

Information and Privacy Commissioner,  
Ontario, Canada



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

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## **ORDER MO-2937**

Appeal MA12-491

Town of South Bruce Peninsula

August 29, 2013

**Summary:** The appellant sought access to a letter written by the town's legal counsel to its staff or elected officials about certain ongoing litigation involving the town and others on the one hand, and the appellant on the other. The town denied access to the record on the basis that it was exempt under the discretionary solicitor-client privilege exemption in section 12 as it is both litigation privileged and subject to solicitor-client communication privilege. In this order, the town's decision is upheld and the appeal is dismissed. The town's exercise of discretion is also upheld.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, definition of "personal information" in section 2(1), sections 12 and 38(a).

### **OVERVIEW:**

[1] The Town of South Bruce Peninsula (the town or TSBP) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the *Act*) for access to:

A letter or e-mail from someone, possibly a lawyer, possibly the Town lawyer, to TSBP or to some staff member or to council, possibly outlining

or listing legal or court proceedings that involve [the appellant], and possibly advising against contact with [the appellant].

This is a very specific letter possibly discussed in closed session, possibly Tuesday June 5<sup>th</sup>, 2012, or thereabouts, possibly under the agenda item from the June 5<sup>th</sup> agenda:

4.4 Litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board (Litigation Update)

As I understand it, in the letter the author recommended that staff and council have no contact with me whatsoever, and if contact was absolutely required that it be kept minimal.

[2] The town located the requested record and denied access to it on the basis that it was exempt from disclosure under the discretionary solicitor-client privilege exemption in section 12 of the *Act*. The requester, now the appellant, appealed this decision.

[3] The town declined to provide this office with a copy of the record, claiming that to do so "would be contrary to our client's right to retain solicitor/client and litigation privilege with respect to an ongoing legal proceeding." It relies on the decision of the Supreme Court of Canada in *Privacy Commissioner of Canada v. Blood Tribe Department of Health*<sup>1</sup> as its authority for taking this position. The town argues that following the decision in *Blood Tribe*, disclosure of the document at issue in this appeal to the Commissioner's office would result in waiver of its privilege in it.

[4] I sought representations from the town initially, as it bears the onus of establishing the application of the solicitor-client privilege exemption in section 12 which it has claimed for the responsive record. Because of the very nature of the request, it appears that any responsive record may also contain the personal information of the appellant. Accordingly, I also sought the representations of the town on the application of the discretionary exemption in section 38(a), in conjunction with section 12.

[5] The town provided me with representations and I provided a summary of them to the appellant, along with a Notice of Inquiry setting out the facts and issues in the appeal. The appellant also provided representations in response to the Notice.

[6] In this decision, I uphold the town's decision to deny access to the record on the basis that it qualifies for exemption under section 12.

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<sup>1</sup> [2008] 2 S.C.R. 574.

## **RECORD:**

[7] The record at issue is a letter from the town's solicitor to its staff and elected representatives.

## **DISCUSSION:**

[8] The sole issue for determination in this appeal is whether the record at issue qualifies under the discretionary exemption in section 12, which 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.

[9] 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**

[10] 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.<sup>2</sup>

#### ***Solicitor-client communication privilege***

[11] 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.<sup>3</sup>

[12] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.<sup>4</sup>

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<sup>2</sup> 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).

<sup>3</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>4</sup> Orders PO-2441, MO-2166 and MO-1925.

[13] 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.<sup>5</sup>

[14] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.<sup>6</sup>

[15] 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.<sup>7</sup>

### ***Litigation privilege***

[16] Litigation privilege protects records created for the dominant purpose of litigation, actual or contemplated.<sup>8</sup>

[17] 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:

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.

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<sup>5</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

<sup>6</sup> *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

<sup>7</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

<sup>8</sup> 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).

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.

### **Analysis and findings**

[18] The town provided representations describing, in a general way, that the record at issue was created as a result of litigation between it and the appellant and that the record represents legal advice about a legal issue provided to the town by its legal counsel. Because of the confidential nature of the representations of the town, I am unable to describe them in a more detailed way. The town indicates that it has not waived the privilege in this document and that it properly exercised its discretion not to disclose it to the appellant because the letter relates directly to the on-going litigation between it and the appellant. It also submits that although the record may include a reference to the appellant by name, it does not include his personal information since it only relates to legal proceedings and not the appellant’s personal matters.

[19] The appellant’s representations are predicated on the argument that although at the time the record was prepared he was involved in four different legal proceedings, only one of those proceedings directly involved the town. This matter involved an application under section 273(1) of the *Municipal Act* for an order of the Superior Court of Justice to strike a by-law. The appellant was also a defendant in an action brought by the CAO of the town in his personal capacity against the appellant and several other individuals for defamation as a result of their alleged comments on an anonymous blog. Two of the other proceedings involved applications to the Superior Court of Justice which the appellant initiated against members of a business improvement area Board of Management and a town councillor under the *Municipal Conflict of Interest Act*. Finally, the appellant was also the plaintiff in a Small Claims Court action alleging that he was defamed by the Chair of the town’s Economic Development Commission.

[20] The appellant argues that the legal advice contained in the subject record related to actions and legal proceedings that did not directly involve the town as it is not a party in three of the four matters described above. As a result, he submits that the communication was not between a solicitor and his or her client about a legal matter involving the client and is not, accordingly, subject to solicitor-client communication privilege.

[21] Because of the very nature of the wording of the request itself, any responsive records would contain information pertaining to the appellant. The town concedes that the record identified as responsive includes the appellant’s name and the fact that he is

involved in legal proceedings with the town. I find that the record contains the personal information of the appellant within the meaning of paragraph (h) of section 2(1) of the *Act* which reads:

“personal information” means recorded information about an identifiable individual, including,

- (h) the individual’s name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[22] Because the record contains information that qualifies as “personal information” about the appellant, my analysis of the exemption claimed must take place in the context of the discretionary exemption in section 38(a) which reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, **12**, 13 or 15 would apply to the disclosure of that personal information. [emphasis added]

[23] Section 38(a) of the *Act* recognizes the special nature of requests for one’s own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information [Order M-352].

[24] Where access is denied under section 38(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

### ***Section 12***

[25] In my view, it is clear that the town was involved in each of these proceedings, either as a named party or in a representative capacity on behalf of its staff and elected officials in the conduct of their official duties on behalf of the town. As a result, I specifically find that the town’s involvement in any communications with counsel retained in each of these matters is that of a client of the law firm providing the advice. I conclude that, at the time the communication was made to the town staff and elected officials, there existed a solicitor-client relationship between them.

[26] In addition, given the nature of the proceedings under way involving the town and the appellant, there was litigation underway between them. I further find that the communication which is the subject of this appeal was directly related to the giving of

legal advice by the solicitor to the clients, in this case the town's staff and elected officials, about a legal matter pertaining directly to the conduct of the litigation.

[27] As a result, I find that the correspondence which is the subject of this appeal is exempt under both the solicitor-client communication and litigation privilege aspects of section 12. I find that the letter represents a confidential communication containing legal advice passing between a solicitor and his clients about a legal issue. Accordingly, the record clearly falls within the ambit of the solicitor-client communication aspect of the section 12 exemption. In addition, the record is a document prepared by counsel for his clients as part of the litigation process and arose as a result of litigation involving the town, its staff and elected officials and the appellant that was underway at the time. As such, I find that the record also qualifies for exemption under the litigation privilege component of the section 12 exemption. Therefore, I conclude that the record is exempt from disclosure under section 38(a), in conjunction with section 12.

[28] Further, I find that there has been no waiver of the privilege. The appellant argues that the advice provided to the client was shared with "council and certain staff present in the June 5<sup>th</sup> meeting." I am of the view that the advice provided, even if shared amongst other town staff or elected officials, does not constitute waiver of privilege as these individuals represent the town and its interests and were intended as the recipients of the advice given to the town in any event.

### **EXERCISE OF DISCRETION**

[29] The section 12 and 38(a) exemptions are discretionary, and permit 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.

[30] 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.

[31] 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)].

[32] The town submits that it properly exercised its discretion not to disclose the record to the appellant. It argues that there is ongoing litigation between it and the appellant and that the record relates directly to that litigation. As a result, it suggests that its legal position may be damaged if the record were to be disclosed to the appellant. It also takes the position that the record is subject to solicitor-client privilege which is designed to protect communications containing legal advice from the opposing party in the litigation.

[33] The appellant submits that the town has exercised its discretion to not disclose the record improperly in order to silence him and other critics of the current mayor and council. He suggests that this is evidence of bad faith on the part of the town.

[34] Based on the submissions of the town, I am satisfied that it exercised its discretion not to disclose the record to the appellant taking into account only relevant considerations, and did not rely on any irrelevant or inappropriate considerations. Further, I find that in light of the ongoing litigation between the town and its staff and elected officials on the one hand, and the appellant on the other, the town's decision to exercise its discretion not to disclose the record was not made in bad faith.

**ORDER:**

I uphold the town's decision to deny access to the requested record and dismiss the appeal.

Original Signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_ August 29, 2013 \_\_\_\_\_