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

ORDER MO-1885

Appeal MA-030271-1

District Municipality of Muskoka

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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 the following:

> From the email servers, archive files and email accounts of the institution, the records that identify all email, incoming and outgoing, including deleted and archived, containing the text [the requester's name] sent or received by anyone.

The requester went on to direct the institution to perform the following searches in order to locate these records:

1. Perform a software text search for the text [the requester's last name] of email accounts, servers and archives, including the deleted email sections. This should generate a list of email found to contain the text [the requester's name]. The resulting list of emails is one of the responsive records which I request be exported by the software and emailed to me, to [the requester's e-mail address]. Kindly ensure that this list shows the "to", "from" and "cc" and date. The list of emails containing the text [the requester's name] can also be printed and faxed or mailed to me.

2. the emails identified in the search results list are themselves be exported by the software, compressed if necessary, and emailed to me at [the requester's e-mail address].

The Municipality responded to the request by issuing a fee estimate in the amount of $ 675 and requested that the requester pay a deposit amounting to 50% of that sum. The requester paid the deposit, and the Municipality issued a final decision indicating an actual fee of $353.53, leaving a balance of $16.03 outstanding. The Municipality provided access to 29 of the responsive records, and denied access to the remaining six records on the basis that they fell within the ambit of the discretionary exemption in section 12 of the *Act* (solicitor-client privilege).

The requester, now the appellant, appealed the decision on the basis of his belief that additional responsive records ought to exist, the quantum of the fee and the application of the section 12 exemption to the undisclosed information.

During the mediation stage of the appeal, the Municipality provided the mediator and the appellant with a detailed description of the search undertaken to locate the records responsive to the request and the basis for its fee. The appellant agreed to remove the photocopy costs from the appeal, but the other issues in the appeal remained unresolved.

I provided a Notice of Inquiry to the Municipality, setting out the facts and issues in the appeal. I received representations from the Municipality, which were shared, in their entirety, with the appellant, along with a copy of the Notice of Inquiry. I also received submissions from the appellant in response.

RECORDS:

The remaining records at issue consist of six e-mails.

DISCUSSION:

WAS THE FEE CALCULATED IN ACCORDANCE WITH THE *ACT*?

General principles

In cases where an institution is charging a fee, it must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Order P-81, MO-1614].

This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460, as set out below.

Section 45(1) requires an institution to charge fees for requests under the *Act*. That section reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 823. Those sections read:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For floppy disks, $10 for each disk.

3. For manually searching a record, $7.50 for each 15 minutes spent by any person.

4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.

6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

Representations of the parties

In a letter to the appellant dated August 18, 2003, the Municipality set out in great detail the nature and extent of the searches undertaken of the computers operated by the individuals listed on the appellant's revised request. It indicates that the In Box, Sent Box and Deleted Box, as well as any personal folders or directories created by staff for each computer were searched, many of them by the Municipality's Freedom of Information Coordinator herself. The Coordinator also indicated that the fee provided was based on the actual computer search time required, as described in the Municipality's July 21, 2003 decision letter.

In the representations provided by the Municipality in response to the Notice of Inquiry supporting the quantum of the fee, the Municipality submits that:

> . . . [the] fee was almost exclusively a search fee, since the photocopy and courier costs were minimal. The original estimate was based on a representative sample, however, the final calculation was based on the actual number of hours required to conduct the search required to respond to the request.
>
> Since the records were all located in the 'mailboxes' of individual computers, the search required viewing the computers of all employees with email access and using the search capabilities of the system to locate emails with the word '[the appellant's name]'. Lists of all such employees were provided by the Computer Centre and each search involved physically going to each employee's computer, and then completing the search. It was not technically possible to conduct the search from a central location or the server.
>
> A number of the computers were located off site in various other buildings around Muskoka such as community offices, public works buildings, the Muskoka Airport, water and sewer treatment plants, etc. and those computers were searched by Computer Centre staff. While this involved staff and travel time, no charge

> was made for that. All calculations were made based on actual search time. In total 237 computers were searched.

The appellant did not address the issue of the appropriateness of the fee in his submissions.

Findings on the fee issue

I have reviewed the representations of the Municipality filed in response to the Notice of Inquiry and the description of the searches undertaken that are contained in the Coordinator's letters of July 21 and August 18, 2003. Based on the information provided in these documents, I have no difficulty in upholding the search time component of the fee. In my view, the Municipality has provided me with sufficient evidence and argument to support the fee quoted to the appellant for the cost of searching for the responsive records.

REASONABLENESS OF SEARCH

Again, the Municipality provided its representations on this issue in a clear and straight-forward fashion, relying as well on its earlier correspondence with the Mediator and the appellant to bolster its arguments that the searches undertaken for responsive records were reasonable in the circumstances.

The Municipality submits that:

> All searches were conducted by a third party, many of them being done by [the Coordinator], others by managers or supervisors and also by staff from the Computer Centre. All computers with email access were searched including the Inbox, Outbox and Deleted folders of Muskoka's email system, Outlook, and also any personal folders. Since all computers were searched there is nowhere else to look for emails.
>
> A total of 35 emails were found of which 29 were released and 6 were denied access under a Section 12 exemption.
>
> It is probable that other emails did exist at one time, however, most staff delete emails when they are no longer of any use and the system either permits the user to permanently delete it at that time, or to simply delete it by sending it to a deleted folder that automatically empties within a specified time period. Some items found were in the deleted folder but hadn't been purged from that folder yet. Generally emails represent correspondence of a less formal nature, similar to messages and note pads and therefore do not form part of any formal record.

The appellant also provided representations on this issue, submitting that the email retention policies referred to by the Municipality are not in keeping with normal requirement for email retention for a government. The appellant provided me with some examples of email retention policies from the Governments of Canada and British Columbia. The appellant suggests that the

Municipality has not conducted a reasonable search of all of the email accounts of the individuals he identified.

Based on my review of the representations of the Municipality, I find that it has conducted a reasonable search for records responsive to the appellant's request. In my view, the Municipality has undertaken a reasonably comprehensive review of its email record-holdings in order to identify and locate any responsive records. I find that the appellant's submissions do not provide a sufficient basis for me to make a contrary finding.

I will accordingly, dismiss that part of the appeal.

SOLICITOR-CLIENT PRIVILEGE

The Municipality identified six records (paper copies of emails) as responsive to the request and denied access to them on the basis that they are exempt under the solicitor-client exemption in section 12.

General principles

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 as described below. The institution 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 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.)].

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 that 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.*].

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.), cited with approval in *General Accident Assurance Co.*; see also Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (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, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in 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 types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, 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.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice."

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation."

Application of section 12 to the records

The representations of the Municipality

The Municipality made submissions with respect to the application of section 12 to three email records recovered from the computer belonging to its Environmental Engineer (Records 1, 2 and 3). The first two records are internal emails from the Municipality's Commissioner of Engineering to the Environmental Engineer to which are appended memoranda and correspondence relating to certain litigation between the appellant and the Municipality. It argues that these records "have been included in the Solicitor's brief for the actual litigation." The third record is an email from a staff person at the office of its outside counsel regarding arrangements for a meeting between outside counsel and the Municipality's engineering staff.

The Municipality also submits that the remaining three emails (Records 4, 5 and 6), which were located in the computer records of its in-house solicitor, consist of correspondence between the Municipality's senior staff and its in-house and outside counsel regarding matters pertaining to the ongoing litigation involving the appellant. Each of the attachments to these three emails are correspondence either sent by the appellant or to him. As the appellant indicated that he was not seeking access to records he sent or received, these attachments are not at issue.

Findings

With respect to the first two records identified by the Municipality in the computer record-holdings of its Environmental Engineer (Records 1 and 2), I find that the emails themselves, as well as the attachments (with one exception), represent part of the continuum of communications passing between the Municipality's solicitor and his clients. These records form part of the Municipality's preparation of its case by the in-house counsel and the Municipality's engineering staff. One of the attachments to Record 2 is a letter dated May 12, 2003 from the Municipality's outside counsel to the former solicitors for the appellant. I find that any privilege that may have existed in the information contained in that document was waived when it was provided to the appellant's counsel. With the exception of that letter, I find that the solicitor-client privilege exemption in section 12 applies to the other portions of Records 1 and 2.

Record 3, an email from the office of the Municipality's outside counsel to its engineering staff regarding certain arrangements for a meeting, also qualify for exemption under section 12 as it represents a confidential communication between solicitor and client pertaining directly to the provision of legal advice.

The remaining three emails taken from the computer record-holdings of the Municipality's in-house counsel are all communications from outside counsel to the Municipality's Commissioner of Engineering that were copied to the in-house counsel. I find that all three of these records satisfy the requirements of section 12 as they are confidential communications between a solicitor and her client regarding the giving or receiving of legal advice.

In conclusion, I find that all six of the email records, with the exception of the May 12, 2003 letter attached to Record 2, are exempt from disclosure under section 12.

ORDER:

1. I order the Municipality to disclose the May 12, 2003 letter that is appended to Record 2 by providing a copy to the appellant by **January 12, 2005.**

2. I uphold the Municipality's decision to deny access to the remaining records.

3. I uphold the Municipality's fee.

4. I find that the Municipality's search was reasonable and dismiss that part of the appeal.

December 16, 2004

Donald Hale
Adjudicator