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

ORDER M-1165

Appeal M-9800038

Township of West Lincoln

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NATURE OF THE APPEAL:

A request was made to the Township of West Lincoln (the Township) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to a particular municipal address and its use. The Township located records responsive to the request and denied access, in part, based on the following exemptions under the Act:

- closed meeting - section 6(1)(b);
- advice or recommendations - section 7(1);
- law enforcement - section 8(1)(b); and
- solicitor-client privilege - section 12.

The Township also stated that records relating to inspections of the subject property did not exist. The requester appealed the denial of access.

During the mediation of this appeal, the requester (now the appellant) advised that he was only appealing the denial of access to one record: a letter sent by Township staff to the Township solicitor requesting a legal opinion on the permitted occupancies at the subject property. As the Township has only claimed section 12 of the Act for this one record, this will be the only exemption at issue in this appeal.

The appellant also believes that copies of reports/records relating to the inspection of the property by Township staff must exist, and therefore the question of whether additional records exist (reasonable search) is at issue in this appeal. During mediation, the Township provided the appellant with notes from the By-law Enforcement Officer pertaining to the subject property, however, the appellant still believes that more records should exist in relation to inspections of the property.

This office provided a Notice of Inquiry to the Township and the appellant. Representations were received from both parties. In his representations, the appellant claims that the Township had waived solicitor-client privilege in the record at issue in that it had read out part of the legal opinion to him during a meeting. As this issue was not previously canvassed in the Notice of Inquiry a supplemental notice was sent to the Township asking for representations on this issue. The Township provided supplemental representations. The Township's supplemental representations were provided to the appellant, however, he did not provide a reply in response to them.

I subsequently wrote to the parties and advised them that in order to address the issues in this appeal it was first necessary for me to determine whether the Township has waived solicitor-client privilege in the legal opinion which was prepared in response to the record at issue. I sent the parties a further supplementary Notice of Inquiry and asked them to address specific questions regarding the Township's treatment of the legal opinion. Representations were received from both the Township and the appellant.

RECORD:

The record at issue in this appeal consists of a letter dated September 25, 1997, from the Township's Director of Planning to the Township solicitor.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 12 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).

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

[Order 49. See also Orders M-2 and Order 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 an 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.

[See Order 210]

The Township submits that the record is exempt under Branch 2 of the exemption in that it was prepared for use in giving legal advice to Township Council in contemplation of potential litigation. The Township also claims that the record was created or obtained specially for the lawyer's brief for existing or contemplated litigation and, is therefore, exempt under the second part of Branch 1. The Township does not provide any further clarification or evidence regarding the nature of the contemplated litigation. Accordingly, I am not satisfied that it is exempt under this part of the section 12 test.

However, on its face, the letter is clearly addressed to legal counsel from the Township's Director of Planning, and is seeking legal advice on a legal issue. Accordingly, I find that the letter qualifies for exemption under Branch 2 of the section 12 exemption as it was prepared for counsel retained by the institution for use in giving legal advice.

As I indicated above, the appellant claims that the Township has waived privilege in the document. In this regard, he states:

> [T]he Township used my October 8th/97 letter of complaint as a reference for the Township Solicitor to frame his legal opinion; advised me they were doing this and then read part of the legal opinion to me at a subsequent meeting. By sharing both their intent and the Solicitors opinion the matter no longer retains confidentiality.

In responding to the supplemental Notice of Inquiry on this issue, the Township indicates that the appellant's letter was forwarded to its solicitor along with other background materials in order that he could have an accurate history prior to forming a legal opinion. In my view, the fact that the appellant's letter was used in preparing the legal opinion does not go to the issue of waiver. Nor does the mere fact that the institution advised him that they were doing so. A statement that a legal opinion is being sought does not in any way reveal the nature of the issue to which the legal opinion relates as defined by the institution and its solicitor, nor does it impinge on any expectation of confidentiality on the part of the institution regarding the content of the opinion.

In response to whether the Township disclosed part of the legal opinion, it states initially that:

> Our solicitor's legal opinion in total was formed over the course of three separate letters in excess of ten pages of written material. For [the appellant] to claim that confidentiality has been breached because he heard a portion of one part of one letter is a supposition that cannot be supported given the extent of the legal opinion rendered.

In its final representations on this issue, the Township advises that it did not reveal the contents of any part of the legal opinion directly to the appellant. It indicates further that the appellant may have been told by individual members of Council that the legal opinion did not support litigation, but that this does not constitute waiver.

In my view, this is akin to providing the "bottom line" of a legal opinion. In Order MO-1172, I addressed a similar issue as follows:

> I have reviewed page 3 of Report No. 18 of the Committee of the Whole. I find that it contains a small portion of the "bottom line" of the advice provided to Council from the City's solicitor. It very briefly outlines the City Solicitor's view of what the City is entitled to do and what is required in order for it to do so. The bulk of the legal opinion deals with other aspect of this issue. In my view, it is often necessary or desirable for a public body to refer to the crux of the advice its solicitors provide to it in order to carry out its mandate and responsibilities. In many cases, the public body will intend to retain the privilege, while at the same time provide a minimal degree of public disclosure to ensure the proper discharge of its functions. In the usual case, this should not of itself constitute express waiver of the privilege attaching to the underlying solicitor-client communication (Order P-1559).
>
> This issue was recently addressed by the Federal Court of Appeal in Stevens v. Canada (Prime Minister) (1998), 161 D.L.R. (4th) 85 at pp.108 -109. In this case, pursuant to an access request under the federal Access to Information Act, a federal institution provided partial access to legal accounts, severing out the narrative portion of the accounts while providing access to the dollar amount of the accounts. In dealing with the issue of waiver in the freedom of information context, Linden J.A. stated on behalf of the Court:
>
> > In Lowry v. Can. Mountain Holidays Ltd. [(1984, 59 B.C.L.R. 137 (S.C.), at p. 143] Finch J. emphasized that all the circumstances must be taken into consideration and that the conduct of the party and the presence of an intent to mislead the court or another litigant are of primary importance.
> > ...
> >
> > I would add, with respect to the release of portions of the records, that, in light of these reasons, the Government has released more information than was legally necessary. The itemized disbursements and general statements of account detailing the amount of time spent by Commission counsel and the amounts charged for that time are all privileged. But it is the Government qua client which enjoys the privilege; the Government may choose to waive it, if it wishes, or it may refuse to do so. By disclosing portions of the accounts the Government was merely exercising its

> discretion in that regard. **As I mentioned earlier, a government body may have more reason to waive its privilege than private parties, for it may wish to follow a policy of transparency with respect to its activity. This is highly commendable; but the adoption of such a policy or such a decision in no way detracts from the protection afforded by the privilege to all clients**. [emphasis added]

Although the matter in Stevens arose in the context of disclosure under the federal Act, in my view, the Court's rationale may be similarly applied to the disclosure, generally, made by government institutions of information in their custody or control. This is not to say that an institution can never be found to have waived solicitor-client privilege by partial disclosure of a privileged document. Rather, in determining this issue, a decision-maker must be cognizant of the environment in which institutions operate and their responsibilities with respect to the public interest, which may include maintaining a "policy of transparency" regarding information which is used in the decision-making process.

In the circumstances of the current appeal, I am satisfied that in making the relatively minimal disclosure of a small portion of the "bottom line" of the advice, the City did not intend to waive privilege with respect to the record. Accordingly, I find that the City has not expressly waived privilege.

There is no evidence that the City provided access to the legal opinion to anyone other than City officials. As well, the City took active steps to preserve the confidentiality of the opinion. I am satisfied that the City treated the record as confidential. In the circumstances, although the City did provide a small portion of the "bottom line" of the advice, I am not satisfied that fairness or consistency would require a finding that the privilege ceased. Therefore, I conclude that the City did not implicitly waive privilege.

I find that this reasoning and my conclusion in this regard are equally applicable in the current appeal. In my view, the appellant has not established that the Township either explicitly, or by its actions, implicitly, waived privilege in its communications with its counsel relating to the seeking of legal advice. Accordingly, I find that the exemption in section 12 of the Act applies to this record.

REASONABLENESS OF SEARCH

The appellant believes that records of inspections of the subject property should exist. In this regard, he advises that at a meeting held at the Township offices on November 5, 1997, the Township Building Inspector referred to Township records which indicated that the subject property had been inspected on two occasions. Further, the appellant states that in correspondence between the Township and himself, the Township indicates that the Building Inspector has a statement that she visited the property. The appellant suggests that this record is responsive to his request and that he should be given a copy of it.

The Township indicates that the property was initially visited in order to determine whether a building permit was required. The Township advises further that a building permit was not required and, therefore, no official inspections were done. The Township indicates that it does not, as a matter of practice, keep detailed records of site visits to properties when it is determined that no further action is required.

The Township advises that it contacted a former Building Inspector who conducted the first visit to the property. This individual indicated that he did not have written notes of the site visit. The current Building Inspector advised that she had taken notes, however, they were incorporated into the minutes of the meeting which was held on November 5, 1997. The notes were thereafter destroyed.

The appellant indicates that he is not interested in the notes, but wishes access to the "statement" , which he believes was the document she read from at the November 5 meeting.

In cases where a requester provides sufficient details about the records which he or she is seeking and the Township indicates that records do not exist, it is my responsibility to insure that the Township has made a reasonable search to identify any records that are responsive to the request. The Act does not require the Township 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 Township 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 employees expends a reasonable effort to locate records which are reasonably related to the request.

In reviewing the representations of the parties, I find that the appellant has established, and the Township has confirmed, that at least one record - the "statement", which may be in the form of minutes of the November 5 meeting, should exist. In my view, this record is responsive to the request. Accordingly, I will order the Township to issue a decision regarding this record.

With respect to any other records of inspections of the subject property, I am satisfied that no records of the site visits were made. Accordingly, I find that the Township's search for responsive records was reasonable.

ORDER:

1. I uphold the Township's decision to withhold the record at issue.

2. I order the Township to issue a decision to the appellant regarding access to a statement made by the Building Inspector, or minutes of the November 5, 1997 meeting within 30 days from the date of this order without recourse to a time-extension

3. The Township's search for any remaining records was reasonable and this part of the appeal is dismissed.

Original signed by: December 24, 1998
Laurel Cropley
Adjudicator