



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

ORDER MO-2535

Appeal MA09-128

The Corporation of the Township of Prince



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NATURE OF THE APPEAL:

The appellant submitted a request to the Corporation of the Township of Prince (the Township) under the *Municipal Freedom of Information and Protection of Privacy Act* for:

[A] copy of the written documentation given [to] the Township from the legal and insurance advisors in regards to the liability of the Volunteer Fire Dept accessing the Prince Lake area during the winter season.

The Township located three records containing e-mails and/or e-mail chains and an administrative report. The Township issued an access decision in which it disclosed the administrative report to the appellant, but withheld the records containing the e-mails pursuant to section 12 of the *Act* (solicitor-client privilege). The Township's decision stated that the information it received from its insurance advisor was given verbally and not in written format. The Township noted that this was also the case for the majority of information received from its legal counsel.

The appellant appealed the Township's decision to this office. During mediation, the Township agreed to conduct a further search to determine if there were any additional responsive records. The Township did not locate any additional records, and reiterated its explanation that there were no additional records, as the consultations with the insurance provider and the lawyer were verbal, with the exception of the records that were identified as responsive. The appellant subsequently confirmed that the reasonableness of the Township's search was no longer at issue.

During mediation, the appellant confirmed that she was not pursuing access to portions of the records that had been identified as non-responsive to the request. Accordingly, this information is not at issue.

Also during mediation, the Township released one of the records containing emails dated February 12th and 11th, 2009 to the appellant, and therefore, this record is no longer at issue. The Township subsequently issued a revised decision letter to the appellant which stated that the two remaining records "should remain protected as solicitor-client privilege under section 12 of the *Act*."

Mediation could not resolve all of the issues on appeal, and the file was transferred to the adjudication stage of the appeals process. The adjudicator previously assigned to this file commenced her inquiry by sending a Notice of Inquiry, setting out the facts and issues in the appeal, and seeking the Township's representations. In response, the Township provided representations.

The adjudicator then sought the representations of the appellant, and provided her with a copy of the Notice of Inquiry and a complete copy of the Township's representations. The appellant also made submissions, in which she raised the possible application of the public interest override in section 16 of the *Act*. The previous adjudicator sent the appellant's submissions to the Township and provided it with an opportunity to address the application of the public interest override in reply. The Township provided reply submissions.

The appeal file was subsequently transferred to me to complete the adjudication process.

RECORDS:

There remain two records at issue in this appeal. Record 1 is a one-page e-mail from the Township's lawyer to the Township, dated January 13, 2009. Record 2 contains the responsive portions of a two-page e-mail exchange between the Township's lawyer and the Township, dated February 6, 2009.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Township has claimed the discretionary exemption in section 12 to exempt both records from disclosure. 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.

The Township claims that both branches apply. I will begin with branch 1.

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. (4th) 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.)].

Representations

The Township submits that the records at issue are part of ongoing communication between the Chief Administrative Officer (CAO), on behalf of Council and the solicitor retained by the Township. The Township submits further that these communications took place with the “express purpose of obtaining legal advice.” The Township asserts that privilege has not been waived.

In her submissions, the appellant outlines the issues she has been pursuing with the Township regarding the discontinuation of fire and first response services in her area. She describes the efforts she has made to obtain information about this issue, including numerous attendances at Council meetings, and her frustration at the lack of an adequate response. She states:

The barrier seems to be Council and the advice they’ve been given. I still have yet to hear/read any of the advice given [to] Council..

Analysis and Findings

The two records at issue are e-mail communications between the CAO and outside legal council. The first e-mail contains only one e-mail from legal counsel to the CAO in which counsel provides his advice relating to a legal matter. The second e-mail contains an originating e-mail from the CAO, in which she formulates a question for legal counsel. The response e-mail contains legal counsel’s advice to the CAO regarding her question.

I am satisfied, based on my review of the records and the Township’s submissions that these two records qualify for exemption under section 12 of the *Act* as they both contain 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. Based on the evidence before me, I am satisfied that the Township has not waived privilege.

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)].

The Township indicates that the appellant's request for records was considered at length and that it was ultimately decided that the information should be maintained in confidence. The Township notes that it took into consideration "that the appellant has a compelling reason to gather the information, as it refers to emergency services in the area in which she lives." Nevertheless, the Township indicated that the appellant could obtain sufficient information about the issue using other sources, including the administrative report, dated February 24, 2009 (disclosed to her), verbal discussions in open council sessions and a public meeting held October 28, 2009.

The appellant does not agree that her concerns have been addressed via the public information mentioned above. She does not believe that she has been given an adequate platform to voice her concerns.

The Township has provided documents referred to or relating to the public forums identified above. In my view, the Township properly considered the information already publicly available in exercising its discretion not to disclose the legal advice provided to it by its solicitor. Based on the circumstances of this appeal, I find that the Township has not erred in exercising its discretion not to disclose the records. Accordingly, I find that the records at issue are exempt under section 12 of the *Act*.

Because of these findings, it is not necessary for me to consider the other branches and aspects of solicitor-client privilege. The appellant has claimed that there is a public interest in disclosure of the records at issue, and I will now turn briefly to that issue.

PUBLIC INTEREST OVERRIDE

General principles

Section 16 states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Section 12 of the *Act* is not included as an exemption subject to the public interest override in section 16. In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and 19 of the provincial *Act*, which are equivalent to sections 8 and 12 of the *Act*, are to be “read in” as exemptions that may be overridden by section 23, the provincial equivalent to section 16 of the *Act*. On behalf of the majority, Justice LaForme stated at paragraphs 25 and 97 of the decision:

In my view s. 23 of the *Act* infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. It is also my view that this infringement cannot be justified under s. 1 of the *Charter*. ... I would read the words “14 and 19” into s. 23 of the *Act*.

On June 17, 2010, the Supreme Court of Canada released its decision on this matter, overturning the Court of Appeal’s decision [*Ontario (Public Safety and Security) v. Criminal Lawyers' Assn.*, [2010] S.C.J. No. 23]. The Court restored the Commissioner’s decision confirming the constitutionality of section 23 and holding that two of three records at issue are exempt under section 19. The Court held that, while section 2(b) of the *Charter* does not guarantee access to government information, such access is nonetheless “a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government.” The Court went on to find no section 2(b) *Charter* breach in the particular case before it. In arriving at this conclusion, the Court found, among other things, that the impact of the absence of a section 23 public interest override is minimal because the discretionary exemptions at sections 14 and 19 (sections 8 and 12 of the municipal *Act*) already incorporate consideration of the public interest.

There is nothing in the circumstances of this appeal to support the application of section 2(b) of the *Charter*. I find that the application of section 16 is not available to override the exemption in section 12 of the *Act*.

ORDER:

I uphold the Township's decision.

Laurel Cropley
Adjudicator

June 29, 2010