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

ORDER M-1164

Appeal M-9800081

Regional Municipality of Waterloo

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BACKGROUND:

The appellant was formerly a civilian employee with the Waterloo Regional Police Service (the Police). She was dismissed from employment in 1982. She subsequently lodged a complaint with the Ontario Human Rights Commission (the OHRC) and initiated a civil action for wrongful dismissal against the Police. The Regional Municipality of Waterloo (the Municipality), as the funding source for the Police, supplied legal counsel (the Regional Solicitor) to represent and advise the Police in all matters relating to these two actions. In 1984, following negotiations between the appellant (through her counsel) and the Regional Solicitor, the parties arrived at a settlement of all outstanding issues and claims by the appellant against the Police.

NATURE OF THE APPEAL:

The Municipality received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for all information relating to the appellant in its possession. The Municipality located responsive records and granted partial access to them. The Municipality denied access to the remainder on the basis that they fell outside the scope of the Act pursuant to section 52(3) of the Act. The Municipality also claimed the exemption found in section 14 (invasion of privacy) of the Act as well as section 52(3) to 13 pages. The appellant appealed the Municipality's decision. In addition, the appellant claims that there should exist an audio tape of a telephone conversation between herself and a named individual. The conversation was apparently taped by the other individual at her home. The parties are aware of the identity of the other individual.

During the mediation stage of this appeal (and within 30 days from the Notice of Appeal), the Municipality issued a second decision letter in which it claimed the application of the exemption found in section 12 of the Act to a number of records. This claim was made "in the alternative", in the event that section 52(3) is found not to apply in the circumstances of this appeal.

Also during mediation, the Municipality informed this office that the audio tape does not exist within its custody or control. Therefore, the reasonableness of the Municipality's search for this record is included within the scope of this appeal.

This office provided a Notice of Inquiry to the appellant and the Municipality. Representations were received from both parties.

After the Notice of Inquiry was issued, and while the issues in this appeal were being considered, this office released a number of orders dealing with the interpretation of section 52(3) and its provincial counterpart. Because these orders could have an impact on the present appeal, both parties were sent a Supplementary Notice of Inquiry and provided with an opportunity to make further representations. Additional representations were received from the Municipality.

RECORDS:

The records remaining at issue consist of occurrence reports, handwritten notes, memoranda, a transcript of a radio broadcast and correspondence, in draft and final form, primarily between the Regional Solicitor and other parties.

PRELIMINARY MATTER:

DELAY AND PREJUDICE TO THE INSTITUTION

The Municipality objects to the delay in resolving this appeal as a result of recent developments in decisions being issued by this office. Although not expressly stated, the Municipality alludes to some prejudice to it as a result of these actions. In this regard, the Municipality states:

> In this appeal, the delay has had the effect of allowing the "case law" established by Commissioner's Orders to change and become a possible factor in the outcome of the appeal. At the time the decision on access and appeal of the request were made, directions set by Commissioner's Orders had allowed a broad, literal interpretation of the exclusion in subsection 52(3). Because of the Commission's delay in resolving the appeal, recent Orders have narrowed the interpretation of the exclusion and are now being raised in resolving this appeal. For institutions, this amounts to having to aim at a moving target in establishing positions in an appeal.

I appreciate the concerns raised by the Municipality in this regard. Delay is something which the Commissioner's Office has made great efforts to avoid, and has, in fact, taken active steps to move appeals along in a timely fashion. However, the state of the law, especially in relatively new amendments to the legislation, tends to be very dynamic. As our experience and understanding of the issues and records to which they are applied develop, the need for flexibility in approaching new files must be recognized. The facts in this case, as well as in a number of other appeals, raised a number of interpretive questions stemming from a newly emerging direction which had been taken by this office. In order to fully and fairly adjudicate the issues in this appeal, it was necessary to allow the time to articulate the manner in which these types of appeals should be approached. In fairness to the parties, it was also necessary to go back to them to allow their input in the application of this new approach to their particular fact situations.

As the Municipality indicates, this has resulted in an approximately four month delay. This delay is unfortunate, however, the determination in question is jurisdictional, thus critical to the matter, and the delay was necessary in the final determination.

DISCUSSION:

JURISDICTION:

The first issue in this appeal is whether the records fall within the scope of sections 52(3) and (4) of the Act. These provisions read:

(3) Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

(4) This Act applies to the following records:

1. An agreement between an institution and a trade union.

2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

The interpretation of sections 52(3) and (4) is a preliminary issue which goes to the Commissioner's jurisdiction to continue an inquiry.

Section 52(3) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 52(4) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction. As a result, if I find that I do not have jurisdiction to deal with the records, it will not be necessary for me to deal with the substantive exemptions claimed by the Municipality.

The Municipality submits that the records fall within the parameters of paragraphs 52(3)1 and/or 3 of the Act.

Section 52(3)1

In order for a record to fall within the scope of this paragraph, the Municipality must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; **and**

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by that institution.

(Order M-815)

The Municipality indicates that the records in its possession document the Regional Solicitor's actions in providing legal advice to the Police regarding the human rights complaint and the civil action initiated by the appellant following her termination with the Police. The Municipality advises that it is an "arm's length" institution from the Police, however it is responsible for the funding of the Police, approval of its operating budget and provision of certain administrative services, including legal counsel. The Municipality states that the records at issue were either collected by the Regional Solicitor or were prepared by him in his capacity as legal representative of the Police and were used by him to defend both the interests of the Police and the Municipality.

The appellant simply states that she was never an employee of the Municipality.

I have reviewed the records and the representations and I am satisfied that they were collected or prepared by the Regional Solicitor on behalf of the Police which is an institution under the Act. I am also satisfied that the records were collected, prepared and used in preparation of the defence of anticipated proceedings before the OHRC and the courts and are, therefore, "in relation to" these anticipated proceedings. Finally, I find that the anticipated proceedings arose out of the termination of the appellant's employment with the Police.

In its representations, the Municipality indicates that the pending legal issues between the Police and the appellant were resolved in January 1984 as a result of a cash settlement. The Municipality attached a copy of a letter from the Regional Solicitor to the appellant's lawyer which outlines the terms and conditions of the settlement as well as an unsigned copy of the Release (which indicates that it is to be signed by the appellant).

In Order P-1618, Assistant Commissioner Tom Mitchinson found that section 65(6)1 of the provincial Act (which is the equivalent to section 52(3)1), is "time sensitive". He stated that:

> However, in my view, in order for section 65(6)1 to apply to these records in the context of the present appeal, it must be established that the proceedings or anticipated proceedings referred to are current or are in the reasonably proximate past so as to have some continuing potential impact for any ongoing labour relations issues which may be directly related to the records.
>
> As previously stated, the OPP's investigation into the appellant's husband's complaint and the subsequent complaint made by appellant and her husband to the PCC took place six years ago.

I agree with and adopt the approach outlined by the Assistant Commissioner to the application of section 52(3)1 for the purposes of the present appeal. The issue of timeliness was the subject of the Supplementary Notice of Inquiry.

In its representations on this issue, the Municipality acknowledges that it may appear that the records, which are between 14 and 16 years old, do not relate to a current legal issue because of the lapse of time since their creation and because the matter was settled. However, the Municipality argues that the agreement which resolved these matters is in current and continuing force. Therefore, it submits that it maintains a legal and current interest in the records that were compiled at the time that the agreement was struck.

Moreover, the Municipality indicates that the agreement contained specific conditions. Among other things, the appellant agreed not to make any public statement about the settlement or its terms. The Municipality recognizes that it cannot compel a requester to advise it of his or her intent in requesting the information. However, the Municipality argues that "the Head must consider all relevant circumstances when deciding to exercise discretionary powers such as applying exclusions or exemptions from access". The Municipality submits that it must consider that the appellant may use the records to violate the terms of the agreement or that the information in the records may provide her with a new avenue of relief from the courts.

Finally, the Municipality cannot understand why, when the records would not have been released to the appellant immediately after the agreement was signed, it should make any difference to release them now simply because of the passage of time. The Municipality argues that the intent of the Legislature in enacting the amendments to the Act is to "level the playing field in labour relations". The Municipality submits that:

> Following the proclamation of [the Act], public servants were afforded a right of access to employment records that far exceeded that of employees in the private sector. In this respect, one could interpret the intent of the amendment to exclude employment records entirely from a statutory right of access. For any objective observer of the current government's actions with respect to labour law or its election manifesto, the *Common Sense Revolution*, this understanding would be consistent.

In Order P-1618, the Assistant Commissioner considered whether an institution's interests following the conclusion of the matter at issue could be viewed as "continuing". He said:

> Although the Ministry states that "the record at issue is being maintained for the purpose of responding to further complaints that may be filed by the appellant's husband and for the purpose of maintaining an employment related record concerning a matter which could be deemed relevant in a future related or unrelated proceedings involving the subject officer", I am not persuaded that there are any specific "anticipated proceedings" relating to the complaint file records.
> ...
>
> The fact that the appellant has requested access to the complaint file, in my view, is not sufficient to establish that issues related to the request are current or ongoing, nor do the precautionary file management practices of the Ministry persuade me that the subject matter of the particular investigation file in this appeal remains current.

I have taken these comments into consideration in the circumstances of the current appeal. In my view, the evidence is clear that the issues relating to all legal actions which had been initiated and the possibility of any future legal actions arising from the appellant's termination, had been resolved in 1984 by way of cash settlement. I do not agree with the Municipality that the matter is in "continuing force". In my view, the Municipality has not provided sufficient evidence to substantiate its arguments that any other matters as between it and the appellant have any reasonable prospect of arising. Further, in my view the Municipality's determination that a decision under section 52(3) is discretionary is incorrect. Either the records fall within the exclusion or they do not. The Municipality is not in a position to exercise its discretion in this determination. Therefore, the simple fact that the appellant may violate the terms of the agreement, or that she may find other grounds for legal action, do not, in and of themselves, demonstrate that anticipated proceedings exist. The Municipality has not established that the appellant has any legal right, after 14 years, to bring any further action in this matter. Nor has the Municipality established that there is any reasonable likelihood of legal action arising from a violation of the terms of the agreement or that the records at issue have any relation to such a legal action, if one should exist.

With respect to the Municipality's last argument, I do not accept its interpretation of the intent of the Legislature. If this were the case, in my view, it would have been very simple for the amendments to clearly state that employment records are not subject to the Act. The Legislature did not do this. Rather, the amendments were phrased in such a manner as to place limits on the extent to which "employment records" fall outside the ambit of the Act.

In Order P-1618, Assistant Commissioner Mitchinson addressed the intent of the Legislature in his discussion of the issue of "time sensitivity". He stated:

> In my view, section 65(6) must be understood in context, taking into consideration both the stated intent and goal of the Labour Relations and Employment Statute Law Amendment Act (Bill 7) - to restore balance and stability to labour relations and to promote economic prosperity; and overall purposes of the Act - to provide a right of access to information under the control of institutions and to protect the privacy of and provide access to personal information held by institutions. When proceedings are current, anticipated, or in the reasonably proximate past, in my view, there is a reasonable expectation that a premature disclosure of the type of records described in section 65(6)1 could lead to an imbalance in labour relations between the government and its employees. However, when proceedings have been completed, are no longer anticipated, or are not in the reasonably proximate past, disclosure of these same records could not possibly have an impact on any labour relations issues directly related to these records, and different considerations should apply.

I agree generally with these comments and adopt them for the purposes of this appeal.

Therefore, based on the settlement of the issues between the parties and the length of time that has elapsed since this matter first arose (some 14 years), I find that there are no "proceedings" anticipated or existing in the reasonably proximate past. Therefore, I find that the second and third requirements for section 52(3)1 have not been established. For this reason, I find that the records do not fall within the scope of the exclusion in section 52(3)1.

Section 52(3)3

In order for a record to fall within the scope of paragraph 3 of section 52(3), the Municipality must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which that institution has an interest.

(Order P-1242)

Requirement one

Similar to my finding above under section 52(3)1, I am satisfied that the records were collected, prepared, maintained and used by the Regional Solicitor for the Municipality on behalf of the Police which is an institution under the Act. Accordingly, the first part of the section 52(3)3 test has been established.

Requirement two

In Order P-1223, Assistant Commissioner Mitchinson stated:

> In the context of section 65(6) [the provincial equivalent of section 52(3)], I am of the view that if the preparation (or collection, maintenance, or use) of a record was for the purpose of, as a result of, or substantially connected to an activity listed in sections 65(6)1, 2, or 3, it would be "in relation to" that activity.

I agree with the Assistant Commissioner's interpretation of this phrase.

The Municipality states that the records consist of communications between the Regional Solicitor, the police commission, senior officers or external solicitors. In reviewing the records, I note that not all are communications. However, I am satisfied that, if they are not direct communications, they are notes made which reflect the content of these communications. Therefore, I find that the preparation, collection, maintenance or use of these records is "in relation" to communications and/or discussions conducted by the Municipality on behalf of the Police. Accordingly, the second part of the section 52(3)3 test has been established.

Requirement three

The Municipality submits that the communications are related to the appellant's termination which constitutes an employment-related matter. In this regard, it argues that the Municipality and the Police **had** an interest in the matter in that they were liable for the costs associated with the actions initiated by the appellant.

The appellant states that she is no longer pursuing any matter with the Municipality (or presumably, the Police). As I noted above, the Municipality substantiates this by attaching to its representations a settlement letter and Release as between the appellant and the Police in which all outstanding issues relating to the appellant's actions against the Police are resolved and releasing the Police from all future claims by the appellant.

Several recent orders of this office have considered the application of section 52(3)3 in circumstances where there is no reasonable prospect of the institution's "legal interest" in the matter being engaged (Orders P-1575, P-1586, M-1128, P-1618 and M-1161). The conclusion of this line of orders has essentially been that an institution must establish an interest that has the capacity to affect its legal rights or obligations, and that there must be a reasonable prospect that this interest will be engaged. The passage of time, inactivity by the parties, loss of forum or conclusion of a matter have all been considered in arriving at a determination of whether an institution has a legal interest in the records.

I have considered the Municipality's arguments above in the context of section 52(3)3. In my view, due to the passage of time since the matter was completely resolved through the cash settlement, and the insufficiency of evidence that any other interest could be engaged with respect to these records as a result of their disclosure or of any actions by the appellant, I find that the Municipality has not demonstrated that it has sufficient legal interest in the records to bring them within the scope of section 52(3)3.

As a result of my findings above, the records all fall within the ambit of the Act. As I indicated above, the Municipality has claimed the application of section 14(1) to 13 pages (Record 3, page 1 of Record 6, and Records 8, 10, 27, 28, 29, 30, 36 and 38) and section 12 to 19 records (Records 2, 6, 7, 12, 14, 16, 18, 22, 23, 24, 31, 34, 39, 41, 42, 43, 44, 48 and 49).

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. The Municipality takes the position that while the majority of records contain the appellant's personal information, Record 3, page 1 of Record 6, and Records 8, 10, 27, 28, 29, 30, 36 and 38 do not. The Municipality indicates that these records contain communications between the Regional Solicitor and a lawyer who had been privately retained by another individual. I have reviewed the records and I find that they all contain the appellant's personal information as they either directly or indirectly relate to her employment situation and/or subsequent litigation. This includes Record 3, page 1 of Record 6, and Records 8, 10, 27, 28, 29, 30, 36 and 38.

I find that Record 3, page 1 of Record 6, and Records 8, 10, 27, 28, 29, 30, 36 and 38 also contain the personal information of another identifiable individual. In addition to those already referred to, I find that Records 13, 14, 17, 18, 26, 34, 41 and 48 contain the personal information of a number of identifiable individuals.

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

Under section 38(a) of the Act, the Municipality has the discretion to deny access to an individual's own personal information in instances where certain exemptions, including section 12, would apply to the disclosure of that personal information.

As I indicated above, the Municipality claims that section 12 applies to exempt Records 2, 6, 7, 12, 14, 16, 18, 22, 23, 24, 31, 34, 39, 41, 42, 43, 44, 48 and 49 from disclosure. I note that Records 51 and 52 are draft duplicates of parts of other records (Records 14 and 6, respectively) prepared by the Regional Solicitor and I will, therefore, include them in this discussion.

Section 12 of the Act 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 the Municipality for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

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

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 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 210]

The Municipality submits that a number of the records contain legal advice. I have reviewed the records and find that Records 14 (duplicate Record 51), 18, 22, 24, 31, 51 and 52, plus page 4 of Record 2 and page 2 of Record 6 (duplicate Record 52) contain drafts of correspondence prepared by the Regional Solicitor. I am satisfied that the information in these records represents the confidential legal advice of the Regional Solicitor on issues relating to the appellant's OHRC complaint and civil action. Therefore, I find

that these records and parts of records qualify for exemption under the communication privilege component of section 12 as they are confidential communications between a solicitor and his client which are directly related to the seeking and giving of legal advice.

Pages 2 and 3 of Record 2 are correspondence between the Regional Solicitor and the OHRC which are attached to Page 1. Page 1 of Record 2 is a letter from the Regional Solicitor to the Police seeking instructions relating to the attached correspondence. I find that this package, in its entirety, contains confidential communications between the solicitor and his client directly relating to the seeking and giving of legal advice and is, therefore, exempt under the communication privilege component of section 12.

Page 1 of Record 6 is a memorandum from the Regional Solicitor to the Deputy Chief. I find that it forms part of the on-going confidential communications between the Regional Solicitor and the Police relating to the seeking and giving of legal advice.

Page 3 of Record 6 is a copy of a letter written by the appellant. Although it is attached to Record 6, the Municipality does not refer to it in its description of this record. It is not clear whether this page was inadvertently included, however, the Municipality's representations do not specifically address it. Further, I have been advised that a copy of this letter was previously provided to the appellant and that it is not at issue.

The Municipality claims that Records 7, 33 and 44 also fall within the solicitor-client communication privilege.

Record 7 contains a memorandum from the Regional Solicitor to the Chief (page 1). I am satisfied that it forms part of the on-going confidential communications between the Regional Solicitor and the Police relating to the seeking and giving of legal advice and thus qualifies for exemption under the communication privilege component of section 12. Attached to this memorandum is a letter dated May 10, 1983 to the Regional Solicitor from the OHRC (pages 2 - 3). The appellant was provided with a copy of this attached letter and it is not at issue in this appeal.

Record 43 contains a "confidential" memorandum from the Chief to the Regional Solicitor in which the Chief apprises the Regional Solicitor of the status of the matter involving the appellant. I am satisfied that this memorandum was provided to the Regional Solicitor as part of his on-going confidential communications with the Chief for the purpose of giving or receiving legal advice. Therefore, this record qualifies for exemption under the communication privilege component of section 12.

Record 44 consists of a copy of a phone message from the appellant's lawyer (page 1), a memorandum from the Regional Solicitor to the Chief (page 2), a letter to the Regional Solicitor from the appellant's lawyer (page 3), and several attached letters which were provided to the Chief and the Regional Solicitor by the appellant's lawyer (pages 4 - 7). In reviewing this package, I am satisfied that page 2 of the record, along with the attachments, contains a confidential communication from the Regional Solicitor to the Chief which relates to the giving of legal advice and thus qualifies for exemption under the communication privilege

component of section 12. I am not persuaded that page 1 was used by the Regional Solicitor in formulating or giving the legal advice in page 2 or in any other record, nor does this page contain a confidential communication between a solicitor and his client for the purpose of legal advice. Therefore, page 1 is not exempt.

In summary, I find that Records 2, 14, 18, 22, 24, 31, 43, 51 and 52, plus pages 1 and 2 of Record 6, page 1 of Record 7, and pages 2 - 7 of Record 44 contain information which falls within the solicitor-client communication privilege in section 12. I find further that the remaining pages of Records 6, 7 and 44 do not qualify for exemption under this exemption.

The Municipality claims that the remaining records (Records 12, 16, 23, 34, 39, 41, 42, 48 and 49) fall within the litigation privilege component of the section 12 exemption. Having reviewed these records, I am satisfied that they were prepared or obtained by the Regional Solicitor for the purpose of then existing litigation. I am also satisfied that these records were prepared or obtained with an intention that they be confidential in the course of the litigation.

However, as I indicated above, all of the litigation between the appellant and the Municipality (and Police) was settled in 1984. In Order P-1551, Inquiry Officer Holly Big Canoe addressed the effect of the termination of litigation on the application of the exemption in section 19 of the provincial Act (which is similar to section 12). She stated at page 7:

> Litigation privilege ends with termination of the litigation for which the documents were prepared or obtained [Boulianne v. Flynn, [1970] 3 O.R. 84 at 90 (Co. Ct.); Meaney v. Busby (1977), 15 O.R. (2d) 71 (H.C)]. The exception to this rule is where the policy reasons underlying the privilege remain, despite the end of the litigation. For example, privilege may be sustained in related litigation involving the same subject matter in which the party asserting the privilege has an interest [Carleton Condominium Corp. v. Shenkman Corp. (1977), 3 C.P.C. 211 (Ont. H.C.)]. In other words, the law will only give effect to the privilege while the purpose for its recognition continues to be served. Unlike solicitor-client communication privilege, the purpose of which is to protect against disclosures which could have a chilling effect on the solicitor-client relationship, the purpose of litigation privilege is to protect against disclosures which could have a chilling effect on the lawyer's preparation for the particular litigation, or any related litigation arising out of the same subject matter.

She recognized, however, that this general rule may be excepted further. She states at pages 6 and 7 of Order P-1551:

> Under the litigation privilege or work product rule, a distinction has been drawn between "ordinary" work product (documents gathered from third parties, the document itself or factual information) and "opinion" work product (counsel's mental impressions, conclusions, opinions or legal theories), with the latter enjoying a heightened protection

> [R.J. Sharpe, "Claiming Privilege in the Discovery Process", Law Society of Upper Canada Special Lectures, 1984 (Richard DeBoo Publishers, 1984), pp. 175-177; In re Sealed Case, 676 F.2d 793 at 809-810 (U.S.C.A., Dist. Col., 1982); C.A.); Mancao v. Casino (1977), 17 O.R. (2d) 458 (H.C.)].
> ...
>
> As indicated above, "opinion" work product, which consists of counsel's mental impressions, conclusions, opinions or legal theories, enjoys a heightened protection over ordinary work product.

Finally, in Order P-1342 Inquiry Officer Big Canoe examined whether the limitations on the common law privilege should also generally apply to Branch 2 of the exemption in section 19 of the provincial Act (which, as I indicated above, is similar to section 12). She concluded:

> ... the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation. In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships.
> ...
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> Because the rationale behind the two branches of the exemption is essentially the same, the fact that the litigation in question no longer exists and that the information has been disclosed to another party should, as with the common law privilege, lead to the conclusion that the privilege no longer applies. There is no suggestion in the Williams Commission Report or in the Proceedings of the Standing Committee of the Legislative Assembly that the second branch of the exemption was added to ensure that litigation privilege, which would be lost through waiver or the termination of litigation at the common law, would endure simply because the now terminated litigation had been conducted by Crown counsel. Nor is there any suggestion that privilege attaching to the government's solicitor-client relationships could survive waiver. In fact, the above-noted passage from the Standing Committee debates suggests exactly the opposite. Moreover, in my view, an interpretation which renders Branch 2 of the exemptions more durable than the common law privilege would be inconsistent with the statutory principle that exemptions from the right of access should be "limited and specific" (section 1(a)(ii)), and contrary to one of the fundamental purposes of the Act, which is the promotion of open government (Order 187).

I agree with these comments and conclusions. In reviewing the above referenced records, I am satisfied that Records 12 and 23 reflect a line of thought or strategy that the Regional Solicitor was contemplating in the litigation and this constitutes "opinion" work product. I am satisfied that the rationale for litigation

privilege is present with respect to these two records notwithstanding the termination of litigation. However, with respect to the remaining seven records, which are not "opinion" but rather "ordinary" work product, all anticipated litigation involving the Municipality (and the Police) and the appellant has been settled and, on the basis of the representations and the contents of the records, I am not satisfied that disclosure of the remaining records will harm the adversarial process by hindering the investigation and preparation of future cases of this nature. Therefore, the rationale for litigation privilege is no longer present and, accordingly, I find that Records 16, 34, 39, 41, 42, 48 and 49 do not qualify for exemption under either branch of section 12.

In summary, I find that only Records 12 and 23 qualify for exemption under the litigation privilege component of section 12. As I indicated above, Records 2, 14, 18, 22, 24, 31, 43, 51 and 52, plus pages 1 and 2 of Record 6, page 1 of Record 7 and pages 2 - 7 of Record 44 qualify for exemption under the communication privilege component of the exemption. As all of these records contain the appellant's personal information, they are properly exempt under section 38(a) of the Act.

INVASION OF PRIVACY

The Municipality claims that disclosure of Record 3, page 1 of Record 6, and Records 8, 10, 27, 28, 29, 30, 36 and 38 would constitute an unjustified invasion of privacy. I also found that Records 13, 14, 17, 18, 26, 34, 41 and 48 contain the personal information of individuals other than the appellant. I found above that page 1 of Record 6 and Records 14 and 18 are exempt under section 38(a). Therefore, I will not consider these three records further in this discussion. However, I will consider whether the disclosure of the remaining six records would also constitute an unjustified invasion of privacy.

Where a record contains the personal information of both the appellant and another individual, section 38(b) allows the institution to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy.

Where, however, the record only contains the personal information of another individual, section 14(1) of the Act prohibits an institution from disclosing it except in the circumstances listed in sections 14(1)(a) through (f). Of these, only section 14(1)(f) could apply in this appeal. It permits disclosure if it "does not constitute an unjustified invasion of personal privacy." As I noted above, the Municipality argues that the records do not contain the appellant's personal information and the determination should, therefore, be made under section 14(1). However, as I have found that these records do contain the appellant's personal information, I will consider whether section 38(b) applies to them.

In both these situations, sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

The Municipality does not claim that any of the presumptions in section 14(3) apply in the circumstances of this appeal. In reviewing the records I find that none of the presumptions applies. The Municipality submits that disclosure of the 13 pages which it originally referred to would reveal the identity of the individual who privately retained counsel after the appellant initiated her complaint as well as the substance of the communications between this individual's counsel and the Regional Solicitor. It appears that the Municipality is alluding to the confidentiality of the communications (section 14(2)(h)) and the sensitivity of the issues insofar as the matter relates to the individual who retained private counsel (section 14(2)(f)). These factors both weigh in favour of privacy protection.

I agree that the individual who retained private counsel would have a reasonably held expectation that any communications with the Regional Solicitor relating to his position would be confidential. In addition, I find that an OHRC complaint against the organization which may also have implications with respect to individuals in that organization would be considered highly sensitive. Therefore, I find that both sections 14(2)(f) and (h) are relevant in the circumstances of this appeal. In my view, these factors relate not only to the information in Records 3, 8, 10, 27, 28, 29, 30, 36 and 38, but also to the references to identifiable individuals in Records 13, 17, 26, pages 2 and 3 of Record 34 and Record 41.

I have also considered that a fairly long period of time has elapsed since this matter arose and these records were created. In my view, the possibility that, by revealing the identity of these individuals, they may be contacted and forced to relive this event after they have long moved past it is a consideration which weighs in favour of privacy protection.

I note that the information on page 5 of Record 34 is clearly known to the appellant Similarly, the information in Record 48 was provided by the appellant. In my view, this is a consideration which, in the circumstances, weighs heavily in favour of disclosure of the personal information in these two pages. I find that neither section 14(2)(f) or (h) are relevant to this information.

The appellant does not address this issue.

In balancing the appellant's rights to access and the rights of the other individuals referred to in the records to protection of their privacy, I find that, with the exception of page 5 of Record 34 and Record 48, the factors and consideration referred to above weigh in favour of privacy protection. Accordingly, I find that Records 3, 8, 10, 13, 17, 26, 27, 28, 29, 30, 36 and 38, and 41 and pages 2 and 3 of Record 34 are properly exempt under section 38(b).

I find further that, in the balance, the considerations favour disclosure of page 5 of Record 34 and Record 48. This information should, therefore, be disclosed to the appellant.

Remaining responsive records

The Municipality has not claimed any exemptions for the remaining records which were found to be responsive to the appellant's request (Records 1, 4, 5, 9, 11, 15, 19, 20, 21, 25, 32, 33, 35, 37, 40, 45, 46, 47 and 50). As no mandatory exemptions apply to these records, they should all be disclosed to the appellant.

REASONABLENESS OF SEARCH

As I indicated above, the appellant believes that there should be a tape recording of a telephone conversation between herself and a named individual. The Municipality indicates that this record does not exist.

In cases where a requester provides sufficient details about the records which he or she is seeking and the Municipality indicates that records do not exist, it is my responsibility to insure that the Municipality has made a reasonable search to identify any records that are responsive to the request. The Act does not require the Municipality to prove with absolute certainty that records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Municipality must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records.

A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request.

In prefacing its representations on this issue, the Municipality indicates that the Regional Solicitor involved in the matter at issue has long retired from the Municipality. Therefore, the Municipality submits that it is not possible to state with complete certainty what records he may have had in his possession during this time. However, the Municipality has provided an affidavit affirmed by the current Regional Solicitor which outlines the steps she took to locate responsive records.

The Regional Solicitor states that she directed the Supervisor, Legal Support Services, Legal Services Division to conduct a search for responsive records. In doing so, the Supervisor located a file which was in records storage. This file contained records compiled by the former Regional Solicitor for the defence of the OHRC complaint and civil litigation commenced by the appellant following her termination from the civilian staff of the Police in 1982. The Regional Solicitor indicates that she reviewed the file which consisted solely of paper records. She affirms further that there was no information in the file that would lead her to believe that an audio tape had been retained in or removed from the file.

The Regional Solicitor also states that she conducted a search through records which the former Regional Solicitor had left to her, as his successor, upon his retirement. She stated that none of these records pertained to the appellant.

Finally, the Regional Solicitor indicates that she contacted the Police to determine whether an audio tape relating to the appellant was in the possession of that institution. She says the Police advised her that they did not have such an audio tape.

Based on the representations, I am satisfied that the searches which were conducted by the Municipality were done by experienced and knowledgeable individuals and included locations where responsive records could reasonably be expected to be found. Therefore, I am satisfied that the search conducted by the Municipality was reasonable in the circumstances.

ORDER:

1. The records all fall within the jurisdiction of the Act.

2. I uphold the Municipality's decision to withhold the following records from disclosure: Records 2, 3, 8, 10, 12, 13, 14, 17, 18, 22, 23, 24, 26, 27, 28, 29, 30, 31, 36, 38, 41, 43, 51, 52 and pages 1 and 2 of Record 6, page 1 of Record 7, pages 2 and 3 of Record 34 and pages 2 - 7 of Record 44.

3. I order the Municipality to disclose the remaining records and parts of records to the appellant by providing her with a copy of them on or before **January 5, 1999**.

4. The Municipality's search for responsive records was reasonable and this part of the appeal is dismissed.

5. In order to verify compliance with the terms of this order, I reserve the right to require the Municipality to provide me with a copy of the records and portions of records which are disclosed to the appellant pursuant to Provision 3.

Original signed by: December 14, 1998
Laurel Cropley
Adjudicator

APPENDIX "A"

TABLE OF RECORDS WHICH ARE EXEMPT FROM DISCLOSURE

RECORD NUMBER	DESCRIPTION OF RECORD	WITHHOLD IN FULL OR PART
2	Letter dated Aug. 31, 1983 to Police from Regional Solicitor (page 1); letter from OHRC to Regional Solicitor dated Aug. 26, 1983 (page 2); letter from Regional Solicitor to OHRC dated Aug. 31, 1983 (page 3); draft of response to OHRC prepared by Regional Solicitor dated August 31, 1983 (page 4)	withhold in full
3	Letter dated Sept. 1 1983 from a lawyer to Regional Solicitor	withhold in full
6	Memorandum from Regional Solicitor to Deputy Chief dated May 25, 1983 (page 1); draft response to OHRC prepared by Regional Solicitor dated May 25, 1983 (page 2); letter written by appellant dated May 20, 1983 (page 3)	withhold pages 1 and 2
7	Memorandum from Regional Solicitor to Chief dated May 12, 1983 (page 1) with letter dated May 10, 1983 from OHRC to Regional Solicitor attached (page 2)	withhold page 1
8	Letter from a lawyer to Regional Solicitor dated May 25, 1983	withhold in full
10	Letter from a lawyer to Regional Solicitor dated Feb. 1, 1983	withhold in full
12	Note to file	withhold in full
13	Letter to OHRC from Regional Solicitor dated Jan. 24, 1983	withhold in full
14	Letter from Regional Solicitor to a number of individuals dated Jan. 13, 1983 with draft letters attached	withhold in full
17	Letter to OHRC from Regional Solicitor dated Jan. 6, 1983	withhold in full
18	Duplicate of Record 17 plus attachments	withhold in full
22	Draft letter to appellant's counsel from Regional Solicitor dated Sept. 10, 1982	withhold in full
23	Note to file	withhold in full
24	Draft of letter to appellant's counsel from Regional Solicitor dated may 27, 1982	withhold in full
26	Note	withhold in full

RECORD NUMBER	DESCRIPTION OF RECORD	WITHHOLD IN FULL OR PART
27	Letter to a lawyer from Regional Solicitor dated Feb. 26, 1985	withhold in full
28	Letter from a lawyer to Regional Solicitor dated march 6, 1985	withhold in full
29	Letter from a lawyer to Regional Solicitor dated June 9, 1983	withhold in full
30	Letter from a lawyer to Regional Solicitor dated June 6, 1983	withhold in full
31	Handwritten notes	withhold in full
34	Occurrence Report dated April 9, 1982	withhold pages 2 - 3
36	Letter from a lawyer to Regional Solicitor dated October 25, 1983 with attachments	withhold in full
38	duplicate of page 2 of Record 36	withhold in full
41	Memorandum from Inspector (Community Relations Branch) to Deputy Chief dated Feb. 5, 1982	withhold in full
43	Memorandum from Chief to Regional Solicitor dated October 14, 1982	withhold in full
44	Telephone message dated July 7, 1982 (page 1); Memorandum to Chief from Regional Solicitor dated July 9, 1982 (page 2) plus attachments (page 3 - 7)	withhold pages 2 - 7
51	Duplicate of pages 3 and 4 of Record 14	withhold in full
52	Duplicate of page 2 of Record 6	withhold in full