



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-502

Appeal M-9400709

City of Timmins



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act, (the Act). The City of Timmins (the City) received a request for access to a copy of a report prepared by the City's Public Works Department following two incidents in which the requester's home was damaged by a sewer back up. The City located the requested record and denied access to it in its entirety, claiming the application of the following exemption contained in the Act:

- solicitor-client privilege - section 12.

The requester appealed the City's decision to deny access. A Notice of Inquiry was provided to the appellant and the City. Representations were received from both parties.

DISCUSSION:

The undated report, entitled "Week End Call August 6 and 7, 1994", was prepared by a Department Superintendent at the request of an adjuster retained by the City's insurers following the submission of a damage claim by the appellant. The report, using technical language, describes the efforts undertaken by the City's Public Works Department on the night of August 5-6 and again on August 9, 1994 to determine the source of the sewer problem.

SOLICITOR-CLIENT PRIVILEGE

In its representations, the City indicates that it is relying on both parts of the common law solicitor-client privilege described in Branch 1 of section 12 of the Act.

In order for a record to be subject to the common law solicitor-client privilege, the City 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.

First Part of the Solicitor-Client Test

I accept the position of the City that the record is a written communication which is implicitly of a confidential nature. The record was prepared at the request of the adjuster in the course of his investigation of the circumstances of the appellant's damage claim against the City. I find that it is reasonable to assume that such a communication was intended to be confidential in nature.

I am unable to agree, however, that the Insurance Adjuster for whom the record was prepared can be properly characterized as a "legal advisor" within the meaning of the privilege. Further, I find that the report was not **directly** related to the seeking, formulating or giving of **legal advice**. Rather, it was intended to provide the adjuster with technical information about the sewer problem to assist him in his evaluation of the merits of the appellant's claim. As all four parts of the test must be satisfied, I find that the record does not qualify for exemption under the first part of the solicitor-client privilege test.

Second Part of the Solicitor-Client Test

The City states that the record was created or obtained for the "lawyer's brief for contemplated litigation in the event the claim was denied and the Appellant commenced a civil action."

It goes on to argue that:

privilege attaches to reports prepared by a party to a civil action for its insurer prior to the commencement of a civil action by a third party where a dominant, but not necessarily the sole purpose, for the preparation of the report was for use in anticipated litigation.

In my view, it is important to examine carefully the timing of events surrounding the creation of the report. The problems involving the appellant's property occurred on the night of August 5-6, 1994. The report describes remedial action undertaken by the City which took place on that night and on the 9th of August, 1994.

In Order M-285, Inquiry Officer Holly Big Canoe found that reports prepared by Adjusters Canada for the City of Kitchener in response to damage claims for flooded homes by homeowners fit within the litigation privilege. In that case, as in the present appeal, the City had been put on notice by the homeowners that they intended to hold the City responsible for the damage caused to their property. The Adjusters Canada reports, like the record at issue in this appeal, were prepared following the communication of this fact to the City. Inquiry Officer Big Canoe found that the dominant purpose for the preparation of the reports in that case was in preparation for anticipated litigation between the City and the homeowners.

In the instant appeal, I find that anticipated litigation was also the dominant purpose behind the creation of

the record. It is clear on its face that the report was intended to inform the adjuster retained by the City's insurer of the occurrence and the possible cause of problems with the sewer on the appellant's street. As the City had been put on notice by the appellant that a claim was being made, there was a reasonable prospect of litigation at the time the report was prepared. I find, accordingly, that the City has established the requirements for part two of the solicitor-client privilege under section 12 of the Act and that the record is properly exempt under that section.

ORDER:

I uphold the decision of the City.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ March 29, 1995