



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-291

Appeal M-9300391

Town of Gravenhurst



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

BACKGROUND:

The Town of Gravenhurst (the Town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for records relating to (1) a specific property development, (2) the Ontario Municipal Board (OMB) hearings where objections to this development were considered and (3) any relevant by-laws or site plans. The Town granted access to a total of eight documents but withheld three records in their entirety pursuant to the discretionary exemption contained in section 12 of the Act (solicitor-client privilege). The requester appealed the denial of access to the Commissioner's office.

During the course of mediation, the appellant indicated that he would limit his request to only one of the three documents which had not been released to him. This record consists of 14 pages, and comprises a facsimile transmittal page, a covering letter and a 12-page summary of the evidence tendered at an OMB hearing. This summary of evidence was transcribed by a solicitor retained by the Town. The solicitor, in turn, provided a copy of this document, via the transmittal letters, to the Town's Director of Planning.

Further mediation of the appeal was not successful and notice that an inquiry was being conducted to review the Town's decision was sent to the Town and the appellant. Representations were received from both parties.

The first issue to be determined in this appeal is whether section 12 of the Act applies to the record at issue. This provision reads as follows:

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

In order for a record to be subject to the common law solicitor-client privilege (Branch 1 of the section), the Town must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication; **and**
- (b) the communication must be of a confidential nature; **and**
- (c) the communication must be between a client (or his agent) and a legal advisor; **and**
- (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Orders M-2, M-19 and M-162]

A record can be exempt under Branch 2 of section 12 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2 of the section:

1. the record must have been prepared by or for counsel employed or retained by an institution; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order M-83]

The Town submits that both branches of the section 12 exemption apply to the record at issue. I have carefully reviewed the summary of evidence and find that this document was created especially for a lawyer's brief for existing or contemplated litigation. On this basis, I am satisfied that the summary qualifies for exemption under the second part of the Branch 1 test. I find, however, that the two transmittal letters fall outside the scope of both branches of section 12 and should be disclosed to the appellant.

In his representations, the appellant submits that the Town waived its reliance on the solicitor-client privilege when its solicitor disclosed a copy of the summary to the solicitor for the developer of the project. In determining whether such a waiver of privilege has taken place, I must consider all the circumstances of the case.

The Town does not dispute the fact that its solicitor provided a copy of the record to the other solicitor in this fashion. The Town states, however, that at no time did it waive its confidentiality rights in the record. The Town further asserts that it was not until the appeal was launched that it learned that its solicitor had released the record at issue. In this respect, the Town relies on the general principle that only the client can waive solicitor-client privilege.

In the recent text entitled Solicitor-Client Privilege in Canadian Law, edited by R. D. Manes and M.P. Silver, (Butterworth's, 1993), the authors point out that situations may exist where a lawyer's actions amounting to waiver will be imputed to his or her client. This matter is explored at page 205 of the text in the following fashion:

The general rule is that only the client is entitled to waive privilege or to authorize the solicitor to waive the privilege. However, the solicitor has the ostensible authority to waive the privilege.

...

... the lawyer is an agent of the client with the ostensible authority to bind the client, which authority includes the power to waive the privilege on behalf of the client.

While, in the present case, the Town asserts that it lacked any prior knowledge that the record had been disclosed, it has not tendered any evidence to indicate that its solicitor was acting contrary to instructions. In addition, on November 16, 1993, the Town enacted By-law 93-01 which retroactively endorsed all of the actions taken by its solicitor regarding the proceedings before the OMB. The specific wording of the by-law is here set out:

That all actions taken by [the firm retained by the Town] to date respecting proceedings before the Ontario Municipal Board which relate to By-law 92-67 are hereby ratified, without prejudice.

On the basis that the solicitor was acting within his ostensible realm of authority and given the subsequent endorsement of his actions with respect to the OMB proceeding, I conclude that the release of the record by the solicitor to the developer's lawyer effectively binds the Town. I also find that, when the solicitor disclosed the record in this fashion, this constituted a general waiver of the solicitor-client privilege. The result is that the Town cannot rely on section 12 of the Act to protect this documentation from disclosure.

In reviewing the summary of evidence, I have also determined that some of the information found in this document constitutes the personal information of individuals other than the appellant. Since the appellant has indicated that he is not interested in receiving access to this information, it should not be disclosed by the Town. I have highlighted this information in yellow on the copy of the record to be sent to the Town with this order.

ORDER:

1. I order the Town to disclose those portions of the record that are **not** highlighted in the copy of the record which is being sent to the Freedom of Information Co-ordinator for the Town along with this order to the appellant within fifteen (15) days of the date of this order.
2. In order to verify compliance with this order, I order the Town to provide me with a copy of the record disclosed to the appellant pursuant to Provision 1 **only** upon request.

Original signed by:
Irwin Glasberg
Assistant Commissioner

March 25, 1994