

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4000

Appeal MA19-00230

Tay Valley Township

January 26, 2021

Summary: The appellant made an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the township for correspondence relating to a particular property within a specified time period.

The township issued a decision granting the appellant partial access to the records. The township withheld portions of the records under a variety of discretionary and mandatory exemptions. After mediation, the only remaining issue was whether the township properly withheld two records on the basis of the solicitor-client exemption in section 12 of the *Act*.

The adjudicator finds that the records are solicitor-client privileged communications and therefore exempt under section 12. In reaching this conclusion, the adjudicator determined that the township did not waive its privilege by permitting the communications to occur in the presence of a third party with which it had a common interest. The adjudicator therefore upholds the township's decision.

Statute Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O., Ch. M.56, sections 12 and 38(a).

Orders and Investigation Reports Considered: Orders PO-3154 and MO-3979.

OVERVIEW:

[1] This is the last of four related appeals.¹ It will assist to provide some context.

[2] The appellant's spouse owns property (the property) located in Tay Valley Township (the township). The township issued a building permit regarding a proposed structure on the property. After construction began, staff from the township and the Rideau Valley Conservation Authority (RVCA) attended the property. The township determined that the construction underway was not proceeding in accordance with the permit and it issued a Stop Work Order under its statutory authority and the RVCA determined that a permit was required under its own statutory authority.

[3] The appellant and his spouse made access requests for a variety of information to the township and the RVCA under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[4] This appeal deals with the appellant's access request to the township for correspondence relating to the property within a specified time period.

[5] The township issued a decision granting the appellant partial access to the records. The township withheld portions of the records under the discretionary exemptions in sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege) and the mandatory exemption in section 14(1) (personal privacy) of the *Act*. The township also charged the appellant a fee.

[6] The appellant appealed all aspects of the township's decision to this office.

[7] During mediation, several issues were resolved, including the fee, and records for which the township claimed the exemptions in sections 6(1) and 14(1) of the *Act*.

[8] The only issue that remained in dispute at the end of the mediation was the appellant's interest in pursuing access to two records (5 and 11) for which the township claims the solicitor-client privilege exemption at section 12 of the *Act*.

[9] The appeal was transferred to the adjudication stage of the appeal process and I conducted an inquiry in which the parties made representations that were shared in accordance with this office's *Code of Procedure and Practice Direction 7*.

[10] During the inquiry, I invited supplementary representations from the parties about the possible application of section 38(a) (discretion to refuse requester's own personal information) and the common interest exception to waiver of privilege.

¹ See Orders MO-3962, MO-3978 and MO-3979.

[11] In this order, I uphold the township's decision and dismiss the appeal.

RECORDS:

[12] There are two records at issue:

1. Record 5 consists of notes of a June 12, 2018 meeting that occurred between township staff, the township solicitor, the township's consultant and employees of the RVCA.
2. Record 11 is an email from township staff to its legal counsel, copied to the township's consultant and employees of the RVCA dated August 30, 2018.

ISSUES:

- A. Do the records contain the "personal information," as defined in section 2(1), of the appellant?
- B. Does the discretionary solicitor-client privilege exemption at section 12 apply to the records?
- C. Did the township exercise its discretion to disclose the records under section 12? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Do the records contain the "personal information," as defined by section 2(1), of the appellant?

[13] If the appellant's personal information is contained in the records, the exemption claim made by the township must be considered under section 38(a), which is the section of the *Act* that sets out the exemptions from the right of access to one's own personal information.

[14] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual," including information such as: an individual's age or marital status (paragraph (a)), information relating to financial transactions in which the individual has been involved (paragraph (b)), the address or telephone number of the individual (paragraph (d)), correspondence sent to the institution of a private and confidential nature (paragraph (f)) or the views or opinions of another individual about the individual (paragraph (g)). The list of examples of personal information under section 2(1) is not exhaustive, meaning that other types of information may qualify as personal information.

[15] Sections 2(2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[16] As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual. However, if information associated with an individual in a professional capacity reveals something of a personal nature of about the individual, it may qualify as personal information.²

Representations

[17] The township submits that the records at issue do not contain the appellant's personal information as none of the information falls into the categories identified in section 2(1) or is "identifiable information" about the appellant.

[18] The appellant submits that if the information at issue includes "the views or opinions of another individual about the individual," which is paragraph (g) of section 2(1), it contains the appellant's personal information. He submits that it is reasonably foreseeable that conversations about the issues in dispute might include views or opinions about him and that in consideration of his role and activities in relation to the property, this may be the case even if he is not identified by name.

[19] However, the appellant acknowledges that information relating to the property does not necessarily constitute his personal information.

Finding

[20] Based on my review of them, the records do not include the appellant's personal information and I will therefore not consider section 38(a) further. The records at issue relate to matters in dispute regarding the property and its use by the appellant's spouse. However, this information does not reveal anything of a personal nature about the appellant or his spouse and it is therefore not personal information for the purposes of section 2(1).

² Orders P-1409, R-980015, PO-2225 and MO-2344.

B. Does the discretionary solicitor-client privilege exemption at section 12 apply to the records?

[21] The township relies on section 12 to withhold both records. It says that Record 5 consists of notes of a meeting attended by the township solicitor during which the township received legal advice. The meeting was also attended by representatives of a consulting firm retained by the township (referred to in this order as the consultant) and employees of the RVCA. Based on my review, the notes record statements made by the solicitor.

[22] The township says that Record 11, an email from township staff to the township solicitor, contains a request for legal advice. Other recipients of the email are representatives of the consultant and employees of the RVCA. Based on my review, the email provides information and contains a request for the solicitor's advice.

[23] Against that backdrop, I will review the general principles applicable to the section 12 exemption, with which the parties generally agree.

[24] Section 12 states:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[25] 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 branches apply. The township's main argument is that common law privilege (Branch 1) applies, but it makes the alternative argument that the statutory privilege (Branch 2) applies.

[26] Both common law and statutory privileges contain two types: (i) solicitor-client communication privilege; and (ii) litigation privilege. The township has not expressly stated which privilege it asserts; however, it relies most heavily on the authorities associated with solicitor-client communication privilege and since I find that solicitor-client communication privilege applies I will not refer further to litigation privilege in this order.

[27] 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.³ The rationale for this

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

privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.⁴ 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.⁵

[28] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.⁶ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.⁷

[29] Solicitor-client privilege may be waived. 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 it.⁸

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

[31] 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.¹¹

Representations

[32] The township stresses the importance of solicitor-client privilege and refers to several Court of Appeal and Supreme Court of Canada authorities to underline its position in the context of the *Act* and in other contexts, such as *Big Canoe* and *Descôteaux*,¹² *Lavallée v. Canada (Attorney General)*,¹³ *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*,¹⁴ and *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*.¹⁵ The township states that the IPC must approach claims of privilege in a manner that gives due regard to the importance of the protection it

⁴ Orders PO-2441, MO-2166 and MO-1925.

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

⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.) ("*Chrusz*"); Order MO-2936.

⁷ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

⁸ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

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.) ("*Big Canoe*").

¹⁰ *Chrusz*, cited above; Orders MO-1678, PO-3154 and PO-3167.

¹¹ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

¹² Cited above.

¹³ 2002 SCC 61.

¹⁴ 2008 SCC 44.

¹⁵ 2010 SCC 23.

provides.

[33] The township refers to Order MO-2945-I, in which the adjudicator referred to and relied on *Balabel*,¹⁶ which states that solicitor-client privilege protects any and all communications forming part of the "continuum of communications" between client and lawyer for the purpose of seeking and providing legal advice.

[34] As described above, the township argues that both records contain solicitor-client communication privileged information.

[35] The appellant argues that the township improperly applied section 12. Based on the information contained in the index produced in the appeal, he argues that the records were not necessarily prepared or provided for the purpose of obtaining legal advice. He asks that this office review the records and determine whether the exemption should apply.

[36] Regarding Record 5, the appellant notes that that based on the information in the index, the notes at issue were prepared by a representative of the consultant. He argues that meeting notes prepared by the consultant, a third party, are not necessarily subject to solicitor-client privilege merely because the township's lawyer attended the meeting.

[37] Regarding Record 11, the appellant says that the fact that the township's solicitor is copied on the email does not make the communication privileged.

[38] The appellant also argues that, at minimum, the township ought to disclose the records to this office so that they may be reviewed. I confirm that the township did provide this office with complete copies of the records at issue and I will therefore not summarize or re-state the appellant's representations on this issue further.

[39] Although it was not specifically stated, the appellant's representations give rise to a question about whether a third party's involvement in the communications at issue precludes the application of solicitor-client privilege or whether the township waived privileged.

[40] In reply representations on the issue of waiver, the township provided me with a more detailed description of the meeting attendees and the email recipients, some of which I have referred to above. The records contain communications with the township solicitor that either occurred in the presence of, or were copied to, possible third parties: representatives of the consultant and employees of the RVCA. The township says that the communications in the records have not been disclosed publicly and that, "therefore privilege has not been waived over either record."

¹⁶ Cited above.

[41] The township explained that the consultant has been retained by the township for decades and that it provides planning-related services to the township assisting with its management of planning application and development issues, such as the one involving the appellant's spouse. It submits that the consultant, represented by individuals, was at all times acting as an agent of the township.

[42] It argues that "common interest privilege" exists between the township and the RVCA as it relates to the dispute between it and the appellant (and their spouse) about the property. The township refers to Order PO-3154 in which the adjudicator articulated a two-part test to determine whether the common interest defence to waiver privilege exists under the equivalent provision in the *Freedom of Information and Protection of Privacy Act*. It argues that both parts of the test have been met. That is: (1) the information at issue is inherently privileged; and, (2) the parties (the client and the party with whom the information was shared) have a common interest, but not necessarily an identical interest.

[43] In sur-reply, the appellant acknowledges that if the records are properly subject to solicitor-client privilege, that privilege is not waived if the information is shared internally with employees. However, it says that if information is shared with third parties, the privilege would be waived unless each of the third parties shares a common interest with the township.

[44] The appellant acknowledges that the township may have a common interest with the RVCA and the consultant in some circumstances, but it requests that this office review the records to determine whether the information at issue is privileged in the first place.

[45] The appellant submits that because conservation authorities and municipalities have related jurisdictions they will regularly share information without sharing a common interest necessary to avoid waiver of privilege. The appellant argues that determining whether a common interest sufficient to avoid waiver exists depends on the context of the communication, the content of the record and the role that each organization is fulfilling in relation to the record.

[46] Regarding Record 5 (meeting notes), the appellant reiterated some of the arguments that he made initially, emphasizing that the record appears to have been created by a third party, the consultant. He submits that the mere presence of legal counsel does not establish privilege and refers to *Chrusz*¹⁷ and Order PO-3154 in support of his position.

¹⁷ Cited above.

Analysis and finding

[47] I have reviewed the records at issue and for the following reasons, I find that they consist of solicitor-client communication privileged information and are eligible for exemption under section 12.

[48] In reviewing the records, I remained attentive to the appellant's arguments that mere inclusion of a solicitor in a communication does not make the communication privileged. Without revealing the content of the records, I am satisfied that the substance of the information in both records is for the purpose of seeking or obtaining legal advice.

[49] I am also satisfied based on my review of the records, the representations and the issues in dispute between the appellant, his spouse, the RVCA and the township, that the communications were intended to be confidential.

[50] The next issue that requires consideration is whether the fact that the communications were shared contemporaneously with third parties means that the solicitor-client communication privilege did not arise at all or, if it did, it was immediately waived.

[51] I will deal first with the consultant. Taking into account the context, the township's evidence and the records themselves, I find that the consultant was acting solely as an agent of the township in relation to the issues in dispute involving the appellant and in a manner similar to the township's own employees. I find therefore that the inclusion of representatives of the consultant in the communications does not give rise to any concerns that the privilege was waived.

[52] Unlike the consultant, employees of the RVCA were not acting on behalf of the township and it is therefore necessary to consider whether their attendance or inclusion, as the case may be, had the effect of waiving any privilege that may have attached to the communications.

[53] To address this issue, I adopt the analysis set out by the adjudicator in Order PO- 3154, meaning that I will consider whether there is a sufficient common interest between the RVCA and the township to avoid a finding that RVCA's inclusion in the communications resulted in waiver of the privilege.¹⁸

[54] Drawing on the analysis of the adjudicator in Orders MO-1678 and with regard to *Fraser Milner Casgrain LLP v. Canada (Minister of National Revenue)*,¹⁹ the adjudicator in Order PO-3154 articulated the following two-part test to determine the existence of a

¹⁸ I also followed this approach in Order MO-3979, involving the same parties and issues.

¹⁹ 2002 BCSC 1344.

common interest to resist waiver of solicitor-client privilege:

- 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 [the *Act*]; and,
- b. the parties who share that information must have a “common interest,” but not necessarily identical interest.

[55] I have already concluded that the records are inherently privileged. They involve communications from legal counsel to seek or receive legal advice that were intended to be sought or provided confidentially.

[56] It is also my view that the records consist of communications in which RVCA and the township had a common interest sufficient to avoid waiver. I have formed this view in consideration of the related jurisdictions of the RVCA and the township over the property and the degree of cooperation and collaboration between them as evidenced in the records. Although the two institutions did not have identical interests to each other, I conclude that it was common. In my view it would have been reasonably possible for the township’s counsel to represent the interests of the RVCA in the matter should it have been necessary.²⁰

[57] I also considered the distinction effectively drawn by the appellant that there is a difference between routine sharing of information between cooperative organizations like the RVCA and the township, and the conditions necessary to establish a common interest sufficient to avoid waiver of privilege. Based on my review of the records and the underlying circumstances, I find that the communications at issue in this appeal relate to a discrete matter for which there is a common interest sufficient to avoid waiver between the RVCA and the township. The information at issue is specifically related to the property and the dispute between the appellant’s spouse, the appellant, the township and the RVCA.

[58] I therefore find that the township did not waive its privilege when it included employees of the RVCA in the communications at issue in this appeal.

[59] In summary, the solicitor client exemption in section 12 applies to the records.

C. Did the township exercise its discretion to disclose the records under section 12? If so, should this office uphold the exercise of discretion?

[60] Although I have found that the section 12 exemption applies to the records, the

²⁰ See *Canadian Pacific Ltd. v. CNADA (Competition Act, Director of Investigation and Research)*, [1995] O.J. No. 4148 (Gen. Div.), as referred to in Orders MO-1678, MO-3253-I and PO-3154, for example.

exemption is discretionary, and this office has jurisdiction to review the township's exercise of discretion.

[61] The IPC's jurisdiction to review an institution's exercise of discretion emphasizes that even if a record is eligible for a discretionary exemption, the institution may nevertheless decide to disclose it. Review of the institution's exercise of discretion is separate from the IPC's jurisdiction to review whether a record is eligible for an exemption.

[62] An institution must exercise its discretion. This means that in addition to determining whether a discretionary exemption applies, it must also ask whether the record should nevertheless be disclosed.

[63] Also, an institution must not err when exercising its discretion. An institution may be found to have erred where, for example,

- it acts in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[64] If an institution fails to exercise its discretion or it does so improperly, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²¹ This office may not, however, substitute its own discretion for that of the institution.²²

[65] Relevant to the present appeal, this office has found in previous orders that following considerations are relevant:²³

- 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 is seeking his or her own personal information

²¹ Order MO-1573.

²² Section 54(2).

²³ Not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant: Orders P-344 and MO-1573.

- 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 relationship between the requester and any affected persons
- 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.

Representations

[66] The township submits that it exercised its discretion properly. It says that it considered the appellant's interest in receiving the records and the public interest in transparency and access to information, as well as the township's own interests protected by section 12. It says that it concluded that the potential harm from disclosure outweighed any interest that weighs in favour of disclosure of the records.

[67] The appellant makes no assertion that the township failed to exercise its discretion, although he does – as outlined above – assert that the township erred in its application of the exemption.

Findings

[68] I have to determine whether the township properly exercised its discretion when it decided to withhold the records under section 12. As noted above, this review is distinct from the analysis about whether the records are eligible for the exemption.

[69] I am satisfied that the township considered and weighed relevant factors, including that the information relates to the appellant. There is no evidence that the township took into account irrelevant considerations or exercised its discretion in bad faith. I find that the township properly exercised its discretion and I uphold it.

ORDER:

I dismiss the appeal.

Original Signed by: _____

Valerie Jepson
Adjudicator

January 26, 2021