Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2936

Appeal MA11-464

The Regional Municipality of York

August 29, 2013

Summary: The appellant requested access to the written legal opinions of two named law firms relating to four named social housing providers that were furnished under their applications for a restricted operational mandate. Relying on the solicitor-client privilege exemption at section 12 of the *Municipal Freedom of Information and Protection of Privacy Act*, the Regional Municipality of York denied access to the requested information. This order finds that the legal opinions were not subject to privilege at the time they were provided to the region, but even if they were, there is no common interest that is sufficient to withstand waiver of privilege.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 12; *Social Housing Reform Act 2000*, S.O. 2000, c. 27, section 68(1).

Orders Considered: Orders MO-1338, MO-1678, MO-1923-R, MO-2462, MO-2681, PO-1983, PO-2995 and PO-3154.

Cases Considered: *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27; *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169 (H.L); *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd*. (1985), 3 N.S.W.L.R. 44 (S.C.); *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129 (B.C.C.A.); *Canadian Pacific Ltd. v. Canada (Competition Act, Director of Investigation and Research)*, [1995] O.J. No. 4148 (Gen. Div.); *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); *CC & L Dedicated Enterprise Fund (trustee of) v. Fisherman*, [2001] O.J. No. 637 (S.C.J.); *Pitney Bowes of Canada Ltd. v. Canada*

[2003] F.C.J. No. 311 (T.D.); *R.(C.) v. Children's Aid Society of Hamilton*, (2004) 50 R.F.L. (5th) 394 (Ont. Sup. Ct.); *Pritchard v. Ontario (Human Rights Commission)* [2004] 1 S.C.R. 809, 2004 SCC 31; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.).

OVERVIEW:

[1] The *Social Housing Reform Act*[1] (*SHRA*) received Royal Assent on December 12, 2000. It required municipalities to assume responsibility for funding and social program administration of social housing projects. These social housing projects were previously funded and administered by the Ministry of Municipal Affairs and Housing and/or the Canada Mortgage and Housing Corporation. As a result, the rent geared to income units (RGI) in the Regional Municipality of York (the region) were transferred to the region for funding and administration. As service manager, and pursuant to section 68(1)[2] of the *SHRA*, the region was required to establish and administer a centralized waiting list for RGI units.

[2] In 2007, the Council for the region approved an application process whereby Council would consider requests from social housing providers to enter into agreements permitting the implementation of an operational mandate restricting public eligibility for housing to members of a specific community defined on the basis of common religion or ethnicity. This would allow the social housing providers to restrict occupancy of its RGI units to housing members that fell within the scope of any assigned operational mandate.

[3] Part of that application process was a requirement that the housing provider furnish a legal opinion addressing certain items as a precondition to acceptance. The prospective housing provider was required by the region to retain counsel, at the housing provider's expense, to obtain and provide the requisite legal opinion.

[4] At issue in this appeal is a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the written legal opinions of two named law firms relating to four named social housing providers that were furnished under their applications for a restricted operational mandate. The request further indicated that these legal opinions were referred to in an identified clause of a report of the region's Community and Health Services Committee, as well as an identified section of a report of the region's General Manager of Housing and Long Term Care.

[5] The region relied on the discretionary exemption at section 12 (solicitor-client privilege) of the *Act*, to deny access to the four requested legal opinions.

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[1] 2000, S.O. 2000, c. 27. Repealed and replaced by the *Housing Services Act, 2011*, S.O. 2011, c. 6, Sched. 1.

[2] Section 68(1) provided at the time that: A service manager shall establish and administer one or more waiting lists for rent-geared-to-income units in its designated housing projects and shall do so in accordance with such requirements as may be prescribed.

[6] The requester (now the appellant) appealed the decision.

[7] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[8] I commenced the inquiry by seeking representations from the region, two law firms and four social housing providers on the facts and issues set out in a Notice of Inquiry. The region provided representations in response. One of the law firms and one of the social housing providers took no position. Two other social housing providers agreed with and supported the position of the region. The other law firm and the fourth social housing provider did not respond to the Notice of Inquiry. I then sent a Notice of Inquiry along with the representations of the region, to the appellant.[3] The appellant provided representations in response to the Notice. I determined that the appellant's representations raised issues to which the two law firms and the four social housing providers should be given an opportunity to reply, and sent them a letter requesting their reply representations, enclosing a copy of the appellant's submissions.

[9] The non-responding law firm then decided to provide representations on behalf of the two social housing providers that had earlier agreed with and supported the position of the region. I determined that those representations should be shared with the region and the appellant, and sent them a letter requesting their sur-reply representations, enclosing a copy of the submissions of the two social housing providers. The region responded by advising that their position was consistent with the position set out in the detailed representations provided by the law firm on behalf of two social housing providers, and no additional representations would be made. The appellant provided sur-reply representations.

RECORDS:

[10] The records at issue consist of four written legal opinions.

DISCUSSION:

Do the records contain information that is subject to solicitor-client privilege?

[11] 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

[3] I briefly summarized the positions of the responding law firm and the three responding housing providers in the Notice of Inquiry that I sent to the appellant.

> an institution for use in giving legal advice or in contemplation of or for use in litigation.

[12] 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

[13] 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.[4]

Solicitor-client communication privilege

[14] 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.[5]

[15] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[6]

[16] 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.[7]

[17] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[8]

[18] 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.[9]

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[4] 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).
[5] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[6] Orders MO-1925, MO-2166 and PO-2441.
[7] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[8] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[9] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

Litigation privilege

[19] Litigation privilege protects records created for the dominant purpose of litigation, actual or contemplated.[10]

[20] In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver[11] at 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.
>
> 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.

[21] There is a line of authority which holds that where the records at issue have not been prepared for the dominant purpose of litigation, copies of those records may become privileged if, through the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief.[12]

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[10] 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)].
[11] Butterworth's: Toronto, 1993.
[12] See *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129 at page 142 (B.C.C.A) and *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 at pages 61-62 (S.C.).

Branch 2: statutory privileges

[22] 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

[23] Branch 2 also 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

[24] 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."

[25] 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.[13]

[26] Termination of litigation does not affect the application of statutory litigation privilege under branch 2.[14]

Loss of privilege

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

[28] 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.[15]

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[13] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 290 D.L.R. (4th) 102, [2008] O.J. No. 289 (Div. Ct.); and Order PO-2733].
[14] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. 3d 167 (C.A.)
[15] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

[29] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[16]

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

- the record is disclosed to another outside party[17]
- the communication is made to an opposing party in litigation[18]
- the document records a communication made in open court[19]

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

- waiver of privilege by the *head of an institution*[20]
- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation.[21]

The region's initial representations

[32] It its initial representations, the region explained that the requested legal opinions were to address:

- whether or not the grant by Council of an ethnic mandate to the housing provider can occur without contravening the *Human Rights Code* (*Code*)[22]; and
- whether or not the housing provider's operation of a housing project in accordance with the terms of an ethnic mandate can occur without contravening the provisions of the *Code*.

[33] The region submits that in administering the application process:

(a) the social housing providers were instructed by the region to retain counsel, at their own expense, to obtain and provide the region

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[16] 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.).
[17] Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[18] Orders MO-1514 and MO-2396-F.
[19] Orders P-1551 and MO-2006-F.
[20] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)
[21] *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).
[22] *Human Rights Code*, R.S.O. 1990, c. H.19, as amended.

with the requested legal advice. The legal advice was intended for the common benefit of Council, the Region, the regional solicitor, and the social housing providers, each of whom had an interest in the legal advice;

(b) the legal advice was provided by external counsel in the form of a confidential legal opinion addressed to either the region (records 3 and 4) or the social housing providers (records 1 and 2);

(c) the legal advice was ultimately delivered to both the social housing providers and to the regional solicitor;

(d) after receiving the legal opinions the regional solicitor:

(i) analysed the legal advice, and considered whether or not, in her opinion, the legal advice was sound or deficient;

(ii) reserved the right to accept the legal advice in whole or in part;

(iii) undertook her own analysis of the issues and applicable law incorporating the legal advice into her own work product; and

(iv) finally provided her own opinion and legal advice to Council and the region relative to the issue of whether or not the grant by Council of an ethnic mandate to the social housing providers could occur without contravening the *Code*.

[34] The region submits that the legal opinions at issue in this appeal were created in confidence by external counsel for use by the applicants, Council, the region and the regional solicitor. The region further submits that they were also created in contemplation of litigation under the *Code* for use by the regional solicitor in defending Council's grant of an ethnic mandate to the social housing providers.

[35] In response to a question in the Notice of Inquiry as to who the client was with respect to this first Branch of section 12, the region took the position that, in the circumstances, the Council, the region, the regional solicitor and the social housing providers are all clients.

[36] The region submits that the records are subject to solicitor-client communication privilege for the following reasons:

(i) relying on *Pitney Bowes of Canada Ltd. v. Canada*[23] (*Pitney Bowes*) the legal opinions are the product of the joint consultation of a single solicitor for all the clients' mutual benefit

(ii) communications relating to obtaining the legal opinions and the preparation and delivery of the legal opinions was done in confidence

(iii) referring to *Pritchard v. Ontario (Human Rights Commission)* (*Pritchard*)[24], where the Supreme Court of Canada commented that the fact that having a lawyer "in-house" does not remove the privilege or change its character, the region submits that the records were also created for the purpose of informing the regional solicitor and formed the basis of her own legal opinion to Council, and the region, relative to the issue of whether or not Council could grant ethnic mandates to the social housing providers without contravening the *Code*.

[37] The region further submits that the records are also subject to litigation privilege. It submits that the grant of an ethnic mandate to a social housing provider and the operation of a housing project in accordance with the provisions of an ethnic mandate are open to challenge under the *Code*. The region submits that the opinions were "sought in anticipation of litigation being commenced by individuals denied housing as a result of the granting of an ethnic mandate", to:

(i) evidence good faith conduct

(ii) evidence that all involved were acting in accordance with applicable law, and

(iii) to serve as the evidentiary foundation for a due diligence defense.

[38] The region further submits that the records are also subject to the statutory solicitor-client communication and statutory litigation privilege. The region takes the position that with respect this Branch of section 12, the Council and the region are the clients.

[39] With respect to the statutory solicitor-client communication privilege, the region submits:

> The regional solicitor required the records for the purpose of informing her, and assisting her in the preparation and delivery of her legal opinion

[23] [2003] F.C.J. No. 311 (T.D.).
[24] [2004] 1 S.C.R. 809, 2004 SCC 31.

> to Council, and the region, relative to the issue of whether or not Council could grant ethnic mandates to the applicants without contravening the [*Code*]. Accordingly, the records were incorporated into the regional solicitor's final legal opinion and form part of her work product.

[40] The region repeats its earlier submissions in support of its position that the statutory litigation privilege also applies, with modifications to reflect its position that only the Council and the region are the clients, and adds:

> The issue of whether or not ethnic mandates granted by Council comply with the provisions of the [*Code*] have not been litigated.
>
> However, the regional solicitor in her capacity as legal counsel to Council and the region, is responsible for identifying client risks and is responsible to take steps to mitigate identified risks. The legal advice was obtained by the regional solicitor in anticipation of litigation under the [*Code*] to mitigate client risk.

[41] The region asserts that no waiver of privilege occurred, submitting that:

- none of Council, the region or the regional solicitor has waived privilege or publicly disclosed the records.
- *Pitney Bowes* supports the proposition that where legal opinions are obtained for the benefit of multiple parties, the parties will expect that the opinions will remain confidential as against outsiders and that privilege will be upheld.
- in making its decision to grant an ethnic mandate to the social housing providers, Council met in open session and relied upon public reports. The reports acknowledge that legal advice was sought and legal opinions obtained which were reviewed and accepted by the regional solicitor. Although the reports confirm the "bottom line" legal advice, that the ethnic mandates could be granted without contravening the *Code*, neither the records nor the supporting legal advice contained therein, have ever been disclosed.
- citing Order MO-1172, this office has accepted that the disclosure of the "bottom line" of a legal opinion does not amount to waiver of privilege.

The appellant's initial representations

[42] The appellant submits that there was no solicitor-client relationship between the region and the lawyers who drafted the opinions at issue. The appellant states that the

housing providers are not listed institutions under the *Act* and, relying on Orders MO-1338 and MO-1923-R, submits that the legal opinions that were obtained and submitted as part of the application process do not qualify for exemption under section 12 of the *Act*.

[43] The appellant submits:

> With respect to the records at issue the housing providers were the sole clients. The housing providers alone were responsible for the selection of law firm, negotiation of the terms of the retainer, instructing counsel throughout the work, paying for the rendered opinions and deciding whether to submit the opinion to the region. The region played no role in any part of that process. A "client" would typically have played a major if not exclusive role throughout all or most aspects of that process.
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> Significantly, the housing providers alone decided how many legal opinions to obtain and which one, if any, to divulge to the region. The region had no right or power to demand to see any of the opinions in question if the housing providers had chosen to withhold them. In fact, due to solicitor-client privilege between the housing providers and their lawyers, the region is not even entitled to know if any of the housing providers obtained other legal opinions on the same matter (presumably unfavourable) but chose not to submit them.

[44] The appellant further submits that there was no solicitor-client communication between the lawyers who authored the records at issue, and the region, for the following reasons:

- the fact that some housing providers instructed their lawyers to send or address a record to the region is immaterial. That alone would not confer "client" status on the region.

- the mere vetting of external legal opinions by the region's staff solicitor is not sufficient to constitute them as "working papers". External opinions in various areas of expertise are routinely vetted by regional staff to simply ensure formal compliance with the criteria set out in regional policies, such as that governing specific ethnic mandate applications.

- the region has not established that its solicitor needed to consider the opinions in order to advise the region of its legal position. The appellant submits that at the very least an examination and comparison of the regional solicitor's opinion with those of the housing providers' would be necessary to establish that claim. The appellant states that, more importantly, the legal issues confronting the region are distinct from those

> of the housing providers and it is unclear in what way her opinion needed a detailed analysis of the housing providers' positions. The appellant submits that since only positive opinions would be submitted, the only two premises are either that the housing provider was correct and didn't violate the *Code* or incorrect and did.
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> - had the regional solicitor's office really been unable to opine on the potential liability of the region without outside help, the appropriate method of dealing with it would have been by the region retaining its own outside counsel for assistance.

[45] With respect to the region's position that the records are subject to litigation privilege, the appellant submits that the records were not produced by the region's own counsel to provide advice on actual or potential litigation and the lawyers who prepared the opinions were not retained by the region.

[46] Relying on *Waugh v. British Railways Board*[25] and Order MO-2681, the appellant takes the position that, in any event, the records were not created for the dominant purpose of litigation. The appellant submits:

> The records at issue do not meet the dominant purpose test as there was no more than a vague or general apprehension of litigation at the time when they were created (MO-1337-I). At the time (2007) the City of Toronto was the only municipality in Ontario with such an approval process and the region was aware that there had been no litigation as a result. (Report No. 6 of the Community Services and Housing Committee, adopted by regional Council June 21, 2007). The records were created by the housing providers for the primary purpose of meeting one of the region's criteria for approval of an ethnic mandate proposal.

[47] The appellant also takes the position that the records are not exempt pursuant to the statutory solicitor-client communication privilege under Branch 2 of section 12. The appellant submits that:

- there was no solicitor-client relationship between the region and the author of the record,
- the records were not created by, or for the use of counsel for the region
- the records were created by external counsel for the use of the housing providers in their mandate applications.

[25] [1979] 2 All E.R. 1169.

[48] Nor, the appellant submits, are the records subject to statutory litigation privilege that could be asserted by the region. The appellant submits:

- the records at issue were not created by counsel for the region for use in litigation. Rather, the records were created by external counsel for the use of the housing providers, whom are not institutions under the *Act*

- the records were not created in contemplation of litigation or for the use of litigation, as there was no actual or reasonable threat of litigation when they were created.

[49] The appellant takes the alternative position that any privilege may have existed in favour of the housing providers was lost through waiver when the opinions were forwarded to the region. In that regard, the appellant submits that the common interest exception to waiver of privilege does not apply in the circumstances of this appeal:

> In Order MO-2462, Adjudicator [Bernard] Morrow held that a City and a private company interested in securing a project could not share a common interest as represented by a "united front against a common foe" as the common foe would be the other members of the public who opposed the project. The governmental institution "must be considered to have nothing closer than an arms length relationship" with the private company; to hold a common interest would be contrary to the City's common law and statutory role as impartial guardians of the public interest [ibid].
>
> There is no common interest between the housing providers and the region. The housing providers in question were clearly and unequivocally in favour of having their mandates restricted on ethnic lines. Indeed the approvals process adopted by the region notes that it is in response to the requests of several social housing providers. The region, by contrast, has never promoted such mandate changes and has merely adopted a process to regulate housing providers who wish such changes. The region still retains its duty and right to consider whether the approval of any particular or all such proposals are in the best interest of the public. Notwithstanding the submission of a favourable external legal opinion by a housing provider, the region has explicitly noted its ability to refuse any such proposal, rescind any current approval in future and to periodically review the impact of permitting such changes (Report No. 6, ibid).

[50] Relying on *Canadian Pacific Ltd. v. Canada (Competition Act, Director of Investigation and Research)*,[26] the appellant further submits that it would not

[26] [1995] O.J. No 4148 (Gen. Div.) at paragraph 27.

reasonably be possible for the same counsel to represent both the housing provider and the region:

> Clearly, legal counsel would be in a conflict of interest situation if he or she were asked to represent both a housing provider and the region in any particular application to restrict a housing provider's mandate. The interests of the housing providers are positioned in their ethnically exclusive mandate proposal. The interest of municipal government is in deciding whether approval would be in the broader public interest, including that of low income tenants who would now be ineligible for up to 700 existing apartments and have to wait much longer for subsidized accommodation as a result (Report No. 6, ibid).

[51] The appellant submits in summary that the records at issue cannot be deemed to be resultant from a joint consultation of a single solicitor by the housing providers and the region for their mutual benefit, as alleged by the region, because:

- there is legally and ethically an arms length relationship between them;
- there is no common interest between the two parties; and,
- the region did not choose, instruct or pay the external lawyers retained by the housing providers.

The reply representations

[52] As set out in the overview section above, two of the housing providers who did not initially file detailed representations decided to provide joint representations in reply.

[53] With respect to Branch 1 of section 12, the two housing providers submit that:

- the records are written legal opinions prepared by a named law firm for the two housing providers, respectively, within the context of solicitor-client relationships
- the records were also prepared for counsel employed by the region for use in giving legal advice and/or in contemplation of or for use in litigation

[54] The two housing providers submit that they approached the named law firm for the purpose of seeking legal advice, which was provided. They submit that they had intended all communications, including the written legal opinions, to be confidential. The two housing providers assert that the records are thereby subject to solicitor-client privilege under Branch 1 of section 12.

[55] The two housing providers also take the position that the records are subject to litigation privilege under Branch 1 of section 12. Relying on *R.(C.) v. Children's Aid Society of Hamilton*[27] they submit that a reasonable prospect of litigation is sufficient to trigger the application of litigation privilege and that:

> … the application process that was approved by the region required that an applicant submit a legal opinion concerning a proposed specific mandate's compliance with the [*Code*]. It also required that an applicant agree to indemnify the region in respect of any costs that the region might incur should litigation arise from a specific mandate designation. In the report prepared by the Commissioner of Community Services, Housing and Health Services dated June 5, 2007, in which the Commissioner recommended that the Regional Council approve in principle the application process for specific mandate designations, the Commissioner expressly recognized that such mandates could raise issues under the [*Code*] and that for this reason the region should require as part of the application process the provision of a legal opinion concluding that the grant and operation of a specific mandate fell within the exceptions set out under sections 14 and/or 18 of the [*Code*] [28]. Similarly, the Region's Commissioner of Community and Health Services' report, dated June 4, 2009 (regarding [one housing provider's] application), noted that the region may be exposed to challenges under the [*Code*] and/or the [*Canadian Charter of Rights and Freedoms* (*Charter*)[29]] by persons or groups who would be excluded from housing units because they were not members of the ethnic community specified under the mandate.
>
> The written legal opinions that were prepared by [named law firm] and subsequently provided to [the two housing providers] were prepared for the dominant purpose of reasonably contemplated litigation. Litigation privilege applies to those records. In addition [the two housing providers] shared a common interest with the region in respect of that reasonably contemplated litigation; therefore the sharing of [the named law firm's] legal opinions between them did not effect a waiver of common law litigation privilege.

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[27] (2004), 50 R.F.L. (5th) 394 (Ont. Sup. Ct.).

[28] Section 14(1) read at the time: A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.
Section 18 read at the time: The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.

[29] The *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

[56] The two housing providers further submit that the records are also exempt under Branch 2 of section 12. The two housing providers take the position that the records are subject to the statutory solicitor-client communication privilege because:

> [t]he records, while prepared by [the named law firm] for its clients, [the two housing providers], were, as expressly contemplated by the region's specific mandate approval process, ultimately prepared for use by the region's in-house counsel in providing her legal advice to the region.
>
> … the region sought and its in-house counsel provided legal advice on the issue of whether granting a specific mandate would contravene the [*Code*].

[57] The two housing providers further submit that, for the same reasons set out earlier, the records were prepared for the ultimate use of the region's in-house counsel in contemplation of or for use in litigation. The two housing providers submit:

> … Though the region had not been a party to litigation involving the issue of whether a specific mandate complied with the [*Code*], its in-house counsel was responsible for identifying litigation risks and taking steps to minimize such risks. The records prepared by [the named law firm] were therefore provided to the region's in-house counsel for the purpose of mitigating the region's risk of reasonably contemplated litigation.

[58] The two housing providers take the position that no waiver of privilege occurred when the opinions were provided to the region. They submit that the onus is on the appellant to establish waiver and:

> There is no evidence that in providing the records to the region as part of their application package, [the two housing providers] demonstrated an unequivocal and conscious intention to waive solicitor-client and/or litigation privilege.

[59] They further submit that, in the circumstances, the common interest exception to waiver of privilege applies. They submit that the region, in its role as Service Manager under the *SHRA*, was empowered to and had an interest in funding and administering programs for the provision of residential accommodation in the region in a manner that furthered the *SHRA*'s goal of efficiently and effectively administering social housing programs in the region, and that:

> The region also had an interest in ensuring that it administered such programs in a manner that complied with the [*Code*], including relieving hardship and economic disadvantage, assisting disadvantaged persons or groups in achieving or attempting to achieve equal opportunity, and

> promoting and preserving Canada's multicultural heritage by serving the social and cultural needs of all ethnic groups (ss. 14, 18 [*Code*]).
>
> [The two housing providers] had an interest in providing housing in a manner that ensured the members [of their respective communities], could obtain social housing. In addition, like the region, they had an interest in ensuring that their housing programs complied with the [*Code*], including relieving hardship and economic disadvantage, assisting disadvantaged persons or groups in their communities in achieving or attempting to achieve equal opportunity, and promoting and preserving Canada's multicultural heritage by serving the social and cultural needs of their respective ethnic groups.
>
> The region [and the two housing providers], because of the housing providers' agreement to indemnify the region with respect to any litigation that might arise from the granting and and/or operation of the specific mandates, also shared an interest in defending reasonably contemplated litigation, and in establishing that the specific mandates fell within the exceptions under sections 14 and/or 18 of the [*Code*].
>
> The interests of the region and [the two housing providers], in the context of the specific mandate application process and any litigation that might arise from it, were therefore sufficiently similar in nature and congruent such that they could be said to share a "common interest" (Order MO-2006-F). [The two housing providers] sharing of the records with the region, therefore, was protected by common interest privilege and did not effect a waiver of [the two housing provider's] privilege.

[60] Relying on Order PO-2995, the two housing providers further submit that even in the absence of a finding that the common interest exception to waiver of privilege applies, in circumstances analogous to the appeal before me:

> … where a government institution has requested that a third party obtain a legal opinion, and such opinion is obtained and subsequently provided to the government institution, forming its in-house counsel's working papers that are directly related to his or her provision of legal advice.

The appellant's sur-reply representations

[61] The appellant submits in sur-reply that:

> The respondent has attempted to portray, without supporting evidence, the regional solicitor as somehow "incorporating" the outside legal opinion in hers. It is also asserted that the process adopted by the region

"expressly required that the region's in-house counsel analyze the opinion and formulate his or her own opinion for the purpose of providing legal advice to the regional Council". The submission also asserts, again without evidence, that "the records … were, as expressly contemplated by the region's specific mandate approval process, ultimately prepared for use by the region's in-house counsel in providing her legal advice to the region.

The evidence actually runs counter to these assertions. The specific mandate protocol adopted by Regional Council on June 21, 2007 doesn't mention the regional solicitor as having any role in the process at all, much less the one asserted. Indeed the regional solicitor is not mentioned as part of the approval process established by the region. That process requires a housing provider to "[p]rovide a legal opinion to the *Commissioner of Community Services* … (italics added)". The protocol does not require submission of the outside legal opinion to the regional solicitor for any kind of vetting.

The mandate approval process requires substantial acknowledgements from a housing provider as to indemnification, the continued use of regional wait lists and instructions and defining the specific mandate group. None of that is explicitly required to be even seen, much less approved or negotiated with the regional solicitor. Furthermore, once "the housing provider has met the aforementioned conditions, staff will forward any referrals *to Committee and Council for its decision* (italics added) to permit a specific mandate designation" (para 1 Report)

The region approved a process for housing providers to apply for a specific mandate on June 21, 2007. The letter of opinion in record 1 [named housing provider] is dated April 2, 2007, almost three months prior to the process being established. It's difficult to reconcile that timing with [named housing provider's] assertion that such opinion was provided for the use of the regional solicitor pursuant to Council's adopted policy.

There is also a lack of evidence that the proponent's outside counsel and the regional solicitor discussed the scope of the required opinion or even spoke at all. Particularly in the absence of any role by the region in the selection of the proponent's counsel, that dearth of communication further suggests the lack of any reliance by the regional solicitor on the content of the outside opinion letter. Such pre-opinion consultation has been common in cases where the record holder has successfully argued for the "working papers" finding.

[62] With respect to whether the records were prepared in contemplation of litigation, the appellant submits that:

> … they clearly were from the standpoint of the proponents. Their position required the legal opinion provider sufficiently knowledgeable about the history and in particular the range of services (cultural, social, fraternal, supportive, recreational, etc) delivered by the proponent as to assess their arguable exemption under ss. 14, 18 of the [*Code*]. This is clearly a fact-gathering and analysis task and not one the region would be best able and want to take on particularly give the diversity of possible proponents and the range of services offered or claimed by them. Those proponent-specific legal opinions would not have touched upon the potential [*Code*] or *Charter* liabilities of the region in administering the rent subsidy waiting list in an environment of many potential "specific mandates".

[63] The appellant denies the existence of any common interest in the circumstances of this appeal. The appellant submits:

> The interests are in fact quite dissimilar. The housing providers' admitted interests are limited to those of their community whereas the region must balance the interests of all its residents without bias or favouritism towards any particular group.

[64] The appellant submits that the Report of the Community Services and Housing Committee to Regional Council adopted June 21, 2007, demonstrates the region's "awareness of its duty to the broader community as opposed to a community or group represented by an individual housing provider". The appellant submits that in the report, there is an extensive discussion of the policy implications of allowing specific mandates, the scarcity of RGI housing and that approving specific mandates will reduce the number of RGI units available to the general public. The appellant submits:

> This clearly demonstrates the fundamentally different interests of the proponents as opposed to the region. For every proponent that might eventually succeed in its quest for a specific mandate to serve its own members, the region would become that much less able to meet the needs of the rest of its population (i.e.: everyone who wasn't a member of the successful proponent). While the pressure of a few housing providers and the possible alignment of such a process with one of the region's stated goals (diversity) was acknowledged, there was no conclusion that allowing housing providers to obtain ethno cultural or religious mandates was in the best interests of the region or its population as a whole. Indeed, the report did not recommend that specific mandates be given; merely that a process be established for proponents to apply and for Regional Council to consider them individually (para 4.4 report).

In its argument that there is a shared common interest, the [two housing providers'] reply materials assert that "the region also had an interest in …promoting and preserving Canada's multicultural heritage by serving the social and cultural needs of all ethnic groups. (ss. 14, 18, [*Code*])" This latter attribution is inaccurate. There is no such proviso in the cited sections (14 and 18) of the [*Code*].

The proponent housing providers' motivation in seeking a legal opinion was twofold. First, they wanted to obtain a special mandate and to do so had to comply with a standard requirement of the region's protocol. Second they had a self interest in understanding any risk they would potentially expose themselves to under s. 2 of the *Code*[30] (discrimination in accommodation). The region shared neither of these interests. As described above, it had no stake in whether any particular proponent obtained a special mandate. It had no interest in whether the proponent understood its own potential legal risks. Indeed the region's potential legal liability focused on a different section of the *Code* (s.1)[31] (services) since its role was as provider of financial subsidies, not accommodation.

The region and the housing providers' interests differed in subject matter as well. The housing providers were interested in whether their entire projects would be exempt from the *Code* under s.18. The region's legal implications were limited to that portion of those housing projects that were rent-subsidized by the region (74% in both reply proponents; unknown in other housing providers).

The region requires complete indemnification from all specific mandate proponents arising from their potential liabilities as a provider of accommodation. That one-sided allocation of risk speaks to a dissimilarity of interest as a sharing of risk would speak to a common interest.

Like risk, all legal costs are borne by the proponent, not shared. There is not even a joint retainer. Both facts sit uncomfortably with the assertion of a common interest. The region played no role in the selection of outside counsel for the submitted opinion, nor did it negotiate the retainer nor instruct them. … The complete lack of regional involvement in

[30] Section 2(1) read at the time: Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, disability or the receipt of public assistance.

[31] Section 1 read at the time: Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.

> retaining, instructing and consulting with counsel responsible for the requested legal opinion belies the existence of any common interest.

[65] The appellant further submits that Order PO-2995 is distinguishable and submits that in that case:

> There was ongoing and "confidential" consultation between [Ministry of the Environment] counsel and the third party's counsel and in fact the outside counsel opinion was the result of a specific written request for that from [Ministry of the Environment] counsel, not a proforma requirement as part of a protocol set up for multiple potential parties. Indeed those key differences from the instant case bolster the argument that there was no common interest to negate a waiver in this case.

Analysis and Findings

Branch 1 of the section 12 exemption

[66] In Order PO-1983, Adjudicator Laurel Cropley adopted the comments of former Senior Adjudicator David Goodis in Order MO-1338 regarding how the solicitor-client exemption exists to protect the interests of a government institution in obtaining legal advice and having legal representation in the context of litigation, not the interests of other parties outside government.[32] Although addressing the provincial equivalent of section 12, she wrote:

> In Order MO-1338, Senior Adjudicator David Goodis commented on the purpose of the solicitor-client privilege exemption (in the context of a claim that the principle of common or joint interest applied to them). In my view, his comments are applicable generally to the types of records I have described here:
>
> > In my view, the solicitor-client privilege exemption is designed to protect the interests of a government institution in obtaining legal advice and having legal representation in the context of litigation, not the interests of other parties outside government. Had the Legislature intended for the privilege to apply to non-government parties, it could have done so through express language such as that used in the third party information and personal privacy exemptions at sections 10 and 14 of the *Act*. This interpretation is consistent with statements made by the Honourable Ian

[32] See also Order MO-2462.

Scott, then Attorney General of Ontario, in hearings on Bill 34, the precursor to the *Act*'s provincial counterpart:

> Section 19 is a traditional, permissive exemption in favour of the solicitor-client privilege. The theory here is that in the event the **government** either commences litigation or is obliged to defend litigation, it should be able to count on the fullest accuracy and disclosure from its employees.
>
> . . . . .
>
> If you do things to discourage the client from telling the lawyer the true story, then the **government** does not get good legal advice. Again, the judgement is, "Yes, we exclude the information, but because we are protecting this value that is important." It is important that the **government**, which is spending taxpayers' money, should be able to be certain that **public servants** tell our lawyers the truth. We do not want to discourage **public servants** from telling our lawyers the truth by saying to them, "Everything you say is going to be open in a couple of days in the newspapers." [emphasis added]
>
> [Ontario, Standing Committee on the Legislative Assembly, "Freedom of Information and Protection of Privacy Act" in *Hansard: Official Report of Debates*, Monday, March 23, 1987, Morning Sitting, p. M-9, Monday March 30, 1987, Morning Sitting, p. M-4]

Thus, where the client in respect of a particular communication relating to legal advice is not an institution under the *Act*, the exemption cannot apply. The only exception to this rule would be where a non-institution client and an institution have a "joint interest" in the particular matter. [Emphasis in original]

[67] The region and the two housing providers take the position that both the region and the housing providers were clients for the purposes of establishing a solicitor-client relationship. However, there is no evidence before me that the region retained,

instructed, initiated communications with or paid the solicitors for the housing providers. On the other hand, based on my review of the records at issue, the housing providers did retain, instruct and I presume, communicate with and pay the solicitors that prepared the letters. In my view, even though two of the legal opinions were addressed to the region's Commissioner of Community and Health Services, the only solicitor-client relationship that existed was between the housing providers and the solicitors that they retained to provide the legal opinions. At no time, in my view, could the region be characterized as being the client of the solicitors who prepared the opinion letters, nor could the relationship be characterized as one of joint consultation or joint retainer. In that regard, I agree with the appellant's submission that "the fact that some housing providers instructed their lawyers to send or address a record to the region is immaterial." More is required to establish a solicitor-client relationship. I find that there was no solicitor-client relationship between the region and the solicitors that the housing providers retained to provide the legal opinions.

[68] In *Pritchard*, Major J., for the Supreme Court of Canada court wrote the following in addressing whether a legal opinion prepared by Ontario Human Rights Commission (Commission) counsel for Commission staff and sought by the complainant was subject to privilege:

> The appellant submitted that solicitor-client privilege does not attach to communications between a solicitor and client as against persons having a "joint interest" with the client in the subject-matter of the communication. This "common interest", or "joint interest" exception does not apply to the Commission because it does not share an interest with the parties before it. The Commission is a disinterested gatekeeper for human rights complaints and, by definition, does not have a stake in the outcome of any claim.
>
> The common interest exception to solicitor-client privilege arose in the context of two parties jointly consulting one solicitor. See *R. v. Dunbar* (1982), 138 D.L.R. (3d) 221 (Ont. C.A.), *per* Martin J.A., at p. 245:
>
> > The authorities are clear that where two or more persons, each having an interest in some matter, jointly consult a solicitor, their confidential communications with the solicitor, although known to each other, are privileged against the outside world. However, as between themselves, each party is expected to share in and be privy to all communications passing between each of them and their solicitor. Consequently, should any controversy or dispute arise between them, the privilege is inapplicable, and either party may demand disclosure of the communication. . . .

> The common interest exception originated in the context of parties sharing a common goal or seeking a common outcome, a "selfsame interest" as Lord Denning, M.R., described it in *Buttes Gas & Oil Co. v. Hammer (No. 3)*, [1980] 3 All E.R. 475 (C.A.), at p. 483. It has since been narrowly expanded to cover those situations in which a fiduciary or like duty has been found to exist between the parties so as to create common interest. These include trustee-beneficiary relations, fiduciary aspects of Crown-aboriginal relations and certain types of contractual or agency relations, none of which are at issue here.

[69] The doctrine of common interest privilege is characterized in a number of ways in the jurisprudence cited by the parties. However, in the absence of a fiduciary or like duty, including trustee-beneficiary relations and certain types of contractual or agency relations, none of which have been established as being at issue in the appeal before me, my view is that the argument is better framed as whether there is a common interest that is sufficient to withstand waiver of any solicitor-client privilege that might have existed in the legal opinions when they were provided to the region.

[70] In Order PO-3154, I reviewed the jurisprudence, including orders of this office, pertaining to a determination of whether the common interest exception to waiver of privilege existed in the context of the commercial matter under consideration in that appeal, which dealt with a similar provision in the *Freedom of Information and Protection of Privacy Act*. At paragraph 179 of that decision, I articulated the following test:[33]

> . . . the determination of the existence of a common interest to resist waiver of a solicitor-client privilege under Branch 1, including the sharing of a legal opinion, requires the following conditions:
>
> (a) the information at issue must be inherently privileged in that it must have arisen in such a way that it meets the definition of solicitor-client privilege under section 19(a) of the *Act*, and
>
> (b) the parties who share that information must have a "common interest", but not necessarily identical interest.

[71] Many of the authorities addressing claims of common interest privilege have arisen in the context of active litigation in a specific proceeding or in the context of a commercial transaction. The leading authorities on this subject indicate that the parties claiming a "common interest" need not be co-parties to existing litigation and, in

[33] This test was followed by Adjudicator Donald Hale in Order PO-3167.

addition, may bring somewhat different interests to the matter at hand. The following passages from Adjudicator Donald Hale's Order MO-1678, which I relied upon in Order PO-3154, illustrate these points:

> One such authority is the majority judgment of Carthy J.A. in *General Accident Assurance Co.* (cited above). Mr. Justice Carthy quoted the above passage from *Buttes* with approval, but his later quote (also with approval, at 337-8) from *United States of America v. American Telephone and Telegraph Company,* 642 F.2d 1285 (1980 S.C.C.A. at 1299-1300) indicates that in the context of litigation, "common interest" does not require that those claiming it must be co-parties:
>
> > … The existence of common interests between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege. But "common interests" should not be construed as narrowly limited to co-parties. So long as the transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts. Moreover, with common interests on a particular issue against a common adversary, the transferee is not at all likely to disclose the work product material to the adversary.
> >
> > …
>
> In *Archean Energy Ltd. v. Canada* (1997), 202 A.R. 198 (Q.B.), common interest privilege was claimed by a group of companies some of whom were shareholders of others, and some of whom were joint venturists with others, in connection with tax advice they had received from a single law firm. The court found that common interest privilege could exist in those circumstances. It stated its finding in this regard as follows:
>
> > …
> >
> > A substantial number of these documents are communications between the law firm which provided the tax advice and other law firms acting for the various clients in their corporate capacities. Such communication does not constitute waiver of privilege in the circumstances of this case. The communication was apparently made for the purpose of obtaining instructions and giving common advice to a common client or group of clients.

…

> And in *Pitney Bowes of Canada Ltd. v. Canada,* [2003] F.C.J. No. 311 (T.D.), the court dealt with a situation in which various companies were parties to a complex leasing transaction involving both the purchase and subsequent leasing of railway cars. One law firm represented all the parties at one time or another, "where multiple parties needed legal advice in areas where their interests were not adverse." The Court applied common interest privilege and stated (at para. 18):
>
> > As mentioned above, in these kinds of cases the real issue is whether the privilege that would originally apply to the documents in dispute has somehow been lost -- through waiver, disclosure or otherwise. This is a question of fact that will turn on a number of factors, including the expectations of the parties and the nature of the disclosure. I read the foregoing cases as authority for the proposition that in certain commercial transactions the parties share legal opinions in an effort to put them on an equal footing during negotiations and, in that sense, the opinions are for the benefit of multiple parties, even though they may have been prepared for a single client. The parties would expect that the opinions would remain confidential as against outsiders. In such circumstances, the courts will uphold the privilege.

[72] In *General Accident Assurance Co.*, Carthy J.A. also considered the impact of a confidentiality agreement on common interest, writing that:

> When the transfer to a party with such common interests is conducted under a guarantee of confidentiality, the case against waiver is even stronger.[34]

[73] Parties may have a common interest even if they do not have identical interests. The possibility that parties might at some future point in time become adverse in interest is insufficient in denying a common interest at present.[35]

Solicitor-client communication

[74] At paragraph 26 of *Blank v. Canada (Minister of Justice)* (*Blank*),[36] after citing a number of cases, a majority of the Supreme Court of Canada discussed the origin and rationale of solicitor-client privilege in the following way:

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[34] *General Accident Assurance Co. v. Chrusz*, supra, at page 338.
[35] *CC & L Dedicated Enterprise Fund (trustee of) v. Fisherman*, [2001] O.J. No. 637 (SCJ).

> Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

[75] With respect to the first part of Branch 1 of the Section 12 exemption, as set out above, it is only a communication that originated in privilege that would be subject to the common interest exception to waiver of that privilege (e.g., a privileged opinion shared with another party with a common interest).

[76] Although the appeal before me deals with legal opinions, there is a difference. In this appeal, we are dealing with a component for the approval of the granting of a dispensation by a government actor, in this case the approval of a special housing mandate by the region. There is no typical commercial transaction at issue in this appeal in the sense of there being a buyer or a seller, rather this is at its base an approval process.

[77] In my view, at least three of the legal opinions were never even intended at the outset to be a confidential communication between the housing provider client and their solicitors. These opinions post-dated Report No. 6 of the Community Services and Housing Committee Regional Council Meeting of June 21, 2007, setting out that a requirement of a housing provider applying for a specific mandate designation was the provision to the Commissioner of Community Services, Housing and Health Services of an opinion that the housing provider meets the requirements of sections 14 or 18 of the *Code*.

[78] Even though the two housing providers asserted that, "they had intended all communications, including the written legal opinions, to be confidential", they also stated in their representations that the opinions were expressly prepared at the outset for consideration by the non-client party, the region. The only caveat would be that they had to meet the requirements set out in application process for special mandate approval, which they did.

[79] The two other opinions were addressed directly to the Commissioner of Community Services, Housing and Health Services for the Region, not to any solicitor

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[36] (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

for a housing provider. In my view, the inference that I draw is that those opinions were drafted with the expectation that, if favorable, they would be sent directly to the non-client party, the region.

[80] In my view, therefore, none of the opinions, if they were favorable, were ever intended or even understood at the outset to be a communication of a confidential nature between a client and their solicitor, a material component of the solicitor-client communication privilege. Furthermore, while the presence or absence of an express indication on a communication that it is privileged or confidential does not rule the day, as form must not govern substance; there does not appear to be any express limitation in any of the supporting documentation before me on the use of the opinions once they were provided to the region. There was also no evidence provided to me that there was any confidentiality agreement or any express indication of confidential treatment of any submissions initially submitted under the approval process. Even though the region submitted that communications relating to obtaining the legal opinions and the preparation and delivery of the legal opinions was done in confidence, it also states that the legal opinions were sought for the purposes of evidence to be used in any potential proceeding related to the granting of the ethnic mandate. This would no doubt entail disclosure of the opinions in the context of any such proceeding. Accordingly, in light of the purpose for which the opinions were prepared and requested, at the very outset there was, in my view, no reasonable expectation of confidentiality with respect to them.

[81] Solicitor-client privilege under Branch 1 may also apply to the regional solicitor's working papers directly related to seeking, formulating or giving legal advice.[37] I have already found that no solicitor-client relationship existed between the region and the law firms for the service providers. Furthermore, I find that the opinions do not comprise part of the regional solicitor's working papers. The request was not for a copy of any opinion that may reside in the regional solicitor's file. Rather it was for access to a copy of the opinions the named housing providers "furnished under a restricted operational mandate." The fact that the contents of the opinion letters deal with the impact of the *Code* on the housing providers' request for a special mandate does not transform it into the regional solicitor's working papers. Even if the request covered materials found in the regional solicitor's file, it is only where a record contains or would reveal the contents of a communication between the regional solicitor and their client that it would so qualify. The opinion letters do not reveal the thought processes of the regional lawyer in formulating legal advice to her clients in the region, such as the lawyer's notes of her research or comments on or legal impressions concerning the subject matter of the advice. Accordingly, in all these circumstances, the opinion letters at issue in this appeal do not qualify under this component of the communication privilege.

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

[82] Accordingly, I find that the opinions are not privileged under the solicitor-client communication aspect of Branch 1 of section 12.

No common interest exception to waiver of privilege

[83] In my view, however, even if all the opinions had initially been subject to confidentiality and therefore solicitor-client privileged, any such privilege was waived when the opinions were provided to the region. In that regard, I find that the common interest exception to resist waiver of privilege does not apply to the opinions.

[84] The roles of the participants were defined. The housing providers were seeking to advance their goal of dedicated housing to service their own ethnic or religious community. The region's responsibility was to fund and manage the program and, I would suspect, ensure the maximum availability of RGI housing. The region's primary mission is to manage its municipal affairs, including housing. Although it was a funder and administrator of the programs, by granting a special mandate, the region would effectively reduce the accessibility to RGI housing.

[85] The housing providers' goal is to offer housing to its own ethnic or religious community, while ensuring the economic viability of its operations. At all times, the housing providers acted in the best interest of their constituency, not the entire pool of RGI renters in the region. The housing providers were at all times acting in their own interests.

[86] At all relevant times, the housing providers were and remain private parties, making an application to the region for an approval of a special mandate. As the entity charged with making this decision, the region cannot be considered a private party working in collaboration with the housing providers or dedicated to advancing the housing providers' interests. It would be fundamentally inconsistent with the region's duty as an independent arbiter of the specific mandate approval process to consider the region and the housing providers to have a "common interest" to the exclusion of constituents of the region, who may be adversely affected by a specific mandate designation or who may seek to invoke the *Code* to oppose it. In these circumstances, the region must be considered to have nothing closer than an "arm's length" relationship with the housing providers with respect to the special mandate designation process. This is not a case where the opinions came into the region's hands through mistake or inadvertence. In my view, the housing providers' knew or ought to have known that in light of all the circumstances, providing the opinions could result in waiver.

[87] This finding is in keeping with the origin and rationale of solicitor-client privilege as set out in the excerpt from *Blank*, above. Any limitation on the ability of a client to freely and fully consult counsel could be considered to have a "chilling effect" or impinge on the free exercise of the privilege. However, my determination in no way

impedes or limits the ability of a housing provider to consult counsel for the purpose of obtaining an opinion on whether a specific mandate is contrary to the *Code*. If a positive opinion is obtained then it can be used in the specific mandate designation process. If a negative opinion is obtained then the client is free not to use it and also free to consult another solicitor. In this way the ability of a service provider to consult counsel is not impeded or limited by the finding that I have made in this appeal. Accordingly, disclosure of the records at issue in this appeal would not undermine the rationale for solicitor-client privilege, or its purpose. I also note that there is no chilling effect on the region as it can and did consult with its own counsel confidentially on these matters.

[88] As a result, I find that the opinion letters are not subject to common law solicitor-client communication privilege under Branch 1 of section 12.

Litigation privilege

[89] Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation. This form of privilege encompasses communications between a solicitor or litigant and third parties even where the third parties have no need for or expectation of confidentiality.[38]

[90] The dominant purpose test was articulated in *Waugh v. British Railways Board,*[39] 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.

[91] As set out above, section 12 exists to protect the the interests of a government institution in obtaining legal advice and having legal representation in the context of litigation, not the interests of other parties outside government. Whether or not litigation is or was contemplated by the region at any point with respect to the subject matter of the opinion is not relevant. The region did not draft the opinions; nor were they produced by solicitors that were retained or instructed by the region. Nor is there any evidence of any contact or interaction between the lawyers that prepared the opinions and anyone at the region, including the regional solicitor.

[92] If I am in error in this conclusion, based on the evidence before me, in my view, the opinions were not created for the dominant purpose of existing or reasonably

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[38] See *Blank* cited above at paragraphs 27-34.
[39] [1979] 2 All E.R. 1169 at 1183 (H.L.).

contemplated litigation, but rather for the dominant purpose of satisfying one of the prerequisites set by the region for establishing a specific mandate. The opinions were created by the housing providers' solicitors for the dominant purpose of meeting the region's eligibility criteria, with a view to obtaining such a mandate in their favour rather than for the dominant purpose of existing or reasonably contemplated litigation. While on this topic, unlike the circumstances discussed in *R.(C.) v. Children's Aid Society of Hamilton*, I am also not satisfied that litigation was either actual or contemplated, or that there was a reasonable prospect of litigation when the opinions were prepared. There was no evidence of any action having been contemplated or commenced at the time of the opinions. Furthermore, no evidence was provided of actual or contemplated litigation relating to proposed specific mandates in other jurisdictions in Ontario.

[93] Turning now to the "working papers" argument, in *Blank*, the Supreme Court of Canada did not find it necessary to resolve the issue "whether the litigation privilege attaches to documents gathered or copied - but not created - for the purpose of litigation". The majority of the Court observed that there were conflicting decisions of the Courts of Appeal of two provinces on this issue. It cited the conclusion of the British Columbia Court of Appeal in *Hodgkinson v. Simms*[40] that copies of public documents gathered by a solicitor were privileged, where McEachern C.J.B.C. stated:

> It is my conclusion that the law has always been, and in my view, should continue to be, that in circumstances such as these, where a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection and to refuse production.

[94] The majority of the Court observed that this approach was rejected by the Ontario Court of Appeal in *General Accident v. Chrusz*:[41]

[95] The Court in *Blank* went on to state at paragraph 64, however, that even such an extended form of litigation privilege would not automatically exempt from disclosure otherwise discoverable documents which have simply been remitted to counsel or placed in the litigation file:

> Extending the privilege to the gathering of documents resulting from research or the exercise of skill and knowledge does appear to be more consistent with the rationale and purpose of the litigation privilege. That being said, I take care to mention that assigning such a broad scope to

[40] (1988), 33 B.C.L.R. (2d) 129 (B.C.C.A).

[41] See *Blank v. Canada (Minister of Justice)*, cited above at paragraphs 62-63; *Hodgkinson v. Simms* cited above at page 142; *General Accident v. Chrusz*, cited above at pages 334-336. And also see *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd*. (1985), 3 N.S.W.L.R. 44 at pages 61-62 (S.C.).

> the litigation privilege is **not intended to automatically exempt from disclosure anything that would have been subject to discovery if it had not been remitted to counsel or placed in one's own litigation files. Nor should it have that effect**. [emphasis added]

[96] Accepting for the purposes of my analysis that this "extended" form of common law litigation privilege is protected under Branch 1 of section 12, I find that the opinions do not qualify under this aspect of the privilege.

[97] The request was not for a copy of any opinion that may reside in the regional solicitor's file. Rather it was for access to a copy of the opinions the named housing providers "furnished under their application for a restricted operational mandate." The opinions did not come into the possession of the region though its own solicitor's exercise of skill or knowledge or active selection. There was absolutely no exercise of skill or knowledge exercised by the regional solicitor in obtaining those opinions. Specifically, they were not selectively copied or gathered for the region's litigation file using the regional solicitor's skill and knowledge as a lawyer. They were sent to the region to satisfy the region's requirements for establishing a specific mandate, with a view to obtaining such a mandate in favour of the housing providers.

[98] Nor in this case was there the degree of consultation such as was present in Order PO-2995. There is no evidence of any contact between the region's solicitors and the solicitors for the housing providers that led up to the drafting of the opinions. The opinions were not provided at the request of the regional solicitor. Rather, this was a requirement set by the region applicable to all those that sought a specific mandate. Accordingly, Order PO-2995 is distinguishable on its facts.

[99] Accordingly, I am not satisfied that the opinions qualify as the region's solicitor's working papers.

[100] As a result, I find that the opinion letters are not subject to common law litigation privilege under Branch 1 of section 12.

Branch 2 of the section 12 exemption

[101] With respect to Branch 2 of section 12, in the circumstances before me and in keeping with my conclusions above, I find that the opinions were not "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".

[102] As set out above, the opinions were prepared by solicitors for the housing providers for the dominant purpose of the housing providers seeking to satisfy the region's requirements for establishing a specific mandate with a view to obtaining such a mandate in their favour.

[103] Furthermore, the opinions were not prepared for the regional solicitor. None of the opinions were addressed to the regional solicitor – two opinions were addressed to an administrator at the respective housing providers and the two other opinions were addressed to the region's Commissioner of Community and Health Services. Moreover, none of these opinions contain any language that suggests that they were prepared specifically for legal counsel at the region. There is no evidence before me that suggests that the regional solicitor played any role in procuring these opinions.

[104] In any event, based on the analysis set out above, I find that there is no cognizable zone of privacy sufficient to resist the application of the principle of waiver under section 12 of the *Act*.

[105] Accordingly, the legal opinions do not qualify for exemption under either part of Branch 2 of section 12.

[106] As a result, I find that the opinions do not qualify for exemption under section 12 of the *Act*, and I will order that they be disclosed to the appellant.

ORDER:

1. I order the region to disclose to the appellant the records at issue in this appeal by sending it to him by **October 4, 2013**, but not before **September 30, 2013**.

2. In order to verify compliance with this order, I reserve the right to require the region to provide me with a copy of the records as disclosed to the appellant.

Original signed by: August 29, 2013
Steven Faughnan
Adjudicator