Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3582

Appeal MA16-614

District School Board of Niagara

March 28, 2018

Summary: The District School Board of Niagara (the board) received a request for a report prepared by a lawyer relating to the name change of a local school. The board refused to disclose the report, claiming that it was exempt pursuant to section 12 (solicitor-client privilege) of the *Municipal Freedom of Information of Privacy Act*. In this order, the adjudicator upholds the board's application of section 12 to the record and finds that the board properly exercised its discretion in withholding the document.

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

Orders and Investigation Reports Considered: M-11; MO-1172; MO-1233; M-1165; MO-1172; P-1551; MO-2945-I; MO-3497.

Cases Considered: *Stevens* v. *Canada (Prime Minister)* (1998), 161 D.L.R. (4th) 85.

OVERVIEW:

[1] This appeal arises from a request for information relating to a name change of a local school.

[2] In 2016, two schools in the jurisdiction of the District School Board of Niagara (the board) were consolidated into one and renamed. The new name was generated by a naming committee of student, community and staff representatives, after soliciting submissions from the community. The board struck a name change committee that would help narrow down names and ultimately vote on the top suggestions received.

[3] The appellant, a member of a community organization that challenged both the name and the board's renaming process, obtained documents directly from the superintendent of education regarding the naming process, including policy documents and minutes of meetings of the naming committee. Those documents made reference to the fact that the board had retained external legal counsel, a trademark/copyright lawyer, to conduct a "knock-out" search that could reveal obstacles to proceeding with any of its short-listed names.

[4] The appellant made a request to the board under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for disclosure of the legal opinion prepared by the external counsel reporting on his search. Specifically, the request was for:

> The report from [a lawyer] or his staff regarding the results of the background check of the 6/7 names [six potential names listed] mentioned in the April 27 2016 naming committee minutes or the registrability search mentioned in the May 11 2016 naming committee minutes.

[5] The board did not disclose the lawyer's report to the appellant, claiming that it was a confidential communication between a solicitor and client and therefore privileged and exempt under section 12 of the *Act*.

[6] For the reasons that follow, I find that the record is a communication between a lawyer and client exchanged in confidence for the purpose of the seeking and receipt of legal advice and that it is therefore subject to solicitor-client privilege and exempt from disclosure pursuant to section 12 of the *Act*. I also find that privilege was not waived in the circumstances of this appeal and that the board properly exercised its discretion in withholding the record.

RECORD:

A report from a lawyer.

ISSUES:

A. Does the discretionary exemption at section 12 (solicitor-client privilege) apply to the record?

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

DISCUSSION:

Issue A: Does the discretionary exemption at section 12 apply to the records?

[7] Section 12 of the *Act* allows an institution to 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." The exemption is discretionary, and allows an institution to disclose information despite the fact that it could withhold it.

[8] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[9] At common law, solicitor-client privilege encompasses two types of privilege: solicitor-client communication privilege and litigation privilege.

[10] Branch 2 is a statutory privilege that applies where the records were "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." The statutory and common law privileges, although not identical, exist for similar reasons.

[11] Litigation privilege does not apply to the facts of this appeal. There is no litigation and the board has not claimed litigation privilege.

Solicitor-client communication privilege

[12] 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.[1] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[2] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[3]

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

[14] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either

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[1] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[2] Orders PO-2441, MO-2166 and MO-1925.
[3] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[4] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

expressly or by implication.[5] Solicitor-client communication has an important public interest in ensuring that a client may confide in his or her lawyer on a legal matter without reservation.[6]

Loss of privilege: waiver

[15] Solicitor-client privilege may be waived under common law. An express waiver of privilege will occur where the holder of the privilege knows of the existence of the privilege and voluntarily demonstrates an intention to waive the privilege.[7]

[16] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[8]

[17] Although disclosure to outsiders of privileged information generally constitutes waiver of privilege,[9] waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[10]

Representations:

[18] The appellant submits that "the 'legal advice and recommendations' were not intended to be made in confidence in that the results were to be made available to the naming committee" by the superintendent of education. She further submits that the board "waived privilege when the 'legal advice and recommendations' received from legal counsel was communicated to others" outside the board, and specifically to non-board members of the school naming committee.

[19] Finally, the appellant contends that the information contained in the letter is not legal advice but factual and/or background information that she says was prepared for public dissemination and that the lawyer was acting more in the capacity of a consultant than a lawyer.

[20] The board submits that the record was prepared by the lawyer at the board's request to provide a legal opinion about the viability and availability of a short-list of proposed school names. The board further submits that, at all times, the lawyer was acting in his capacity as a barrister and solicitor and not as a consultant when he reviewed the search, analyzed the results, and provided legal advice relevant to the viability of the use of and/or the principles required to meet the legal test to register trademarks for suggested school names.

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[5] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[6] Order P-1551 at page 5.
[7] *S. & K. Processors Ltd.* v. *Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)
[8] *R.* v. *Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[9] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General)* v. *Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[10] *General Accident Assurance Co.* v. *Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

[21] In the alternative, the board submits that the lawyer was an agent of the board's in-house counsel who required his advice to formulate her own legal advice to the board, and would therefore form part of her working papers.

[22] Finally, the board submits that it took active steps to preserve the confidentiality of the record by purposefully providing only a "bottom line" report of the legal advice it received and not the whole record to the naming committee.

Analysis and findings:

[23] In this case, I find that a solicitor-client relationship was formed when the board retained external legal counsel for the purpose of obtaining legal advice regarding the usability of a short list of potential school names.

[24] While there is no dispute that the exchange between the board and the lawyer resulted in a report prepared by the lawyer reporting on the retainer, the appellant argues that the letter contains not legal advice but factual information. While it is true that not everything communicated by a lawyer to their client is necessarily legal advice,[11] in this case the lawyer's retainer was clear, and the fact that his report may contain fact as well as opinion does not remove it from privilege.

[25] The report, containing the lawyer's legal opinion, fits within the following test set out in Orders M-11 and P-1551:

- there was written communication;
- the communication was of a confidential nature;
- the communication was between a client (or its agent) and a legal advisor; and,
- the communication was directly related to seeking, formulating or giving legal advice.

[26] I find that the report is therefore a privileged communication between the lawyer and the board and is exempt under section 12.

[27] With respect to loss of privilege, the appellant argues that the board waived privilege when it disclosed the nature and fact of the legal opinion to non-staff members of the board. I disagree.

[28] In Order MO-1233, Senior Adjudicator Goodis held that disclosure by an institution of the "bottom line" of legal advice it received did not constitute waiver of solicitor-client privilege.[12]

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[11] *Canada (Public Safety and Emergency Preparedness)* v. *Canada (Information Commissioner)*, 2013 FCA 104. See also Order PO-3804-I.

[12] See also Orders M-1165 and MO-1172.

[29] In Order MO-1172, Adjudicator Cropley held that:

> …it is often necessary or desirable for a public body to refer to the crux of the legal advice its solicitors provide to it in order to carry out its mandate and responsibilities. In many cases, the public body will intend to retain the privilege, while at the same time, provide a minimal degree of public disclosure to ensure the proper discharge of its functions.

[30] The Federal Court addressed the issue of waiver in *Stevens* v. *Canada (Prime Minister).*[13] In *Stevens*, pursuant to an access request under the federal *Access to Information Act*, a federal institution provided partial access to legal accounts, severing out the narrative portion of the accounts while providing access to the dollar amounts. In dealing with the issue of waiver in the freedom of information context, the court held that, in making the relatively minimal disclosure of a small portion of the "bottom line" of the legal advice it received, the institution did not intend to waive privilege with respect to the record itself. The court wrote that, although the institution did provide a small portion of the "bottom line" of the advice it received, "fairness and consistency" did not require a finding that the privilege ceased and held that the institution had not, by disclosing bottom line advice, implicitly waived privilege.

[31] The Assistant Commissioner, in Order MO-2945-I, dealt with a town's submission that the release of an executive summary of a legal opinion was done in the interests of public transparency and did not amount to a waiver of privilege. She considered a number of cases where this office upheld privilege where public disclosure of some information gave rise to claims of implied waiver. As in this case, those cases involved instances where public bodies disclosed a "small portion of the bottom line" or a portion of a conclusion reached in a privileged legal opinion and that "such relatively minimal disclosure" was found not to amount to implied waiver that would warrant disclosure of the privileged material.

[32] More recently, in Order MO-3497, Adjudicator Fadel dealt with the issue of the release of "bottom line" legal advice by an institution, where a town publicly released (to an open meeting of council and the media) part of one paragraph of a lawyer's memorandum that Adjudicator Fadel found was privileged. He held that, in releasing bottom line information as opposed to the entire document, the town did not intend to waive privilege over the record but provided "a minimal degree of disclosure" to carry out its mandate and responsibilities.

[33] Similarly, in this case I am satisfied that the release by the board of the fact that it retained external counsel to the naming committee and the public, together with a summary of counsel's "bottom line" legal advice, was necessary in the interests of transparency and did not evidence an intention to waive privilege over the record itself.

[34] The board argues that it treated the report confidentially and did not share it outside of a limited number of employees to ensure that there was no waiver of

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[13] (1998), 161 D.L.R. (4th) 85.

privilege. For example, the board submits that the legal opinion, that is, the record itself, was not provided to the naming committee. An affidavit sworn on May 10, 2017 by a legal secretary in the board's legal services department states that:

> It was the practice of the Legal Services Department that legal opinions did not get a broad circulation even among [board] staff. Legal Services would limit the number of clients that could access these types of documents to ensure solicitor-client privilege was not waived.

[35] Indeed, a plain reading of the various "Minutes/Notes of the Naming Committee" relied on by the appellant confirms that only a "bottom line" report of the legal advice the board received was disclosed. Specifically, the Minutes summarize the process the board undertook as part of the name-change, its reason for seeking outside trademark/copyright counsel, and a "bottom line" summary of the advice provided by that counsel. That summary was limited to the following: that external counsel searched names that were deemed viable for consideration and that the names of living individuals, if selected, would require permission prior to use.

[36] That limited statement, together with a brief description of the reasons for retaining a trademark/copyright lawyer (to avoid violating trademarks or choosing a name that could be confused with another entity) falls within the reasons articulated by Adjudicator Cropley in Order MO-1172. I find that setting out the reason for hiring external counsel, together with a summary of the "bottom line" legal advice, did not constitute waiver, either implicit or explicit. I find that this limited disclosure allowed the board to discharge its functions and keep its process transparent while maintaining the confidentiality of communication with its counsel.

[37] Therefore, subject to my review of the board's exercise of discretion, below, I find that the record is exempt under section 12 of the *Act*.

Issue B: Did the board exercise its discretion under section 12?

[38] The section 12 exemption is discretionary and permits an institution to disclose information despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[39] 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.

[40] While this office may send the matter back to the institution for an exercise of

discretion based on proper considerations,[14] it may not, however, substitute its own discretion for that of the institution.[15]

Relevant considerations

[41] Relevant considerations may include, but are not limited to, those listed below:[16]

- the purposes of the *Act*, including the principles that information should be available to the public
- exemptions from the right of access should be limited and specific
- the wording of the exemption and the interests it seeks to protect
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person

[42] In denying access to the record, I find that the board properly exercised its discretion pursuant to section 12.

[43] In this case, the change to the school name was a matter of local interest and the process engaged the community. In disclosing certain information, while withholding the report itself, the board shared limited "bottom line" legal advice in an effort to keep the community informed on a topic of importance to it, while preserving the integrity of the solicitor-client relationship. I find that the board considered the need to be transparent, the right of the community to a transparent process, and balanced it with its own right to confide in its lawyer without reservation.[17] I therefore uphold the board's exercise of discretion to withhold the record under section 12.

ORDER:

I uphold the board's decision and dismiss this appeal.

Original signed by
Jessica Kowalski

March 28, 2018

[14] Order MO-1573.
[15] Section 43(2).
[16] Orders P-344 and MO-1573.
[17] Order P-1551.

Adjudicator