Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2929

Appeal MA11-304

Regional Municipality of Durham

August 6, 2013

Summary: The requester sought access to a legal opinion provided by a law firm to the Regional Municipality of Durham (the region) concerning contemplated litigation between the region and the City of Oshawa. The requester submitted that any solicitor-client privilege was waived when the region's solicitor referred to the advice given by the law firm, and those comments were reported in a newspaper article. In this order, the adjudicator finds that the discretionary exemption in section 12 (solicitor-client privilege) applies to the record and the privilege was not waived. The order also upholds the region's exercise of discretion in denying access to the legal opinion.

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

Orders and Investigation Reports Considered: Orders MO-1172 and MO-2222; Report FI-08047(M) (Nova Scotia).

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

OVERVIEW:

[1] The Regional Municipality of Durham (the region) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a legal opinion. The request read as follows:

> I wish a copy of the entirety of the [named law firm] opinion referenced in an article entitled, "Region sues City for $8.9 million" which was published in the May 18, 2011 edition of The Oshawa Express.
>
> The article quotes a Regional staff lawyer as follows: "We reached this point now where the statement of claim was a necessary step to protect our legal rights…We were advised by our lawyers … that if we didn't file our statement of claim by a certain time our legal rights would be jeopardized." The lawyer is authorized to act on behalf of Regional Council. The lawyer's statement did not represent a personal opinion but was a statement made on behalf of the Region. The lawyer is presumed to have the authority to acquire the legal opinion. Accordingly, he had the authority to waive the privilege attached to the same opinion. He knew of the existence of the privilege and voluntarily evinced an intention to waive that privilege as evidenced by comments to the media on the actual content of the legal advice received on the limitation period issue.

[2] The region issued a decision refusing access to the legal opinion pursuant to section 12 (solicitor-client privilege) of the *Act*. In its decision the region denied the requester's claim that solicitor-client privilege in the legal opinion had been waived.

[3] The requester (now the appellant) appealed the region's decision to this office.

[4] The parties were unable to resolve the appeal through mediation and the appeal moved to the adjudication stage of the process. As part of the inquiry, our office initially sought representations from the region. A severed copy of the region's representations (with portions excluded for reasons of confidentiality) was shared with the appellant, who was also invited to submit representations. The appellant chose to rely on earlier submissions made to our office during the mediation stage of the appeal process.

[5] The file was subsequently transferred to me to complete the adjudication process. For the reasons that follow, I uphold the region's application of section 12 of the *Act* to exempt the record from disclosure.

RECORDS:

[6] The record at issue in this appeal is an 11-page legal opinion prepared by a named law firm.

ISSUES:

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

B. Did the region exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[7] 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.

[8] 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. In this appeal, the region relies on both branches of section 12. Since I find that the common law privilege applies, it is unnecessary to consider the branch 2 statutory privilege.

Branch 1: common law privilege

[9] 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]

Solicitor-client communication privilege

[10] 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]

[11] 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]

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

[12] 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.[4]

[13] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[5]

[14] 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.[6]

Litigation privilege

[15] Litigation privilege protects records created for the dominant purpose of litigation, actual or contemplated.[7]

[16] In *Solicitor-Client Privilege in Canadian Law*,[8] 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:
>
> > 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.

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[3] Orders PO-2441, MO-2166 and MO-1925.
[4] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[5] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[6] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[7] Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (above at note 6); see also *Blank v. Canada (Minister of Justice)* (above at note 1).
[8] Ronald D. Manes and Michael P. Silver, *Solicitor-Client Privilege in Canadian Law* (Butterworth's: Toronto, 1993), pages 93-94.

. . . . .

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

Loss of privilege

Waiver

[17] Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

[18] 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[9]

[19] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[10]

[20] Waiver has been found to apply where, for example:

- the record is disclosed to another outside party[11]
- the communication is made to an opposing party in litigation[12]
- the document records a communication made in open court[13]

Termination of litigation

[21] Common law litigation privilege under branch 1 may be lost through termination of litigation, actual or contemplated.[14]

[22] Termination of litigation may not end the privilege where the policy reasons underlying the privilege remain, despite the end of the litigation. Privilege may be

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

[10] 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.).

[11] Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

[12] Orders MO-1514 and MO-2396-F.

[13] Orders P-1551 and MO-2006-F.

[14] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.); *Blank v. Canada (Minister of Justice)* (*supra*, note 1); Orders MO-1337-I, PO-1855, MO-2221 and PO-2441.

sustained where, for example, there is related litigation involving the same subject matter in which the party asserting the privilege has an interest.[15]

Representations

[23] The region submits that the record at issue is a legal opinion, prepared by counsel to the region for use in giving confidential legal advice for the dominant purpose of litigation between the region and the City of Oshawa (the city). The region states that such litigation was contemplated at the time of the legal opinion's preparation, was ongoing at the time the appellant made his access to information request, and is currently ongoing. As a result, the region submits, the record qualifies for exemption under both branches of section 12.

[24] In his request and written submissions, the appellant claims that by his conduct (namely, the statement reported in the local press), the region's solicitor has waived any solicitor-client privilege in the record.

[25] On the issue of waiver, the region submits that a statement made by its solicitor about the existence of legal advice on a topic does not amount to waiver of solicitor-client privilege. The region denies that there is any evidence that the solicitor manifested any intention to waive privilege over the record. Further, with regards to the statement, the region says: "[N]o reference was made to the Legal Opinion itself. Rather, the staff lawyer simply referenced the trite rule of law that the expiration of a limitation period risks the enforceability of legal rights." The region refers to legal authority indicating that where the existence or adequacy of the legal advice contained in the record is not the basis for the litigation between region and the city, privilege in the record cannot be waived by a "simple reference to such advice." In addition, the region notes that the litigation to which the record relates is ongoing, and that, consequently, common law litigation privilege in the record has not been lost.

[26] The appellant's submissions on waiver focus on his arguments that: (1) the solicitor has authority to waive privilege in the record; and (2) by his statement, the solicitor has voluntarily evinced an intention to waive privilege, thus meeting the test for waiver.

[27] The appellant cites a number of authorities to support his assertions on both points. On the second, the appellant summarizes court decisions and orders of this office considering whether certain conduct amounts to waiver of privilege even in the absence of an express intention to waive. He submits that, in the case at hand, the solicitor's comments to the media "did more than disclosing a small portion of the 'bottom line' of the legal advice received by the Region," and "were not necessary to

[15] *Carleton Condominium Corp. v. Shenkman Corp.* (1977), 3 C.P.C. 211 (Ont. H.C.).

serve some public interest, such as to provide transparency of the public process." The appellant concludes:

> For the Region's solicitor to comment to the media about the actual content of the legal advice on the limitation period issue, he had voluntarily evinced an intention to waive confidentiality of the legal opinion containing that advice.

Analysis

[28] I find that the record at issue is a legal opinion prepared by a law firm retained by the region, for the purpose of communicating confidential legal advice in connection with contemplated litigation between the region and the city. I have no difficulty finding that the record qualifies for exemption under both heads of the branch 1 common law privilege at section 12.

[29] As noted, the appellant does not dispute that the record is (or was) subject to solicitor-client privilege. His contention is that there has been a waiver of privilege because of the statement to the local press by the region's solicitor.

[30] Both parties devote some part of their submissions to the question of the authority of the region's solicitor to waive privilege on behalf of the region. I find it unnecessary to consider this issue because, assuming without deciding that the solicitor has authority to waive privilege in the record, I find that the conduct in question does not amount to waiver.

[31] The appellant maintains that, by his statement, the solicitor has voluntarily evinced an intention to waive privilege in the record. The region maintains there is no evidence that the solicitor manifested any such intention. The appellant notes that the intention to waive need not be express; waiver may be implied, and implied waiver does not turn on the subjective intention of the disclosing party.[16]

[32] In *S & K Processors,* the decision setting out the common law test for waiver of privilege, the court recognized that "waiver may also occur in the absence of an intention to waive, where fairness and consistency so require."[17] The court referred to the proposition that:

> … double elements are predicated in every waiver - implied intention and the element of fairness and consistency. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent.

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[16] *Peach v. Nova Scotia (Transportation and Infrastructure Renewal)*, 2010 NSSC 91, at para. 21.
[17] *S & K Processors*, *supra*, note 9 at para. 6.

> The law then says that in fairness and consistency it must be entirely waived.[18]

[33] Even where there is no evidence of an express intention to waive, therefore, "fairness and consistency" may lead to a finding of implied, or implicit, waiver.

[34] In Order MO-1172, this office upheld the City of Vaughn's decision to refuse access to a copy of a confidential memorandum from a deputy city manager and city solicitor that was received by council at an open session. The adjudicator rejected the argument that a public report's reference to a "small portion of the 'bottom line'" of the advice contained in that memorandum constituted waiver of privilege. The adjudicator noted that, in fact, public disclosure of such information may often be necessary in the interests of transparency:

> 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 …
>
> 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.[19]

[35] In that order, the adjudicator found that there had been no express waiver of privilege, as she was satisfied that in making the relatively minimal disclosure the city did not intend to waive privilege. She was also satisfied that there had been no implicit waiver, as in the circumstances there was no basis for finding that fairness or consistency required disclosure. Among other factors, there was no evidence that the city provided access to the legal opinion to anyone other than city officials, and the city took active steps to preserve the confidentiality of the opinion.

[36] The reasoning in Order MO-1172 was followed in Order MO-2222, involving a claim that the Township of Scugog had waived privilege in a legal opinion by sending a letter stating: " … the legal opinion we received indicates that your comments taken as

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[18] Set out in Wigmore on Evidence, cited in *S & K Processors Ltd.*, above at note 9, para. 10.
[19] Order MO-1172, at pages 5 and 6.

a whole may indeed be defamatory.[20]" In that order, the adjudicator found that the sentence in the letter represented just one portion of the conclusion reached in the legal opinion, and did not disclose the bulk of the legal opinion. As a result, the adjudicator was satisfied that although the township had disclosed one portion of the legal opinion's bottom line to the individual, this did not constitute waiver, either express or implied, of the privilege attaching to the legal opinion as a whole.

[37] Similar conclusions were reached in Orders MO-2500 and MO-2573-I of this office.

[38] The only decision cited by the appellant involving a finding of waiver of privilege is a report of a Nova Scotia *Freedom of Information and Protection of Privacy Act* Review Officer, FI-08-47(M). In that case, an individual sought access to a legal opinion solicited by a municipal council on a public petition process that had generated much interest and controversy in the community. The Review Officer found that the municipality had by its own conduct implicitly waived privilege in the opinion and could not rely on privilege to withhold the full opinion from disclosure. The conduct in question included: a municipal councillor discussing the legal opinion with a member of the public, disclosing matters "at the core" of the issues raised by the applicant and other members of the public; and the chief administrative officer providing the applicant with a detailed written response about the legal advice received and how the legal advice was used by council.

[39] The Review Officer was satisfied that there was evidence that the essence of the legal opinion had been made public – noting also that there was evidence that members of the public had acted upon that information. In the circumstances, the Review Officer found that it would be unfair to the applicant for the municipality to withhold the entirety of the opinion, as that would amount to allowing the municipality to "pick and choose the portions of the legal advice it chooses to make public while holding back other portions which may or may not line up with the processes it put in place with respect to petitions."[21]

[40] An important element of the Review Officer's report is the discussion of the public interest override in the Nova Scotia statute and its application to the solicitor-client privilege exemption. I note here that, unlike in Nova Scotia, the Ontario *Act* does not contain an explicit public interest override for records exempt pursuant to solicitor-client privilege. In Ontario, the public interest in disclosure is instead a consideration in the exercise of discretion in applying the exemption under the *Act*.[22] Given the differing legislative schemes, I do not find the Nova Scotia report particularly helpful in the appeal at hand. I also do not find that the actions or conduct of the municipality

[20] Order MO-2222, at p. 7.
[21] FI-08-47(M), at p. 19.
[22] See *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

described in the Nova Scotia report, which gave rise to a finding of implied waiver, comparable to the circumstances in the appeal before me.

[41] In each of the orders of this office canvassed above, the adjudicator arrived at a finding of no waiver, express or implied. Those cases involved actions and conduct disclosing a "small portion of the bottom line" or a portion of a conclusion reached in a privileged legal opinion. Such "relatively minimal disclosure" was not found to amount to implied waiver or to require full disclosure of privileged material in the interests of fairness or consistency.

[42] I return to the statement by the region's solicitor that is at issue in this appeal:

> We reached this point now where the statement of claim was a necessary step to protect our legal rights…We were advised by our lawyers … that if we didn't file our statement of claim by a certain time our legal rights would be jeopardized.

[43] In the circumstances of the present appeal, I am satisfied that in making his statement, the solicitor did not intend to waive privilege with respect to the record. Accordingly, I do not find that there has been any express waiver of privilege.

[44] Further, I find there has been no implied waiver of privilege. I find the statement of the solicitor in the appeal before me to be no more revealing of the contents of the record at issue than were the disclosures considered in the above IPC orders. On reviewing the solicitor's statement and the record at issue, the statement reveals no more than a portion of the bottom line or portion of a conclusion, to explain a step being taken by the region. Without more, these circumstances do not lead to a conclusion that fairness or consistency requires disclosure of the whole of the legal opinion.

[45] I do not find compelling the appellant's submission that the "solicitor's statements to the media were not necessary to serve some public interest, such as to provide transparency of the public process." As noted by the adjudicator in Order MO-1172, disclosure by an institution of the "crux" of legal advice is often desirable in the interests of public transparency. This should not be discouraged by applying a rigid test of necessity to every piece of information an institution chooses to make public.

[46] As there has been no express or implied waiver of privilege, I find that the record is exempt under branch 1 of section 12 of the *Act*, subject to my review of the region's exercise of discretion.

[47] In the circumstances, it is not necessary for me to consider whether the branch 2 statutory privilege of the section 12 exemption would apply to the record.

B. Did the region exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

[48] 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, this office may determine whether the institution failed to exercise its discretion.

[49] In addition, this office 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.

[50] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[23] This office may not, however, substitute its own discretion for that of the institution.[24]

Relevant considerations

[51] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[25]

- 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

[23] Order MO-1573.
[24] Section 43(2).
[25] Orders P-344 and MO-1573.

- 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 affected person
- 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.

Representations and Analysis

[52] The region submits that it properly and reasonably exercised its discretion to withhold the record. It indicates that the relevant considerations taken into account in arriving at its decision included: the privileged nature of the record and the exceptional status accorded to solicitor-client privilege in our legal system, militating against disclosure except in very narrow circumstances; the absence of any sympathetic or compelling need for the appellant to receive this information; the appellant's particular circumstances; and the ongoing nature of the litigation, making disclosure inappropriate.

[53] The appellant does not address the region's exercise of discretion in his submissions, except perhaps indirectly by his reliance on the Nova Scotia case canvassed above.

[54] In these circumstances, I am satisfied that the region has not erred in the exercise of its discretion, as it has not done so in bad faith or for an improper purpose. I am satisfied that the region did not take into account irrelevant considerations or fail to take into account relevant considerations.

[55] Accordingly, I conclude that the region properly exercised its discretion in applying the section 12 exemption, and I uphold its decision to withhold the record pursuant to this section.

ORDER:

I uphold the region's decision, and dismiss the appeal.

Original signed by: August 6, 2013
Sherry Liang
Senior Adjudicator