

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2781

Appeal MA11-300

Town of Oakville

August 21, 2012

Summary: The appellant made a request to the town for an engineering report. The town withheld disclosure of the report pursuant to the discretionary solicitor-client privilege exemption in section 12 of the *Act*. The report was found to have been prepared for legal counsel to assist counsel in providing legal advice to the town. Accordingly, the town's decision is upheld.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 12.

OVERVIEW:

[1] The appellant made a request to the Town of Oakville (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a specified engineering report. The town located the responsive record and denied access to it pursuant to the discretionary solicitor-client privilege exemption in section 12 of the *Act*.

[2] The appellant appealed the town's decision. During mediation, the town provided an affidavit to this office which described the record and set out the town's position on the application of the exemption to it. A copy of this affidavit was provided to the appellant, who confirmed with the mediator that he wanted to pursue access to the record.

[3] During my inquiry into this appeal, I sought and received representations from the town and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[4] In this order, I uphold the town's decision to deny access to the engineer's report.

RECORD:

[5] The record at issue is a specified engineer report.

ISSUES:

- A. Does the discretionary exemption at section 12 apply to the record?
- B. Was the town's exercise of discretion proper?

DISCUSSION:

A. Does the discretionary exemption at section 12 apply to the record?

[6] The town submits that section 12 applies to exempt the record at issue 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.

[7] 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

[8] 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.¹

¹ 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

[9] 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.²

[10] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.³

[11] 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.)].

[12] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.⁴

[13] 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.⁵

Litigation privilege

[14] Litigation privilege protects records created for the dominant purpose of litigation, actual or contemplated.⁶

[15] In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth’s: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

The “dominant purpose” test was enunciated [in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169] as follows:

² *Descôteaux v. Mierzewski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

³ Orders PO-2441, MO-2166 and MO-1925.

⁴ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

⁵ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

⁶ Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (cited above)].

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.

It is crucial to note that the “dominant purpose” can exist in the mind of either the author or the person ordering the document’s production, but it does not have to be both.

...

[For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Branch 2: statutory privileges

[16] 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 solicitor-client communication privilege

[17] 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

[18] 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.”

[19] Termination of litigation does not affect the application of statutory litigation privilege under branch 2.⁷

⁷ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (cited above).

[20] Branch 2 includes records prepared for use in the mediation or settlement of actual or contemplated litigation.⁸

Loss of Privilege

[21] The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the *head of an institution*⁹ and
- the lack of a “zone of privacy” in connection with records prepared for use in or in contemplation of litigation¹⁰

[22] The town submits that the engineering report was prepared for legal counsel employed by the town for use in giving legal advice to the client, town Council. The town submitted the following background of the legal issue where advice from counsel was sought:

Residents of a condominium development at [specified address] raised concerns with respect to the private sewage pump station (“SPS”), which serves their ...townhouse units. The condominium corporation previously sued the builder and the design engineer with respect to alleged deficiencies of the SPS and received a settlement of that action, the terms of which are confidential between the parties to the settlement. The Town was not party to that action.

Notwithstanding the settlement of the action against the builder and design engineer, the Town received repeated correspondence from the residents outlining their concerns with respect to their SPS, and requesting that the Town take action/contribute to correct the alleged problems. Some residents were not satisfied with the responses of the Town and continued to request further information and assistance from the Town. Residents also indicated that they were not part of the settlement that was negotiated by their condominium corporation and that they were not aware of any limitation period to address their concerns. As a result, the following motion was passed by Town Council on March 22, 2010:

That staff be requested to report on the issues raised in the correspondence dated March 1, 2010 from [a resident] regarding municipal approval of sanitary pump stations,

⁸ *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

⁹ *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

¹⁰ *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

recognizing that a majority of the subject will be addressed in a confidential report.

In a public report by Legal staff dated July 23, 2010, staff reported back to Council indicating that there was an internal investigation with respect to the permits and approvals issued by the Town. This investigation concluded that the Town was not at fault, that the Town followed common practice in accepting the engineering certification, and that no changes are required to standard Town practices. Legal staff noted that their report included matters relating to potential liability and the possible disposition of interests in land that could have been the subject of a confidential report; therefore, a more detailed discussion of some of the issues would require legal advice in the absence of the public.

On August 30, 2010, Council directed Legal staff to retain an independent third party engineering firm to:

1. Determine the cause of the failures to the pumping station.
2. Advise whether the pumping station fails to meet the relevant legislation and requirements.
3. Advise what adverse consequences may arise for residents and the neighbouring community, including the environment, as a result of these deficiencies.

[23] The town states:

"Legal advice" has been defined to include 'a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications (*Ontario Order 210*, [1990] O.I.P.C. No. 71). [Named engineering firm] was retained by the Town Solicitor to prepare a report that would assist Town Legal staff in providing legal advice to Town Council on how to deal with the issues raised by the residents. [Named engineering firm] prepared the report and communicated that report directly to the Town's Legal staff implicitly in confidence.

[24] The town submits that while there is no pending litigation by the residents, the town notes that the residents have repeatedly indicated to town staff and Council that they were not part of the settlement that was negotiated by their condominium corporation.

[25] As the town did not provide a copy of the record to this office, it was asked to submit evidence that the town council directed the town's legal staff to retain the named engineering firm to assist with the matters set out above. The town provided:

- Minutes of Town Council's August 30, 2010 meeting;
- A copy of the retainer agreement between the Town's legal department and the engineering firm;
- A copy of the public report that was released following receipt of the engineering report; and
- Emails exchanged between the town and its council after the report had been received discussing next steps.

[26] The town also submits that legal staff provided advice and opinions regarding the engineering report to the town's Chief Administrative Officer, and consulted with external legal counsel.

[27] The appellant's submissions in support of disclosure focus on the fact that the record at issue was funded by taxpayers, is necessary from a public-interest standpoint, and that he does not intend to commence litigation against the town. The appellant also provided extensive evidence as to the problems with the SPS and his efforts to have the problems rectified by the town.

[28] The appellant argued the following in support of his position that section 12 does not apply:

The use of MFIPPA section 12 by the town must be refuted since the town is very well aware that the record doesn't meet the criteria for solicitor-client privilege i.e. the communication doesn't directly relate to seeking, formulating or giving legal advice but only provides technical communication on common infrastructure. Furthermore, the Town is also aware that there is no contemplation of further litigation (as proven by an excerpt from our Condominium Board of Director's legal release of May 2009 enclosed). As well, has the statute of limitations not expired, again precluding the contemplated threat of a [lawsuit].

[29] Based on my review of the parties' representations and particularly the evidence tendered about the circumstances surrounding the retention of the engineer by the town's legal counsel, I find that branch 2 of the litigation privilege aspect of section 12 applies to exempt the record at issue. I find that the town has established the engineering report was a confidential report prepared by the engineering firm for the town's legal counsel for the purposes of providing legal advice to council. I accept the town's evidence that council requested legal counsel retain an engineering firm for the purposes of looking into various issues caused by the SPS at the appellant's condominium. I further accept that the town's counsel retained the engineering firm for the purposes of investigating and providing a report on the issues set out above. Finally, I accept the town's submissions that its counsel provided legal advice to the council about this matter following receipt of the engineering report.

[30] The appellant's submission, that he does not intend to commence litigation against the town nor does he contemplate litigation, does not sufficiently address the litigation issue. I find that the town's legal staff received the engineering report in confidence and reported, in confidence, the findings of the report to the town's council. The appellant has not advanced any evidence that the town has waived its privilege in the information in the record. I further accept that litigation is still a possibility. Accordingly, I find that branch 2 of the section 12 exemption applies to the information at issue, subject to my finding on the town's exercise of discretion.

[31] Before, I address the town's exercise of discretion, I want to briefly address the appellant's position that section 5(1), 7(2)(a), (d), (f) and (g) and 16 of the *Act* are also relevant in this appeal. Firstly, the exceptions listed in section 7(2) relate only to an institution's claim of exemption under the discretionary advice or recommendation exemption in section 7(1), which is not the case in this appeal because the town did not claim section 7(1) to exempt the record at issue. Thus, the exceptions in section 7(2) do not apply and are not relevant in this appeal.

[32] Section 5 of the *Act* requires the head of an institution to disclose any records to the public, if the head has reasonable and probable grounds to believe that it is in the public's interest to do so and that the record reveals a grave environmental, health or safety hazard to the public. The duties and responsibilities under section 5 relate to the head of the institution alone, and this office does not have the jurisdiction or authority to order disclosure under this section.¹¹

[33] Lastly, the appellant appears to argue that there is a compelling public interest in the record at issue such that the exemption in section 12 should not apply pursuant to section 16 of the *Act*. Section 16 of the *Act*, the so-called public interest override, cannot apply to override the application of section 12 and is not a relevant consideration in this appeal, accordingly.

B. Was the town's exercise of discretion proper?

[34] 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.

[35] 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

¹¹ Orders P-65, 187, P-1403, MO-2205.

- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[36] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹² This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

[37] The town submits that in exercising its discretion to withhold the record, it did so in good faith and for no improper purpose. The town submits that it took into consideration the nature of the information contained in the record, as well as the nature and purpose of the exemption claimed. The town also submits that legal staff consulted with external counsel on the applicability of exemptions under the *Act*. The town sets out the fundamental principles of the *Act* and then states:

In taking this into consideration, the town carefully examined the record in an effort to maintain both the principle that information should be available to the public and the principle that information prepared for legal counsel for use in providing legal advice should be exempted. This exercise resulted in the release of a summary of the key findings of the report contained in a public report to Council in an effort to provide the public with as much information as possible without waiving privilege.

[38] The appellant did not make representations on this issue.

[39] Based on my review of the town's representations, I find that the town's properly exercised its discretion in claiming section 12. The town considered the fundamental principles of the *Act*, the purposes of the section 12 exemption and the interests sought to be protected by the exemption. The town also considered the appellant's interests and the public's right to review the report's findings. I have reviewed a copy of the town's public report that was based on the record at issue (the confidential engineering report) and I accept that the town attempted to balance the public's right to transparency with the town's right to protect information related to advice received from its legal counsel. Accordingly, I uphold the town's exercise of discretion as proper.

¹² Order MO-1573.

ORDER:

I uphold the town's decision and dismiss the appeal.

Original signed by: _____

Stephanie Haly

Adjudicator

_____ August 21, 2012