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

ORDER MO-1726

Appeal MA-030108-1

The Regional Municipality of Niagara

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NATURE OF THE APPEAL:

This is an appeal from a decision of The Regional Municipality of Niagara (the Region), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) sought access to all email correspondence, incoming and outgoing, both deleted and archived, containing his surname in the text, from the email files of nine named individuals and their assistants. The appellant requested that the search be done by performing a software text search for his surname in the email accounts of these individuals, including archived and deleted email sections. He also asked for access to the list of emails generated by such a search. The appellant requested that all responsive records be emailed to him.

The Region issued an interim access decision, initially, in which it provided a fee estimate of $65.00, asked for a deposit of 50% of this estimate before processing the records, and indicated that access to most of the records would be denied under section 12 (solicitor-client privilege) of the *Act*. The Region also stated that it would not search in archived and deleted email sections, citing as authority section 1 of Regulation 823 (definition of a "record").

The appellant appealed from the Region's decision. During mediation through this office, certain matters were narrowed or clarified. The Region issued a final decision, confirming its decision to deny access to the records under section 12, its decision not to search for archived and deleted emails, and confirming the fee payable for access without the requirement of a deposit.

I sent a Notice of Inquiry to the Region, initially, inviting it to submit representations on the facts and issues in the appeal. I then sent the Notice to the appellant, along with the representations of the Region (except for certain confidential portions), and invited his response. I have received representations from the appellant.

RECORDS:

The records to which access has been denied under section 12 are listed in an Index of Records provided to the appellant and consist of email correspondence. All are either to or from the Region's Director of Legal Services or outside legal counsel, or have been forwarded or copied to the Region's Director of Legal Services or outside counsel by employees or officials of the Region.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 12 of the *Act* reads:

> 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.

Section 12 contains two branches, the "common law" privilege, and the "statutory" privilege. It is unnecessary to consider the application of the statutory privilege separately, as the result in this appeal would be the same under either branch.

Under the common law, the term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Representations

The Region submits that the records constitute direct communications of a confidential nature between the Region as client and its solicitors. The Region states that the solicitor-client privilege applies to communications involving the Region's outside counsel, as well as its Director of Legal Services. The Region provides information about the subject matter of these communications. Some of them relate to ongoing litigation between the Region and the appellant over payment of legal costs subsequent to a court judgment. I will not reveal the subject matter of other communications for confidentiality reasons.

The appellant submits that the litigation between it and the Region is long over, and it cannot be relied on by the Region to deny disclosure. Further, the appellant submits that the Director of Legal Services is a director who is no different in stature from a Director of Public Works or Director of Community Services, or of any other department. He asserts that the use of the word "legal" in the job title does not in and of itself create the part of a "solicitor" in a solicitor-client relationship. Further, the appellant states that the Region is represented by outside counsel in the litigation, and in acting as the contact person in that litigation, the Director of Legal Services is no different from any other employee of the Region for the purpose of this request. The appellant submits that the Director of Legal Services performs management functions only and does not give legal advice.

Analysis

In Order MO-1707, I considered similar submissions from the appellant on the status of the Region's Director of Legal Services, and concluded:

> I am satisfied that the Director of Legal Services is a legal advisor to the Region, as his title suggests. There is no reason to question that he is employed as legal counsel by the Region, and that at least part of his function is to provide legal services. Further, I find that the circumstances under which the records were forwarded to him involved him in his capacity as legal advisor. Whether or not the Region engages outside counsel for litigation purposes is not relevant to my finding here. It is not uncommon for legal counsel employed by an institution to serve as the contact person where outside counsel is engaged on a legal matter.

I arrive at the same conclusion in the appeal before me. Although it may well be that the duties of the Director of Legal Services extend beyond the giving of legal advice, I find that the circumstances under which the records at issue were either sent by him or forwarded to him involved him in his capacity as legal advisor. This is so whether the records related to the litigation for which the Region had engaged outside counsel, or other matters on which legal advice was sought or received.

Further, the representations and the records themselves demonstrate that they were sent in direct relation to the seeking, formulating or giving of legal advice by the Director of Legal Services or the Region's outside counsel. They are therefore part of the "continuum of communications" aimed at keeping both client and solicitor informed so that advice may be sought and given as required. In some cases, the records reflect direct communications between an employee or official of the Region and either the Director of Legal Services or outside counsel. In other cases, the Region's solicitor is sent a copy of a communication, which I find was for the purpose of keeping the solicitor informed in the context of ongoing legal advice. I also find that in some instances, the communications are made under an explicit statement of confidentiality and where there is no explicit statement, confidentiality can be implied from all of the circumstances. In sum, the solicitor-client communication privilege applies to exempt all of these communications from disclosure.

As I find that the solicitor-client communication privilege applies to the records, it is unnecessary to consider the appellant's submissions on the termination of litigation. Even if litigation has terminated between the appellant and the Region (which is disputed by the Region), this has no bearing on the continuing effect of solicitor-client communication privilege.

I am satisfied that the Region has exercised its discretion appropriately in refusing access to the records.

I now turn to consider the issue of whether archived and deleted email correspondence falls within the definition of a "record" under the *Act*.

DEFINITION OF "RECORD"

The term "record" is defined in section 2(1) as follows:

> "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
>
> (b) subject to the regulations, *any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution* [emphasis added]

Section 1 of Regulation 823 states:

> A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the Act if the process of producing it would unreasonably interfere with the operations of an institution.

Representations

In its representations, the Region explained the system of archiving and deleting email correspondence. It states that the Region's mechanism for "archiving" emails is controlled by the end users. If users want to keep inactive email records off the current email system, they may "archive" them to the "C" drive. This is done only when individuals choose to use this feature of the email software, and it is not a recommended option for storage of records. "C" drives are not backed up and are not considered a reliable storage medium.

In relation to deleted emails, if a user received and deleted the email in the same day, the email would not go through the daily back-up tape procedure and is irretrievable. If a user received an email and kept it overnight, that email would appear on the back-up tape for that night. Evening back-up tapes are re-used as part of a scheduled write-over process.

The Region submits that back-up tapes are kept for the purposes of disaster recovery, not for the purpose of records retention. The process of scanning back-up tapes for the name of the appellant would be an inordinately time-consuming process, with minimal likelihood of positive results. It would involve seconding an information technology professional to scour the back-up tapes. As the likelihood of deleted emails surviving the write-over process diminishes as time goes by, it is possible that considerable time and effort could be expended to find no records whatsoever. The Region states that this particular appellant has, on other occasions, appealed the Region's fees for search time when his requests necessitated an extensive search that produced minimal results.

The appellant submits that the type of media used should not change the nature of the information contained and still should be treated as a record. He asserts that to destroy an email is the equivalent of destroying a municipal record. He submits that email software maintains back-up and archive function to ensure that no email is completely deleted. Though a user may hit delete and remove it from his personal computer, a back-up is maintained on the email server and remains an accessible record. Only purged emails, ones that have intentionally been wiped from the system can be considered truly deleted.

He further submits that the Region maintains back-up of its emails, specifically to avoid losing email through simple deletion at the personal computer. Emails received by a municipal employee during his job functions are the municipality's records. The individual employee does not have a right to destroy them, be they created, sent, or received by him. The appellant submits that email records must be considered equivalent to paper records under the *Act*, including those that have been archived or deleted by the municipal employee, and held in the back-ups and archives of the institution.

Analysis

Although the appellant addresses this in his submissions, it is not in contention that email correspondence can constitute "records" under the *Act*. Indeed, the Region located a number of such records in response to the request, although it denied access to them under the solicitor-client privilege exemption.

There is also a suggestion from the appellant that the deletion of email messages by Region employees is an act of wrongdoing. As indicated above, he states that individual employees do not "have a right to destroy them" and that "[t]o destroy an email is the equivalent of destroying a municipal record." Although it is not an issue directly raised by this appeal, I find it worth commenting that there is no basis for the contention that the deletion of email messages is in itself an act of wrongdoing. It would be a great surprise indeed if any institution's records

retention policies required the storage of each and every email message ever sent or received by an employee, or the storage of each and every paper record ever sent or received.

In a sense, it is not significant that the information at issue consists of deleted or archived emails. What is significant is that the Region has identified that responsive information (beyond that which it has located) may exist, but that it exists in a form that the *Act*, in the Region's contention, does not treat as a record.

Turning first to the possibility that archived emails exist on the "C" drive, none of the Region's submissions support the conclusion that any such archived emails would not constitute "records" under the *Act*. The Region has not identified any difficulty in performing a search of its "C" drive for responsive records, and I will order it to include the contents of the C" drive in its search for records responsive to the request.

The second potential location of information is in the Region's back-up tapes. Returning to the definition of a "record", the Region does not specifically address section 1 of the *Act* and whether the process of retrieving information from these tapes requires "computer hardware and software or any other information storage equipment and technical expertise" not "normally used" by the Region. However, it does refer to the need to acquire the services of an information technology professional to perform a search of the tapes. I am not convinced that these circumstances bring the information in the tapes beyond the scope of a "record". The fact alone that the retrieval of information from "machine readable" records may require an institution to employ measures which are not part of its ordinary records retention and control procedures is not enough to exclude information from the *Act*. It is not difficult to imagine the potential breadth of such an exclusion from the *Act*, and I am not convinced that such an interpretation is required.

The Region's main submission on this issue is based on section 1 of Regulation 823, that is, that the process of searching for and retrieving information from the back-up tapes would "unreasonably interfere" with its operations. After considering the Region's submissions, I am not convinced that it has established the application of section 1. Its submission is broad, to the effect that the process would be "inordinately time-consuming", without any supporting detail. In other appeals where this office accepted an institution's submission that certain information was not contained in a "record", the adjudicators had information that included an estimate of the number of hours of searching required, the nature of the personnel needed, the impact on their other duties, and the overall effect of the task on an institution's resources or operations [see, for instance, Orders P-1572 and PO-2151].

In the appeal before me, the only factor cited as an "unreasonable interference" with the operations of the Region is the time that may be expended in a search, by a seconded professional. There is no estimate or quantification of the time required. Further, there is no other kind of interference asserted, for instance, that the functioning of the Region's email or other computer systems, or any of its other operations would be compromised by the search.

With respect to the Region's concerns about the costs to it of performing a search of the back-up tapes, I refer the Region to a recent decision of this office, Order MO-1699, in which Adjudicator Shirley Senoff reviewed the procedure of issuing interim access decisions, together with a fee estimate, stating:

> Where the fee is $100 or more, the institution may choose to do all the work necessary to respond to the request at the outset. If so, it must issue a final access decision. Alternatively, the institution may choose *not* to do all the work necessary to respond to the request, initially. In that case, it must issue an interim access decision, together with a fee estimate, and may require the requester to pay a 50% deposit of the estimated fee (see section 7 of Regulation 823 made under the *Act*).
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> The purpose of the fee estimate, interim access decision and deposit process is to provide a requester with sufficient information to make an informed decision as to whether to pay the fee and pursue access, while protecting an institution from expending undue time and resources on processing a request that may ultimately be abandoned.

If, in this instance, the Region decides not to do all the work of searching through its back-up tapes at the outset, it may issue an interim access decision and request a deposit (assuming the fee is over $100) before proceeding with the search. Although an interim access decision is not a final access decision, it must provide the requester with an indication of whether any responsive records are likely to be located through a search, and an indication of what exemptions or other provisions the Region might rely on to refuse access in the event responsive records are found. Ordinarily, an interim access decision is based on a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records [see Orders 81 and MO-1367].

In conclusion, I do not accept the Region's contention that archived and deleted emails are not records as defined by the *Act*.

ORDER:

1. I uphold the application of the solicitor-client privilege exemption to the records listed in the Index of Records.

2. I order the Region to include archived and deleted emails in the records encompassed by the appellant's request.

3. I order the Region to issue a decision in relation to the archived and deleted emails, within 30 days of this order.

Original signed by: December 10, 2003
Sherry Liang
Adjudicator