

INTERIM ORDER MO-1802-I

Appeal MA-020185-2

District Municipality of Muskoka

NATURE OF THE APPEAL:

The District Municipality of Muskoka (the municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a number of records relating to a particular company. The municipality initially issued a decision identifying that the request was frivolous and vexatious. The requester appealed that decision, and appeal file MA-020185-1 was opened by this office.

During the mediation process of that earlier appeal, a number of issues were resolved. The requester revised his request for records, and the municipality agreed to process the revised request. The revised request asked the municipality to:

... review all records within the cabinets of the Solicitor's office and disclose all records which comprise Schedule "B" documents i.e., "records that [the municipality] is not willing to produce" for whatever reason.

The municipality issued a decision, identifying that the requested Schedule "B" records referred only to documents that the municipality objected to producing in the course of a particular legal action on the grounds of solicitor-client privilege, litigation privilege, and without prejudice communication privilege. The municipality also issued a fee estimate of \$1,800 for the records. The requester appealed the fee estimate decision, and that issue was addressed in appeal MA-020185-1. That appeal was resolved by Order MO-1610, in which adjudicator Hale stated that the municipality was entitled to charge a fee of up to \$450.

The municipality requested a 50% deposit of this amount, which the requester paid. After searching for and reviewing the records, and preparing a detailed index of the records, the municipality issued a decision denying access to the records on the basis of section 12 (solicitor-client privilege) of the *Act*.

The requester (now the appellant) appealed the municipality's decision to deny access, and this appeal was opened. Mediation did not resolve this appeal and it proceeded to the inquiry stage of the process.

One of the issues the appellant raised during mediation was whether the municipality's index of responsive records was adequate. The issue of the adequacy of the index prepared by the municipality is therefore an issue in this appeal.

In the circumstances of this appeal, I decided to send a Notice of Inquiry to the appellant, initially, inviting representations on the issues raised. I received representations from the appellant.

I then requested that the municipality forward a copy of the records at issue to this office. The municipality did so, and I reviewed the responsive records. Following my review, I sent a Notice of Inquiry to the municipality, inviting the municipality to make representations on the application of section 12 with respect to the following 22 specific records:

Document 1 from File 4;
Document 4 from File 7;
Document 11 from File 8;
Documents 4 and 5 from File 10;
Documents 11, 13, 15, 16, 18, 20, 21, 22, 23, 25, 26, 27, 28, 29 and 30 from File 19;
Document 2 from File 24; and
Document 4 from File 27.

I received representations from the municipality in response to the Notice of Inquiry. In its representations the municipality agreed to disclose twenty of the specifically identified records, and these records are no longer at issue in this appeal. The municipality also provided representations on the application of section 12 to the two other identified records. Furthermore, the municipality identified that the index of records originally provided to the appellant had been slightly modified to address a few clerical errors.

I then sent a Reply Notice of Inquiry, along with a copy of the municipality's representations and a copy of the corrected index of records, to the appellant. I received reply representations from the appellant.

During the processing of this appeal, an additional issue was raised. When the municipality provided the records to me, it identified that it could not locate two records referred to in the index (Document 9 of File 2 and Document 17 of File 23). Both of these records are clearly identified and described in the index, and the municipality claims that section 12 applies to these records. They are each identified in the index by correspondence type, by specific date, and as correspondence from the [named] law firm to its client (the municipality, represented by the district solicitor). Clearly the municipality had the records at the time it prepared the index and made its access decision. In its representations the municipality identified the nature of the searches conducted to locate these records. In response, the appellant indicated that the municipality ought to be able to request copies of these records from its solicitor. However, in view of my findings set out below on the application of the section 12 exemption to these two records, it is not necessary for me to address the issues raised concerning the location of these two records.

RECORDS:

The records remaining at issue are the 283 records specifically identified in the index prepared by the municipality, except for the twenty records which the municipality has agreed to disclose.

DISCUSSION:

PRELIMINARY ISSUE – ADEQUACY OF THE INDEX

As identified above, in the course of processing this appeal the municipality prepared a detailed index of the responsive records at issue. The appellant takes the position that portions of the index inadequately describe the records on the basis that:

... several line items refer to documents in other files.... I believe those records should be identified for the purposes of the review and further submissions.

In the Notice of Inquiry the appellant was asked to address this issue with reference to the wording of section 22 of the *Act*, particularly section 22 (3.1) which reads:

If a request for access covers more than one record, the statement in a notice under this section of a reason mentioned in subclause (1)(b)(ii) or clause (3)(b) may refer to a summary of the categories of the records requested if it provides sufficient detail to identify them.

The appellant responded as follows in his representations:

In the [index], the line items referring to documents in other files is not acceptable, and the [municipality] should list those records being refused here and reiterate [the] reason each record is refused, in the event that a reason was previously given.

I did not seek representations from the municipality on this issue.

There are 283 records individually identified in the index of records prepared by the municipality. Each record is identified by the type of record (ie: fax, letter, memo), the date of the record, the sender and the recipient, and the exemption claim made for the record. The appellant does not take issue with the descriptions of these records.

The descriptions of records which the appellant does take issue with are certain references in the index to records under a particular file category. They are described as documents previously requested (by the appellant) and at issue in another identified appeal file with this office. The appellant and the municipality are the parties involved in this other file as well. The municipality identifies in the index that it has claimed that the records at issue in the earlier appeal, which are covered by the request in this appeal, also qualify for exemption under the solicitor-client privilege in section 12. As there is an overlap in the records at issue in the two appeals, the municipality has described these records in a general way in this index as the ones at issue in the other file. The appellant takes the view that the specific records which overlap should each be specifically identified in this file as well, rather than referred to by a more general description.

In light of the positions taken by the parties, I reviewed the other appeal file referred to by the appellant. That appeal was opened prior to this appeal, and was before another adjudicator who addressed the issue of access to the records at issue in that appeal. In the course of that appeal, the appellant was provided with a comprehensive index of the records at issue.

In the circumstances of this appeal, and in view of the overlap between the two appeals, I find that the index prepared by the municipality in this appeal is adequate. Each record at issue in this appeal is identified in detail. The records covered by the earlier appeal are described in detail in that appeal. In my view, in the circumstances of this appeal there is no purpose served in requiring the municipality to describe more fully the records at issue in the other appeal, and I am satisfied that the index prepared by the municipality is adequate.

SOLICITOR-CLIENT PRIVILEGE

Introduction

The municipality claims that all of the records remaining at issue are exempt under section 12 of the *Act*, which 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 as described below. The municipality must establish that one or the other (or both) branches apply.

Branch 1: common law privileges

This branch applies to a record that is subject to “solicitor-client privilege” at common law. The term “solicitor-client privilege” encompasses two heads of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

General principles

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 professional legal advice.

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 Supreme Court of Canada has described the privilege as follows:

. . . all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship . . . [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618].

The privilege has been found to apply 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.)].

Solicitor-client communication privilege has been found to 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. As stated in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 at 349 (C.A.):

The confidentiality of the communications is an underlying component of each of the purposes which justify client-solicitor privilege. In *McCormick*, supra, at p. 333, it is said:

It is of the essence of the privilege that it is limited to those communications which the client either expressly made confidential or which he could reasonably assume under the circumstances would be understood by the attorney as so intended.

The centrality of confidentiality to the existence of the privilege helps make my point that the assessment of a claim to client-solicitor privilege must be contextual. . .

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co.*].

The purpose of this privilege is to protect the adversarial process by ensuring counsel for a party has a “zone of privacy” in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co.*].

English courts have described the “dominant purpose” test as follows:

A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.); see also Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.)].

To meet the “dominant purpose” test, there must be more than a vague or general apprehension of litigation [Order MO-1337-I].

Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if they have found their way into the lawyer’s brief [Order MO-1337-I; *General Accident Assurance Co.; Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

Branch 2: statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of institution counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two heads of privilege as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. The statutory and common law heads of privilege, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies (See Order MO-1658).

Representations

In this appeal, the municipality has identified that all of the requested Schedule “B” records are documents that the municipality objects to producing in the course of a particular legal action on the grounds of solicitor-client privilege, litigation privilege, and without prejudice communication. Indeed, the request itself identifies that the records requested are limited to records in the solicitor’s office which the municipality is not willing to produce, and which the municipality has included in its list of Schedule “B” records in the course of litigation involving the municipality and the appellant, among others.

The municipality has provided me with a copy of the Schedule “B” affidavit of documents, which identifies the position taken by the municipality.

The appellant states:

I acknowledge that some of the records may be subject to severances, however, I wish to receive as much of the records as possible.

The appellant then refers to the types of information which could be severed from the records, and to which he should be granted access. I will deal with the issue of severance below.

Findings

I have viewed all but two of the records remaining at issue in this appeal. Based on my review of the records, the index of the records, and the surrounding circumstances, I am satisfied that the large majority of the remaining records consist of confidential communications between the municipality and its lawyers, or their agents or employees, made for the purpose of giving or receiving legal advice with respect to the conduct of the litigation involving the appellant. These records can be described as forming part of the *Balabel* “continuum of communications” aimed at keeping the lawyer and the client informed, or were created for the dominant purpose of existing or reasonably contemplated litigation and fall within the “zone of privacy” in which to investigate and prepare a case for trial.

Some records contain solicitor’s notes to file or working papers. These records were also created for the dominant purpose of existing or reasonably contemplated litigation and fall within the “zone of privacy”, and in my view also qualify for exemption under section 12 of the *Act*.

With respect to the two records for which an access decision was made, but which could not be located when the records were forwarded to me, I am satisfied that these two records also qualify for exemption under section 12 of the *Act* for the reasons set out above. I make this finding based on the detailed description of these two records contained in the index (identified specifically by date and correspondence type, and as correspondence from a [named] law firm to the district solicitor), and based on my review of the numerous other records of similar description that I have reviewed and that I have found qualify for exemption.

With regards to the two records which I sought representations on, and which the municipality was not prepared to disclose, the municipality provided specific representations.

With respect to Document 1 of File #4, the municipality states:

[The municipality] continues to claim an exemption under section 12 of the *Act* since this document was prepared at the request of the District Solicitor in contemplation of litigation to deal with matters likely to be in issue in the contemplated litigation. This document has been included in the solicitor’s brief for the actual litigation which is still ongoing and the solicitor’s name appears on the top of the page. The notation on page two was made by the solicitor as part of his review of matters in the litigation.

With respect to Document 4 of File #27, the municipality states:

This is a second copy of the same document listed as Document 1, File #4, but without any notation on it. As noted previously, this document was prepared at the request of the District solicitor for use in contemplation of litigation and as such is privileged under section 12. The document also forms part of [the municipality's] solicitor's brief in the ongoing litigation.

The municipality's representations set out above were shared with the appellant. Although the appellant does not address the section 12 exemption directly, he suggests that documents may be disclosed in relation to his access request with notations contained on them to protect privilege.

Based on the representations of the municipality and on my review of the records, I am satisfied that these two records were prepared for the district solicitor in contemplation of litigation, and also qualify for exemption under section 12 of the *Act*.

Finally, there are a small number of records remaining at issue for which I have decided to defer my finding regarding the application of section 12, in order to provide the municipality with an opportunity to provide representations on these specific records. Based on the appellant's reply representations, it may also be that certain of these remaining records are no longer at issue. The records for which I have decided to defer my finding are the following documents (and the duplicates thereof): File 2 (#2 and 14); File 3 (#35); File 4 (#6, 8, 11, 12, and 14); File 6 (#4); File 7 (#3); File 8 (#6, 8 and 12); File 10 (#3); File 11 (#2); File 12 (#1); File 13 (#6); File 14 (#8 and 15); File 15 (#17, 18 and 19); and File 19 (#14).

In summary, except for the records set out above, I find that all of the records remaining at issue qualify for exemption under section 12 of the *Act*.

Waiver

The appellant takes the position that the municipality has waived the privilege in portions of the records by providing a detailed index of the records. I disagree. There is no indication that the municipality intended to waive its solicitor-client privilege in the records when it prepared the detailed index in response to the request for records. (See Order MO-1172)

Severance

Previous orders have held that severance applies in the context of section 12. In a judicial review application of Order P-771, the Divisional Court stated:

Once it is established that a record constitutes a communication to legal counsel for advice, it is my view that the communication in its entirety is subject to privilege.

I would hasten to add that this interpretation does not exclude the application of s. 10(2), the severance provision, for there may be records which combine communications to counsel for the purpose of obtaining legal advice with communications for other purposes which are clearly unrelated to legal advice. I would also emphasize that the privilege protects only the communication to legal counsel.

[*Ontario (Minister of Finance v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71; see also the following cases cited in Order P-1409: *Peaker v. Canada Post Corp.*, [1995] O.J. No. 2282 (Gen. Div.); *Law Society of Upper Canada v. Baker*, [1997] O.J. No. 69 (Div. Ct.); *Re Sokolov* (1968), 70 D.L.R. (2d) 325 (Man. Q.B.)]

The appellant takes the position that because certain information was disclosed by the municipality in the index, the portions of the records which contain that information should be disclosed to the appellant, and the other exempt information in those records could be severed from the records. Although the appellant acknowledges that this may lead to the records being “grossly severed”, it is his view that, as certain information in the records was released to him in the index, that information should be disclosed to him.

Where a record contains exempt information, section 4(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. A head will not be required to sever the record and disclose portions where to do so would reveal only “disconnected snippets”, or “worthless”, “meaningless” or “misleading” information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.)].

I am satisfied that the records at issue cannot reasonably be severed. To do so would reveal only “disconnected snippets”, or “worthless”, “meaningless” or “misleading” information, such as information of an administrative nature (See Order PO-1735). Some of the information the appellant expresses an interest in obtaining (for example, the dates of the letters and the parties involved, where these have been disclosed in the index), may not be “meaningless” or “misleading”. However, absent any exceptional circumstances, in situations where severing would only reveal information which, by definition, the appellant already is in possession of because of the detailed index provided by the municipality, I find that there is no useful purpose served in requiring the municipality to disclose those portions of the records which are already disclosed in the detailed index.

Accordingly, in the circumstances of this appeal, I find that the information cannot be severed from the records for the purpose of disclosure.

ORDER:

1. I uphold the Municipality's decision to deny access to the following Records:

File Number	Document number
1	1
2	1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13
3	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37
4	1, 2, 3, 4, 5, 7, 9, 10, 13
5	2, 3, 4
6	2, 3, 5,
8	2, 3, 4, 5, 7, 9, 10
9	2, 3, 4, 5, 6, 7, 8
10	2, 6, 7
11	3, 4, 5, 6, 8, 9, 10
13	2, 3, 4, 5, 7, 9, 10, 11
14	2, 3, 4, 5, 6, 7, 9, 10, 11, 13, 14, 16
15	2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 20, 21, 23, 24
16	1, 2, 3
19	12, 17, 19, 24
20	1, 2, 3, 4, 5, 6, 7, 8
21	1, 2, 3, 4, 5, 6, 7
23	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23
24	1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21
25	1, 2
26	1, 2, 3, 4, 5
27	1, 2, 3, 4, 5
28	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14
29	1
31	1, 2, 3, 4, 5

2. I remain seized of this matter, in order to deal with the outstanding issues related to the following Records (and the duplicates thereof): File 2 (#2 and 14); File 3 (#35); File 4 (#6, 8, 11, 12, and 14); File 6 (#4); File 7 (#3); File 8 (#6, 8 and 12); File 10 (#3); File 11 (#2); File 12 (#1); File 13 (#6); File 14 (#8 and 15); File 15 (#17, 18 and 19); and File 19 (#14).

Original signed by: _____

Frank DeVries
Adjudicator

_____ June 21, 2004