Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

# ORDER M-274

## Appeal M-9300126

## Town of Oakville

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# ORDER

The Town of Oakville (the Town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to records indicating the total cost of legal fees incurred on behalf of the Town in defending an action brought against it by the requester.

The Town denied access to this information pursuant to section 12 of the Act. The requester appealed.

During mediation it was agreed that a record would be created which indicated the total cost of the action. This dollar figure is the sole information at issue in this appeal.

Further mediation 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 sole issue in this appeal is whether the discretionary exemption provided by section 12 of the Act applies to the dollar amount the Town spent in defending the action filed against it by the appellant. 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.

The Town claims that the information at issue is exempt from disclosure under Branch 1 of section 12 which provides an institution with the discretion to refuse to disclose a record that is subject to the common law solicitor-client privilege.

In order to qualify for exemption under this branch, the Town must provide evidence that the information 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.

[Order 49]

In its representations, the Town states its position as follows:

> ... because the record is derived from written communications of a confidential nature by the Town's Insurer's solicitors arising from their defence of an action on behalf of the Town, the substance of the record was generated by counsel employed or retained by an institution relating to the obtaining of legal advice. Accordingly, the Town says that because the accounts themselves constitute communications directly related to seeking, formulating or giving legal advice in connection with the representation of the Town in a legal action, the sum total of all these accounts is privileged.

The Town has referred to several judicial decisions which it claims support this proposition.

One of these decisions is that of Southey J. in Mutual Life Assurance Company of Canada v. The Deputy [Attorney] General of Canada, [1984] C.T.C. 155 (S.C.O. Motions Court). In that case, the Court was called upon to interpret section 232(1)(e) of The Income Tax Act. In the course of his decision, Southey J. stated in obiter that, were it not for the fact that The Income Tax Act explicitly excluded an "accounting record of a lawyer" from the ambit of solicitor-client privilege, he would have decided that ordinarily a statement of account is a document to which this privilege would apply.

In Order P-624, Assistant Commissioner Irwin Glasberg did not consider the Mutual Life decision to represent a binding authority on him for the purpose of interpreting section 19 of the Freedom of Information and Protection of Privacy Act (the provincial Act), which is similar to section 12 of the Act, to legal accounts. He provided three reasons for this conclusion:

> ... First, Mr. Justice Southey's comments were provided in obiter. Second, the Mutual Life decision was made in the context of a different legislative scheme to that established under the Act. Third, the ruling in this case appears to be at odds with the position taken by Southey J., on behalf of the Divisional Court, in the case of Re Ontario Securities Commission and Greymac Credit Corp; Re Ontario Securities Commission and Prousky (1983) 41 O.R. (2nd) 328 (Ont. Div. Ct.). At page 337 of that ruling, Mr. Justice Southey states:
>
> ... Evidence as to whether a solicitor holds or has paid or received moneys on behalf of a client is evidence of an act or transaction, whereas the privilege applies only to communications. Oral evidence regarding such matters, and the solicitor's books of account and other records pertaining thereto (with advice and communications from the client relating to advice expunged) are not privileged, and the solicitor may be compelled to

> answer the questions and produce the material. [emphasis added]

Like Assistant Commissioner Glasberg, I consider these two cases to be inconsistent.

The Town has also made reference to the cases of Re Playfair Developments Ltd. and the Deputy Minister of National Revenue (1985), 85 D.T.C. 5155 and Taves v. Canada [1993] B.C.J. No. 1713 (B.C.S.C.)to support its position that, at common law, legal accounts fall within the common law solicitor-client privilege.

Both of these cases also involved a determination by the court of whether certain documents were subject to solicitor-client privilege or fell within the "accounting record of a lawyer" or "supporting voucher or cheque" exception in The Income Tax Act.

One of the documents referred to by the Town in the Re Playfair case is merely described as an "account". No further description is provided in the case report. The other document referred to is described as "a letter from the client to the law firm enclosing a cheque to pay an interim account". These documents, with the exception of the cheque, were held to be privileged. However, I note that no reference is made in this case to a document similar to the one at issue in this appeal.

In the Taves case, Baker J. considered the Mutual Life and Re Playfair decisions. He concluded that a letter from a law firm to a client dealing with the application of disbursements is not an "accounting record" within the meaning of The Income Tax Act and held that it was privileged. He reached the same conclusion with respect to a statement of account from a law firm to a client.

In summary, although there is some case law to support the Town's position, I conclude that the common law position on whether legal accounts are protected by the solicitor-client privilege is still unclear. I also note that the cases to which the Town has referred were decided in a statutory context quite different from that of the Act. The result, therefore, is that my determination on whether section 12 applies to the information at issue in this appeal must be based exclusively on the wording and intent of the Act.

The Town also submits that the interpretation of "legal advice" given by Commissioner Tom Wright inOrder P-210 is incorrect as it narrows the scope of the solicitor-client privilege in a way not recognized at common law. It states:

> This is a narrowing of the common law privilege and is frankly an unrealistic test to apply with respect to legal accounts; bills for services rendered pursuant to a legal retainer, as is the case in Order 126, will rarely if ever on their face contain legal advice or reveal any such advice indirectly, although they reflect communications of a confidential character directly related to the seeking, formulating or giving of legal advice between a client and its legal advisor.

These are essentially the same arguments made by the institution in Order P-624, (i.e. that the section 19 of the provincial Act test should be interpreted liberally with a view towards protecting legal accounts from

disclosure and that only those factors established at common law should be used to determine whether the contents of a record fall within the section 19 exemption). In Order P-624, Assistant Commissioner Glasberg did not accept either of these arguments and I accept this reasoning.

Therefore, I will consider the wording an intent of the Act to determine if section 12 applies to the information at issue in this appeal.

The rationale for the common law solicitor-client privilege is to protect communications between a client and his/her solicitor from disclosure in the interest of providing all citizens with full and ready access to legal advisors (Order 136). Two of the principles of the Act as set out in sections 1(a)(i) and (ii) are that information should be available to the public and that necessary exemptions from the right of access should be limited and specific.

In my view, these principles are reflected in the analysis developed by Assistant Commissioner Glasberg in Order M-213. In that order he concluded that:

> ... the implication of this decision [Order 126] is not that the solicitor-client exemption will apply automatically to records of this nature, but rather that the decision maker must determine, based on the contents of each legal account, whether the information contained in the document relates in a tangible and direct way to the seeking, formulating or provision of legal advice.

This approach requires a case by case analysis of accounts to ascertain if the section 12 exemption applies. Moreover, because the decision maker makes this determination on the **information** contained in each legal account, it is also consistent with the principle of severance set out in section 4(2) of the Act. I adopt this approach for the purposes of this appeal.

As I have previously indicated, the only information at issue in this appeal is a dollar figure. I cannot see how this number has any direct connection with either "seeking, formulating or giving legal advice". It follows that the fourth part of the test for the application of the first branch of the section 12 exemption has not been met.

The Town also submits that since the legal action leading up to this bill was settled by an order of the court, this request for information and subsequent appeal would appear to not be in the letter or spirit of the order. I do not agree with this argument.

The court settlement is totally unrelated to the appellant's right to make a request under the Act for the information at issue in this appeal. Moreover, the reason why the appellant has requested this information and the use to which he may put it are irrelevant considerations when determining whether the section 12 exemption applies. As Commissioner Wright said in Order P-240:

> While I understand the appellant's concern relating to the use of the report, the Act does not provide that a requester's reasons for making an access request are relevant to the consideration of whether access should be granted. An individual is free to use any record to which he or she has been granted access as he or she chooses.

In my view, the same considerations apply to the facts of this case. The Town's concerns and comments about the appellant's motivations in requesting this information have no application to the factors which the Town should consider when deciding whether section 12 of the Act applies to exempt the information from disclosure.

Accordingly, in my view, section 12 does not apply to the record.

## ORDER:

1. I order the Town to disclose the record 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: February 23, 1994
Anita Fineberg
Inquiry Officer