



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

# **ORDER MO-2469**

**Appeal MA07-432**

**Township of Puslinch**



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## **NATURE OF THE APPEAL:**

The Township of Puslinch (the Township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to soil contamination at a specified location. The request was for the following information:

...total records on file pertaining to the [named] farm, contamination of the soil, refinery sludge per investigations & legal recourse:

- (A) From original investigation up to current status of site per Ministry of Environment approvals (if any).
- (B) Full settlement records between [named individual]/Ministry of Environment & Puslinch Township financials and to whom charged.

The Township located responsive records and issued a decision granting access in full to 14 records and access to the remaining 40 records was denied in accordance with the discretionary exemption in section 12 of the *Act* (solicitor-client privilege). The Township provided the requester with a detailed index of records setting out the responsive records. The Township did not send the disclosed records directly to the requester, but made them available to him to review in its offices.

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

During mediation, the appellant attended the Township's offices and reviewed the records to which he had been granted access. After his review, the appellant advised the mediator that he wished to proceed with his appeal of the Township's decision to deny access to the remaining records.

No further issues could be resolved at mediation and the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry.

I began my inquiry by sending a Notice of Inquiry to the Township setting out the facts and issues in the appeal. The Township provided representations which were shared with the appellant. I then sent a Notice of Inquiry to the appellant. The appellant also provided representations.

## **RECORDS:**

The records at issue consist of letters, enclosures, faxes, handwritten notes, transcripts, and agreements and are described in the attached Appendix. The Appendix does not include a description of the records that were provided to the appellant.

## **DISCUSSION:**

### **SOLICITOR-CLIENT PRIVILEGE**

The Township submits that all of the records at issue are exempt under section 12 of the *Act* as either solicitor-client communication privilege or statutory litigation privilege. Section 12 states as follows:

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. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

#### **Branch 1: common law privilege**

Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4<sup>th</sup>) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

#### ***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 [Orders PO-2441, MO-2166 and MO-1925].

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

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

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

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

## **Branch 2: statutory privileges**

Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

### ***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.”

Records that form part of the Crown brief, including copies of materials provided to prosecutors by police, and other materials created by or for counsel, are exempt under the statutory litigation privilege aspect of branch 2 [Order PO-2733]. However, “branch 2 of section [12] does not exempt records in the possession of the police, created in the course of an investigation, just because copies later become part of the Crown brief” [Orders PO-2494, PO-2532-R and PO-2498, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952; leave to appeal pending]

Documents not originally created in contemplation of or for use in litigation, which are copied for the Crown brief as the result of counsel’s skill and knowledge, are exempt under branch 2 statutory litigation privilege [*Ontario (Ministry of Correctional Services) v. Goodis* (2008), 290 D.L.R. (4th) 102, [2008] O.J. No. 289; and Order PO-2733].

Termination of litigation does not affect the application of statutory litigation privilege under branch 2. [*Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (cited above)]

## **Representations**

The Township submitted the following in support of its position that section 12 applies to exempt Records 2, 3, 4, 5, 13-27, 29, 31-49 and 51.

In [specified year] an action was commenced by [named individuals] against the Township. In [specified year] this Action settled, and as such, this Action did not proceed to open court for trial.

The Township submits that all of the Records at issue in the appeal, being Records 2, 3, 4, 5, 13 – 27, 29, 31 – 49 and 51, meet either the solicitor-client communication privilege or statutory litigation privilege.

With respect to Records 2, 3, 4 and 5, the Township submits that these Records are direct correspondences between the Township and its legal counsel regarding the drafting of a by-law dealing with industrial waste. The Township submits that these Records were part of open and frank communications for obtaining legal professional legal advice being sought by the Township. The Township did not deny the appellant access to Record 6, being the final result of the said communications, By-Law #9-64. The Township's refusal to disclose these Records are in accordance with statements articulated by the Supreme Court of Canada in *Blank v. Canada (Minister of Justice)*, [2006] SCJ No. 39...

With respect to further Records, the Township claims both solicitor-client privilege and statutory litigation privilege as the correspondence pertains to communications between the Township and its counsel, and also various correspondence to other counsel involved in the action. For instance, Records 13-18 are correspondence between the Township and the Ministry of the Attorney General, and also the Township and counsel acting for the plaintiffs in the action. All of the said correspondences were then sent to the Township's counsel who was retained for litigation purposes, so that counsel could adequately prepare for litigation. Further, the Township submits that all of these correspondences from the Township to counsel were matters of a confidential nature. Records 19-27, 29, 31-49 are all direct correspondence between the Township and its counsel. For example, Record 32 is an entire examination for discovery transcript of an employee of the Township. This transcript deals with the actions and involvement of this employee pertaining to the Action. The Township submits that this direct communication between the Township and its counsel are covered by solicitor-client privilege.

As stated in *Blank*, solicitor-client privilege protects direct communications of a confidential nature between a solicitor and a client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice. Thus, the Township submits that Records 19-24, 27, 29, 31, 32-48 are all subject to both solicitor-client privilege and statutory litigation privilege. For example, Records 43 and 44 are correspondence to the Township's counsel with respect to mediating the Action, and as such, the Township submits that it used its discretion and denied the appellant based on section 12 of the *Act*. Records 21, 22, 23, 34, 26 deal with employees of the Township that were going to be part of examinations for discovery...The Township submits that the discussions surrounding the examinations for discovery, particularly counsel informing and dealing with employees of the Township, is part of a process where the Township and its employees may have open and frank discussions in how to proceed with the Action.

The Township further submits that at no time has it implicitly or expressly waived its solicitor-client privilege or statutory litigation privilege.

The appellant submits that as a taxpayer he is entitled to disclosure of the withheld records as he is, by association, the “client” of the Township’s solicitors.

### **Analysis and finding**

#### *Taxpayer as “client”*

Before I proceed to my discussion of whether section 12 applies to the record at issue, I must first address the appellant’s argument that because he is a taxpayer of the Township, he is the “client” of the Township’s solicitors. This argument was most recently addressed in Order MO-2222 by Adjudicator Colin Bhattacharjee. In that appeal, an appellant asserted that he should have access to a legal opinion prepared for a municipal institution because taxpayers are the “clients” of the lawyers who prepared it. Adjudicator Bhattacharjee states:

In my view, although it is certainly true that elected and appointed officials are public servants who are accountable to taxpayers, this does not mean that any resident or ratepayer in a municipality is the “client” of a lawyer who prepares a legal opinion at the request of a municipality.

In Order MO-1172, Adjudicator Laurel Cropley addressed this issue in the following manner:

The appellant submits that the “taxpayers” are the true clients within the meaning of section 12 of the Act since the taxpayers ultimately pay the salary of the Council and the City’s solicitor. If I were to accept this argument, there would effectively be no need for the exemption in section 12. Moreover, section 1 of the Act provides that the public has a right to information held by government institutions, but also stipulates that this right to information is not absolute. Through section 12, the Act recognizes the confidential relationship between public officials and their counsel to the same extent that the common law recognizes the private solicitor and client relationship (P-1551 and P-1561). Further, section 12 acknowledges that public officials may be “clients” distinct from the public at large, notwithstanding the special duties and responsibilities these officials have with respect to the public. Accordingly, I find that the appellant’s arguments in this regard are without merit.

I agree with this reasoning. The Ontario legislature included the section 12 exemption to ensure that institutions covered by the Act could exercise their discretion in deciding whether to disclose records subject to the common law privileges or statutory privileges in this exemption.

If municipal residents or taxpayers were deemed to be the “clients” in such situations, there would be little reason for the exemption to exist in the *Act*, because the public would have unfettered access to any records that fall within the ambit of the section 12 exemption. Clearly, this is not what the Ontario legislature intended when it decided to include this exemption in the *Act*.

I agree with the finding of Adjudicator Bhattacharjee in Order MO-2222 and the reasoning of Adjudicator Cropley in Order MO-1172. In the present appeal, I find that the Township is the “client” for the purposes of the section 12 exemption, and not the appellant. To find otherwise would be to render the section 12 exemption meaningless in situations where the requester is a taxpayer of the municipal institution which received the legal opinion or advice. For clarity, I would also note that the appellant is not in any way involved in the action which is the subject matter of his request.

#### *Application of exemption*

Based on my review of the records and the representations of the Township, I find that section 12 of the *Act* applies to some of the records at issue. I accept the Township’s submission that it has not implicitly or explicitly waived its solicitor-client privilege and that the communications between itself and its lawyer were made in confidence.

For ease of discussion I have organized my discussion of the records in the same order as presented in the Township’s representations. Records 2-5 all relate to part (a) of the appellant’s request for original investigation records relating to a named farm including contamination of the soil. The rest of the records (Records 13-18, 19-27, 29, 31, 32-48) relate to part (b) of the appellant’s request for records involving a named individual, the Ministry of the Environment and the Township.

#### **Records 2, 3, 4, 5**

These records all consist of letters between the Township and its lawyers regarding a draft by-law dealing with the dumping of industrial waste.

Records 2 and 4 are requests for legal advice from the Township to the lawyer it had retained; and Records 3 and 5 are responses from the lawyer to the Township in which he replies to the Township’s request for advice. I find that all of these letters were confidential communications between the Township and its lawyer made for the purpose of obtaining or giving legal advice regarding the dumping of industrial waste within the Township. Accordingly, these records are exempt from disclosure under section 12 branch 1 solicitor-client communication privilege.

#### **Records 13, 14, 15, 16, 17, 18**

Record 13 is a cover letter from the plaintiff’s lawyer to the Township to which is attached a Notice of Action and Statement of Claim. Record 14 is a letter to the Township’s lawyer requesting advice and enclosing the statement of claim. Records 15 and 16 are fax cover sheets from the Township to its lawyer. Records 17 and 18 are copies of a cover letter and statement of

defence to the Township from the Ministry of the Attorney General in the context of the litigation in which they were both named as defendants. I accept the Township's submission that all of these records were provided to its lawyer who was retained for the purpose of conducting the litigation on the Township's behalf and that they were used by counsel to prepare the Township's defence to the litigation. The Township was a named defendant in the action begun by the plaintiffs and retained a lawyer to provide advice on how to proceed and to act for it in the litigation. I find that these records are exempt from disclosure under both Branch 1 of section 12 relating to solicitor-client communication privilege and the Branch 2 statutory litigation privilege.

As stated above, although the litigation that is the subject of the records has been terminated, the statutory litigation privilege in section 12 still continues to apply.

**Records 19-27, 29, 31, 32-49, 51**

All of these records relate to the action which is the subject matter of the appellant's request.

Record 19 is a two-page fax cover sheet from the Township to its lawyer. Based on my review of the records, I find that this record is part of the "continuum of communications" between the Township and its lawyer within the context of seeking legal advice about the litigation and I find that this record is exempt under Branch 1 of the section 12 exemption as solicitor-client communication privilege.

Records 20-24 and 26 are all letters between the Township and its lawyer regarding the examinations for discovery relating to the litigation which is the subject of the records. These records contain confidential discussion and advice relating to the examination for discovery including scheduling and the process for examination for discovery. I find that these records are exempt under section 12 Branch 1 solicitor-client communication privilege.

Record 25 is a non-waiver agreement between the Township and its insurer relating to the action. Based on the Township's representations, I find that this record was provided to its lawyer as part of the "continuum of communications" within the context of seeking and providing advice regarding the action. Therefore, this record qualifies for exemption under Branch 1 solicitor-client communication privilege.

Records 27 is a letter from the Township's lawyer to the plaintiff's lawyer which attaches the Plaintiff's Offer to Settle setting out the Township's position on the Offer to Settle, as well as other matters. I accept the Township's submission that this record was prepared by the Township's lawyer for use in litigation and as such is exempt from disclosure under the Branch 2 statutory litigation privilege.

Records 29 and 31 are letters from the Township's lawyer to the Township advising the Township about the examination for discovery and documentation received from the plaintiff's lawyer. I accept the Township's submission that these records were direct communications between the Township and its lawyer made for the purpose of providing legal advice.



Accordingly, I conclude that Records 29 and 31 are exempt under Branch 1 solicitor-client communication privilege.

Records 32 to 42 are letters and documents exchanged between the Township's lawyer and the Township regarding certain undertakings entered into by the Township in an examination for discovery of a representative of the Township. These letters and documents relate to the litigation referred above. I accept the Township's submission that these records were direct communications between the Township and its lawyer made for the purpose of providing legal advice. These records are exempt under Branch 1 solicitor-client communication privilege.

Records 43 to 45 are a fax cover and two letters passing between the Township and its lawyer regarding the mediation of the action. I accept the Township's submission that these records are confidential direct communication between the Township and its lawyers in the giving and receiving of legal advice and are exempt under Branch 1 solicitor-client communication privilege in section 12.

Record 46 is a letter from the Township's lawyer to the Township enclosing a number of documents that he had received by way of certain undertakings that arose during the examinations for discovery of the parties to the action. Based on the Township's representations, I find that this record and attachments form part of the "continuum of communications" between the Township and its lawyer, and as such is exempt under Branch 1 solicitor-client communication privilege.

Records 47 to 49 are letters between the Township and its lawyer regarding the settlement of the litigation. These records were exchanged between the Township and its lawyer for the purpose of obtaining and giving legal advice relating to the terms of the settlement. I find that these records are exempt from disclosure as they represent solicitor-client communication under Branch 1 of section 12.

Record 51 is a letter from the Township's insurance company enclosing a billing for the amount related to the litigation. I am unable to find that this Record is solicitor-client communication privileged; nor am I able to find that this Record was used by the Township's lawyer for litigation which had at this point concluded. Record 51 does not qualify for exemption under section 12.

In summary, I have found that all the records at issue except Record 51 qualify for exemption under section 12 of the *Act*, subject to my finding on the Township's exercise of discretion. As the Township did not claim additional exemptions for Record 51 and it is not subject to a mandatory exemption, I will order that this record be disclosed.

### **EXERCISE OF DISCRETION**

The section 12 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

### **Relevant considerations**

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
  - information should be available to the public
  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

The Township submits that everything pertaining to part (a) of the appellant's request was disclosed, including Records 6-11, 28, 50, 52, 53, and 54. The Township further states:

Although this was part of the action, the Township used its discretion...and released Record 30 (analytical results from water sample taken from Community Centre well) and Record 52 (technical memorandum from the Ministry of Environment based on soil sampling). The Township submits that it is not only complying with the *Act*, but also that the release of these Records will maintain and increase public confidence in the operation of the Township.

Regarding part (b) of the appellant's request, the Township states that it considered the following factors:

First, the information requested by the appellant did not deal with the appellant's personal information. Second, the appellant's request was very broad relating to Records that spanned over a thirty year time period. Third, this information dealt with information of a sensitive nature, as the Records were put together as an index of the Action. Nonetheless, the Township reviewed all of the Records and disclosed 14 of the 54 Records. By releasing these 14 Records, the Township submits that this is an effort to be transparent and accountable to the public.

The appellant did not make representations on this issue directly; however, he appears to argue that the Township improperly exercised its discretion by withholding the records from him for an improper purpose. Specifically, the appellant claims that the Township seeks to hide or cover up a serious environmental issue.

Based on my review of the records at issue and the representation of the parties, I find that the Township properly exercised its discretion to withhold the records that I have found exempt under section 12. The Township properly considered the factors that information should be made available to the public, and that exemptions from the right of access should be limited and specific. The Township also considered the interests that the section 12 exemption seeks to protect, that the privacy of the individuals (including the plaintiffs in the litigation which is the subject of the request) should be protected and also considered the sensitivity of the information to the affected persons. Finally, the Township considered that by disclosing some of the records, including results of environmental samplings, that further disclosure of the records subject to the section 12 exemption would not increase public confidence in the operation of the institution.

I find that the Township considered only relevant factors and exercised its discretion properly, and thus I uphold its exercise of discretion.

**ORDER:**

1. I order the Township to disclose Record 51 by sending the appellant a copy by **December 2, 2009**.
2. I uphold the Township's decision to deny access to the remaining records.
3. In order to verify compliance with Order Provision 1, I reserve the right to require the Township to provide me with a copy of the record that is disclosed to the appellant.

Original Signed by: \_\_\_\_\_  
Stephanie Haly  
Adjudicator

\_\_\_\_\_ October 27, 2009

**APPENDIX OF RECORDS  
APPEAL MA07-432**

<b>Record Number</b>	<b>Document Type</b>	<b>Description</b>	<b>Number of Pages</b>
2	Letter	From Township to Lawyer Firm	1
3	Letter	From Law Firm to Township	1
4	Letter	From Township to Law Firm	1
5	Letter	From Law Firm to Township	1
13	Letter and enclosure	From Law Firm to Township	13
14	Letter	From Township to Law Firm	1
15	Fax Cover	From Township to Law Firm	1
16	Fax Cover	From Township to Law Firm	1
17	Letter	From Ministry of the Attorney General to Township	3
18	Fax Cover	From Ministry of Attorney General to Township	5
19	Fax Cover	From Township to Law Firm	1
20	Letter	From Law Firm to Township	4
21	Handwritten note	From clerk of Township to Township	1
22	Letter	From Law Firm to Township	1
23	Letter	From Law Firm to Township	1
24	Letter	From Law Firm to Township	10
	Non-Waiver Agreement	From Township to Insurance Company	1
26	Fax Cover and Enclosure	From Lawyer to Township	2
27	Letter and enclosure	From Law firm to Lawyer	7

29	Letter	From Law Firm to Township	2
31	Letter	From Law firm to Township	2
32	Examination for Discovery Transcript		53
33	Letter	From Law firm to Township	3
35	Letter	From Township to Law firm	2
36	Letter	From Law firm to Township	1
37	Letter	From Law firm to Township	3
38	Letter	From Law firm to Ministry of the Attorney General	5
39	Letter	From Township to Law firm	3
40	Letter	From Township to Law firm	1
41	Handwritten Note	Township's Note to File	1
42	Letter	From Law firm to Ministry of the Attorney General	11
43	Fax Cover	From Township to Law firm	1
44	Letter	From Law firm to Township	1
45	Letter	From Law firm to Law firm	1
46	Letter and enclosures	From Law firm to Township	132
47	Letter	From Township to Law firm	8
48	Letter	From Law firm to Law firm	8
49	Letter and account	From Law firm to Township	2
51	Letter	From 3 <sup>rd</sup> party to Township	2