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

ORDER M-974

Appeal M_9700079

City of Scarborough

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On June 12, 1997, the undersigned was appointed Inquiry Officer and received a delegation of the power and duty to conduct inquiries under the provincial Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act.

NATURE OF THE APPEAL:

The City of Scarborough (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for a copy of a specific report prepared by the City Solicitor regarding a proposed by-law dealing with the licensing of adult video stores. The City denied access to the report based on the following exemption:

- section 12 - solicitor-client privilege

The requester (now the appellant) appealed this decision to the Commissioner's office. This office sent a Notice of Inquiry to the City and the appellant. Representations were received from both parties.

The record at issue is a one-page report to the Chair and the members of the Planning and Buildings Committee of the City from the City Solicitor.

PRELIMINARY ISSUES:

The appellant devotes a large portion of his representations to arguments which relate to the process surrounding the proposal of the by-law. For example, he states that the City's actions in denying the release of the record fundamentally constrained the ability of his client to fully participate in this public decision making process, which is contrary to the principles of natural justice, the rule of law and jurisprudence. Further, he states that the denial of access has precluded an assessment of whether the City of Scarborough considered less draconian alternatives than the current course which results in the City substantially violating the fundamental constitutional right of freedom of expression.

In my view, the appellant's arguments with respect to disclosure during the by-law process are not relevant to the application of section 12 of the Act to the requested report. This is not the proper forum for any complaints he may have with regard to that process. Had the legislators intended that the Act not apply to records related to certain processes such as the process by which a municipality introduces a by-law, they could have used specific wordings to that effect. I find no such wording in the Act and the appellant has not drawn my attention to any section of the Act which might be interpreted in such a manner. In my view, the Act can and should operate as an independent piece of legislation.

The appellant also raises the issue of public interest in the disclosure of the record. Section 16 of the Act states that an exemption of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. Therefore, section 16 would not be available to the appellant should I find that the record at issue is properly exempt under section 12.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 12 of the Act states that a head may refuse to disclose a record that is subject to solicitor-client privilege (Branch 1) 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 (Branch 2).

The City relies on both branches of the exemption.

In order for the record to be subject to the common law solicitor-client privilege (Branch 1), 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.

[Orders 49, M-2 and M-19]

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:

1. the record must have been prepared by or for counsel employed or retained by the City; and

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

With respect to Branch 1 of the test, the City states that the record is a written communication between City Council as client and its legal advisor - the City Solicitor. It states that the record is clearly identified as a confidential document that was considered *in camera* and has always been treated as a confidential communication. The City adds that the record is more than "directly related" to giving legal advice, it is the legal advice to Council.

Having reviewed the record, I am satisfied that it is subject to the common law solicitor-client privilege (Branch 1). It is a written communication of a confidential nature prepared by the City's legal advisor to the Chair and Members of the Committee. The contents of the record directly relate to the giving of legal advice.

In his representations, the appellant states that there has been an implied waiver of privilege by the large scale distribution of the record and by the references to the record in Planning Department reports.

The City states that the record is and has always been treated as a confidential communication between solicitor and client.

Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive the privilege [S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd., [1983] 4 W.W.R. 762, 45 B.C.L.R. 218, 35 C.P.C. 146 (S.C.) at 148-149 (C.P.C)]. Generally, disclosure to outsiders of privileged information would constitute waiver of privilege [J. Sopinka et al., The Law of Evidence in Canada at p. 669. See also Wellman v. General Crane Industries Ltd. (1986), 20 O.A.C. 384 (C.A.); R. V. Kotapski (1981), 66 C.C.C. (2d) 78 (Que. S.C.)].

Strictly speaking, since the client is the "holder" of the privilege, only the client can waive it. However, the client's waiver of the privilege can be implied from the actions of the client's solicitor.

In Order M-260, former Inquiry Officer Anita Fineberg considered the issue of implied waiver. Quoting from Solicitor-Client Privilege in Canadian Law, R.D. Manes and M.P. Silver, (Butterworth's, 1993) at pp. 189 and 191, she stated:

> Generally waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. Fairness is the touchstone of such an inquiry.

She also referred to the following passage from Wigmore on Evidence, vol. 8 (McNaughton rev. 1961), which was set out in The Law of Evidence in Canada (Markham: Butterworth's, 1992), by Sopinka, Lederman and Bryant at p. 666, and quoted with approval by the Ontario Court (General Division) in the recent case of Piche et al. v. Lecours Lumber Co. Ltd. et al. (1993) 13 O.R. (3d) 193 at 196:

> A privileged person would seldom be held to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not.

I adopt this analysis for the purposes of this appeal.

The appellant bases his claim that there has been an implied waiver of solicitor-client privilege on three factors. I shall address each of these factors in turn.

First, the appellant refers to specific paragraphs in the December and January Planning Department reports. The appellant states that these paragraphs reveal the nature of the advice sought.

In my view, disclosure of the nature of the advice one intends to seek is not sufficient to imply a waiver of solicitor-client privilege for the advice given if the advice, once received, is consistently treated in a confidential manner.

Second, the appellant claims that because one Planning Department report indicates that it is to be read in conjunction with the record, Council has, in effect, waived privilege for the record.

I have reviewed the report carefully. The reference to the record in the report clearly states that it is being sent under separate cover to the members of Council. Using the criterion of an objective assessment of this conduct set out above, and keeping in mind that the record is clearly marked confidential, I cannot conclude that the City's reference to the record constitutes an implied waiver of privilege.

Finally, the appellant states that privilege has been waived for the record by "the scale of its distribution within the City." According to the appellant, the record has "obviously been provided to the Planning Department and we presume to the Clerk's Department." Therefore, he argues, any privilege accorded the record has been waived by it leaving the guardianship of the Legal Department and/or Council.

Former Assistant Commissioner Tom Mitchinson addressed the issue of whether distribution of a record negates or waives solicitor-client privilege in Order M-739. That order involved a request for access to documentation concerning a by-law passed by the City of Mississauga (Mississauga) to deal with lap dancing. Mississauga claimed section 12 to exempt the records at issue. The records had been "cc'd" to a number of individuals.

The former Assistant Commissioner found that copying a document does not constitute a waiver of solicitor-client privilege if the person to whom the document was copied is a member of the municipal staff and there is no disclosure of the document outside the confines of the municipal corporation. I agree with this analysis and adopt it for the purposes of this appeal.

In the circumstances of this appeal, I have not been provided with any evidence by the appellant that the record itself was distributed to anyone outside of the City Council or City employees nor is there anything on the face of the record that would indicate wider distribution. Therefore, I find that the internal distribution of the record does not constitute an implied waiver of solicitor-client privilege.

In summary, I find that an objective consideration of the City's conduct with respect to the record does not demonstrate an intention to waive privilege. On the contrary, it appears that the City has consistently treated the record as confidential.

Because I have found that there has not been waiver of solicitor-client privilege, I find that the record is exempt under the first part of Branch 1 of section 12 of the Act.

ORDER:

I uphold the City's decision to deny access to the record.

Original signed by: July 24, 1997
Marianne Miller
Inquiry Officer