



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

ORDER M-1012

Appeal M-9700152

The Corporation of the Township of Cardiff



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NATURE OF THE APPEAL:

The Corporation of the Township of Cardiff (the Township) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for copies of any correspondence from the Township's solicitor concerning the requester and a named individual who is a public official.

The Township identified three records in response to the request and denied access to them on the basis of section 12 (solicitor-client privilege) of the Act.

The requester (now the appellant) appealed the Township's decision. During mediation, the appellant indicated that he was only pursuing access to two of the records.

This office provided a Notice of Inquiry to the appellant and the Township. Because the records appeared to contain the personal information of the appellant and other individuals, the Appeals Officer raised the possible application of section 38(a) (discretion to refuse requester's own information), as well as section 38(b) (unjustified invasion of personal privacy) in the Notice of Inquiry. Representations were received from both parties. In his representations, the appellant raised section 16 of the Act, the so-called public interest override.

Record 1 is a letter from a lawyer for the Township's insurer to the Township. Record 2 is a letter from the Township's lawyer to the Township. The records relate to complaints made by the appellant.

DISCUSSION:

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/SOLICITOR-CLIENT PRIVILEGE

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I find that both records relate to a matter raised by the appellant and, therefore, contain his personal information as well as that of other individuals.

Under section 38(a) of the Act, the Township has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. Section 38(a) states:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 9, 10, 11, **12**, 13 or 15 would apply to the disclosure of that personal information. [emphasis added]

The Township has exercised its discretion to refuse access to the records at issue under section 12. In order to determine whether the exemption provided by section 38(a) applies to the information in these records, I will first consider whether the exemption in section 12 applies.

[IPC Order M-1012/October 2, 1997]

Section 12 of the Act 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.

This section consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1);
and
2. a record which 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 Township relies on both branches of the exemption.

In order for the records to be subject to the common law solicitor-client privilege (Branch 1), the Township must provide evidence that the records satisfy 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]

The Township submits that Record 1 is a letter from the law firm representing the Township's indemnity insurers which provides advice to the Township with respect to a potential claim. The Township submits that Record 2 is a reply from its solicitors to a request for legal advice.

Having reviewed the records, I am satisfied that both records are subject to the first part of the common law solicitor-client privilege (Branch 1). They are written communications of a confidential nature which contain legal advice. With respect to part (c) of the test, I am satisfied that, in the circumstances of this appeal, the law firm which prepared Record 1 was representing the interests of the Township and, therefore, the communication was between a legal advisor and its client, the Township. I am also satisfied that Record 2 represents communication between the Township's lawyers and their client, the Township.

The appellant states that the named individual, who is a member of the Township Council, cannot be considered a client because the appellant's complaint relates to him. The appellant has provided a copy of the minutes of a Township Council meeting where his complaints appear to have been discussed in camera and which indicate that the named individual was present at the in camera meeting. If the appellant is claiming that the Township waived solicitor-client privilege by discussing these matters in front of the named individual, I do not agree. The individual is a member of Council and the appellant's complaints were about not only the actions of the individual but also the actions of Council with respect to the complaint. Accordingly, solicitor-client privilege has not been waived.

Therefore, section 12 of the Act applies and Records 1 and 2 are exempt under section 38(a).

The appellant submits that releasing these documents would be in the best interest of the public under section 16 of the Act. Section 16 cannot apply to override the application of section 12.

Because I have found that the records are exempt under section 38(a), it is not necessary for me to consider the application of sections 38(b) or 14 of the Act.

ORDER:

I uphold the Township's decision.

Original signed by: _____
Marianne Miller
Inquiry Officer

October 2, 1997