimal disclosure of a small portion of the "bottom line" of the advice, the City did not intend to waive privilege with respect to the record. Accordingly, I find that the City has not expressly waived privilege.

In my view, the circumstances in this appeal are similar to those in Order MO-1172 and MO-1714 for the purpose of the waiver analysis, and I agree with Adjudicator Cropley's application of the common law principles discussed in *Stevens*.

I have reviewed the contents of the legal opinion contained in Record 1 and referred to in Record 2 in order to determine whether what is expressed therein is substantially similar to the information provided by the appellant. Obviously, I am not able to describe in detail the contents of the legal opinion contained in the records in this decision for to do so would render the appeal moot. However, based on my reading of the contents of both Records 1 and 2 in comparison with the information provided by the appellant, I cannot agree that anything more than the "bottom line" was revealed to the appellant by the Township. Further, I find that this disclosure does not constitute an express waiver of the privilege that exists in the contents of the opinion. The information in Records 1 and 2 is substantially more detailed in content from that which is referred to in the Report referred to by the appellant in her submissions. Accordingly, I find that the disclosure of the information contained in the Report did not constitute a waiver of the privilege that exists in the contents of Records 1 and 2.

In summary, I conclude that both Records 1 and 2 are exempt from disclosure under section 12. As a result, I need not address the possible application of the section 7(1) exemption to Record 2.

## **ORDER:**

I uphold the Township's decision to deny access to the records.

Original Signed By: \_\_\_\_\_

November 9, 2005

Donald Hale  
Adjudicator