FINAL ORDER MO-2006-F

Appeal MA-020185-2

District Municipality of Muskoka

NATURE OF THE APPEAL:

This is my final order disposing of the sole outstanding issue in this appeal.

This is an appeal from a decision of the District Municipality of Muskoka (the municipality) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) asked for copies of a number of records relating to a particular company, including records identified as Schedule "B" documents and located in the office of the solicitor for the municipality. The municipality stated 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 that they are subject to solicitor-client privilege, litigation privilege, and without prejudice communication privilege.

Following the resolution of the appeal relating to certain fees under the *Act*, the municipality located the responsive records and prepared a detailed index of the records. The municipality then issued a decision denying access to the records under section 12 (solicitor-client privilege) of the *Act*.

The appellant appealed the municipality's decision, and this appeal was opened and proceeded to the inquiry stage of the process on a number of issues. The inquiry resulted in Order MO-1802-I, in which I addressed a number of the issues raised in the appeal.

One of the issues addressed in MO-1802-I was whether or not the exemption in section 12 of the *Act* applied to certain records. In that order, I found that section 12 of the *Act* applied to a large number of the records for which it was claimed. However, I also deferred my decision regarding the possible application of section 12 to a small number of records. The relevant portion of Order MO-1802-I reads:

> 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).

Accordingly, I sent a Supplementary Notice of Inquiry to the municipality, initially, asking the municipality to provide representations on the possible application of the exemption found in section 12 of the *Act* (solicitor-client privilege) to the specifically identified records listed above.

The municipality provided representations in response to the Supplementary Notice of Inquiry. In its representations, the municipality identified that it no longer objected to disclosure of two identified documents (File 15 (#19) and File 19 (#14)). Accordingly, those records are no longer at issue in this appeal. I then sent the Supplementary Notice of Inquiry, along with the non-

confidential portions of the representations of the municipality, to the appellant. The appellant did not provide representations in response.

RECORDS:

The records remaining at issue are the following numbered records, as identified in the index prepared by the municipality:

> 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); and File 15 (#17 and 18).

DISCUSSION:

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

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 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).

Loss of privilege

Termination of litigation

Under Branch 1, at common law, litigation privilege may be lost through termination of litigation or the absence of reasonably contemplated litigation [Order P-1551; see also *Ontario (Attorney General) v. Big Canoe* (2002), 62 O.R. (3d) 167 (C.A.); *Boulianne v. Flynn*, [1970] 3 O.R. 84 at 90 (Co. Ct.); *Meaney v. Busby* (1977), 15 O.R. (2d) 71 (H.C)].

Termination of litigation may not end the privilege where the policy reasons underlying the privilege remain, despite the end of the litigation. Privilege may be sustained where, for example

- there is 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.)]

- the information constitutes "opinion work product" as opposed to "ordinary work product" [Order P-1551]

Termination of litigation does not negate the application of the Branch 2 statutory litigation privilege [*Ontario (Attorney General) v. Big Canoe* (2002), 62 O.R. (3d) 167 (C.A.)].

Waiver

The actions by or on behalf of a party may constitute waiver of privilege under either branch [Order P-1342].

Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and

- voluntarily evinces an intention to waive the privilege

[*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

Waiver has been found to apply where, for example

- the record is disclosed to another outside party [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)]

- the communication is made to an opposing party in litigation [Order P-1551]

- the document records a communication made in open court [Order P-1551]

Waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party. The common interest exception has been found to apply where, for example

- the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties [*General Accident Assurance Co. v. Chrusz* (above); Order MO-1678]

- a law firm gives legal opinions to a group of companies in connection with shared tax advice [*Archean Energy Ltd. v. Canada (Minister of National Revenue)* (1997), 202 A.R. 198 (Q.B.)]

- multiple parties share legal opinions in an effort to put them on an equal footing during negotiations, but maintain an expectation of confidentiality vis-à-vis others [*Pitney Bowes of Canada Ltd. v. Canada* (2003, 225 D.L.R. (4th) 747 (Fed. T.D.)]

Representations

In this appeal, the municipality asserts that the records remaining at issue qualify for exemption on the grounds of litigation privilege. The municipality states that "one of the basic questions is whether or not the documents were prepared for use in or in contemplation of litigation". The municipality proceeds to specifically identify the time when the appellant's intent to litigate was made clear to the parties, and then identifies that all of the documents postdate the appellant's "clear and publicly expressed intent to litigate".

The municipality then states that all of the documents remaining at issue are documents that passed between counsel for the municipality and counsel for other parties involved in litigation or potential litigation. It argues that these parties had "common interests with the municipality against a common adversary", namely, the appellant, in the context of that litigation. The municipality describes each record remaining at issue in detail, identifies the parties referred to

in the records, and describes the actual or anticipated litigation for which the documents were created. In support of its position, the municipality attached to its representations the originating documents to the various actions, as well as correspondence documenting anticipated actions by the appellant. It identifies that, for each of the records remaining at issue, the municipality and the party to whom the records were sent or from whom the records were received are identified as actual or potential co-defendants in the respective actions.

The municipality's representations were shared with the appellant; however, the appellant chose not to provide representations in response.

Analysis

Litigation Privilege

The records remaining at issue represent correspondence between the municipality and counsel for other parties. In some circumstances, providing records to other parties will raise the question of whether the privilege that otherwise might apply has been waived by sharing the records with other parties. As set out above, the municipality has taken the position that the privilege was not waived in these circumstances, as the parties with whom the records were shared had a common interest with the municipality. I will review this issue in more detail.

"Common Interest"

Parties that are involved in or anticipate litigation against a common adversary on the same issue or issues, particularly when they are co-parties in the litigation, can be regarded as having a "common interest". As stated by Mr. Justice Carthy in *United States of America v. American Telephone and Telegraph Company*, 642 F.2d 1285 (1980 S.C.C.A. at 1299-1300):

> ... The existence of common interests between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege. But "common interests" should not be construed as narrowly limited to co-parties. So long as the transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts. Moreover, with common interests on a particular issue against a common adversary, the transferee is not at all likely to disclose the work product material to the adversary.

This reference was also relied on by Adjudicator Donald Hale in Order MO-1678, in which he reviewed the basis and background of the "common interest" in the context of requests under the *Act*. He found that the parties involved in the appeal before him had a "common interest", notwithstanding that one of the parties claiming the common interest was not a party to the relevant litigation.

In the present appeal, the municipality has explained in detail the circumstances giving rise to the creation of each of the identified records remaining at issue. It identifies that, for most of the records, the municipality is a co-party in existing litigation with the party to whom the records were sent or from whom the records were received, and that they had a common interest in the subject matter for which these records were prepared. With respect to the other records, the municipality states that litigation was reasonably contemplated between the appellant on the one hand, and the municipality and the party with whom the records were exchanged on the other hand, therefore, it submits that these records were also exchanged between parties with a common interest in these situations. The municipality attached copies of various pleadings, as well as correspondence documenting anticipated actions by the appellant, in support of its position that it had a common interest with the parties with whom the records were exchanged.

Based on the records and the representations provided to me, I am satisfied that, with the exception of two records which I will discuss below, the municipality and the parties with whom the records were exchanged had a common interest in the subject matter of the records at issue. In the circumstances of this appeal, and in view of the existence of a common interest, I find that the disclosure of the records to parties with a common interest did not constitute waiver of any privilege which may exist in those records.

I will now determine whether the records meet the requirements for exemption under section 12 under the "General principles" outlined above.

Are the records exempt from disclosure under section 12?

The municipality submits that all of the records satisfy the criteria for litigation privilege, as they were specifically created or obtained for the lawyer's brief for existing or contemplated litigation. It indicates that the records were shared with counsel with a view towards exchanging information and co-operating in the common defences, or to aid in the litigation. The municipality then specifically indicates the circumstances through which the documents were created and states that, but for the identified litigation, the documents would not exist.

I have carefully reviewed all of the records remaining at issue in this appeal, along with the representations of the municipality. I find that, with two exceptions, all of these records describe the legal strategies and advice formulated in the course of the identified or anticipated litigation involving the parties and were created for the dominant purpose of that litigation. Accordingly, in the circumstances of this appeal and based on the material provided to me, I find that Records File 2 (#2 and 14); File 3 (#35); File 4 (#6, 8, 11, 12, and 14); File 6 (#4); File 8 (#6, 8 and 12); File 11 (#2); File 12 (#1); File 13 (#6); File 14 (#8 and 15); and File 15 (#17 and 18) qualify for exemption under section 12 of the *Act*.

However, some of the records remaining at issue involve settlement discussions. In Order MO-1736, Former Senior Adjudicator Goodis determined that a number of records which involved settlement discussions did not qualify for exemption under the solicitor-client privilege found at section 12 of the *Act*. More recently, in Order PO-2045, Senior Adjudicator John Higgins reviewed the issue of whether or not documents prepared for the purpose of settling a matter, and

for which "settlement privilege" is normally claimed, qualify for exemption under section 19 of the *Freedom of Information and Protection of Privacy Act* (which is similar to section 12 of the *Act* at issue in this appeal). He found that these documents did not qualify for exemption under that section.

In its representations the municipality takes the position that previous orders addressing the application of section 12 to records involving settlement discussions, including Order MO-1736, were wrongly decided. However, in Order PO-2405, Senior Adjudicator Higgins conducted an extensive review of the approach this office has taken to records which involve settlement discussions. In that appeal an affected party argued that the "modern rule" of statutory interpretation (which argues for a contextual model of statutory interpretation) favours the inclusion of settlement privileged records in section 19. Senior Adjudicator Higgins discussed the broad public policy considerations underlying this whole question, including the public policy supporting settlement privilege (i.e. encouraging the settlement of disputes), but also the transparency and accountability purposes of the *Act*, and the fact that the *Act* includes exemptions which are limited and specific. He also reviewed the legislative history of the *Act*, including the settlement-related provisions that were included in other sections of the provincial Act (the equivalent to sections 10 and 11 of the *Act* in issue in this appeal). Following his review of this issue, Senior Adjudicator Higgins determined that the modern rule of statutory interpretation does not favour inclusion of settlement privilege within section 19 and that settlement privileged documents are not, on that basis alone, exempt under that section.

I adopt the approach taken to this issue in previous orders, including Orders MO-1736 and PO-2405, and agree that records which were prepared solely for the purpose of settling a dispute are not necessarily covered by section 12 of the *Act*. On my review of the records remaining at issue in this appeal, there are two records (File 7 (#3) and File 10 (#3)) which were prepared for the sole purpose of responding to settlement discussions. I find that these records were not created for the dominant purpose of existing or reasonably contemplated litigation; rather, they were created for the purpose of settling the litigation. They accordingly do not qualify for exemption under the common law litigation privilege in branch 1 of the section 12 exemption. In addition, and in keeping with the identified difference between the purposes of settlement and litigation, I find that these two records, prepared for the purpose of settlement, are not prepared "in contemplation of or for use in litigation", and that the litigation privilege in branch 2 of the section 12 exemption also does not apply to them.

Furthermore, although the municipality takes the position that there exists a common interest between it and the parties with whom these two records were exchanged, I find that the records themselves relate to matters in which the municipality and the parties were adverse in interest, and relate to the settlement of those matters.

Accordingly, I find that the records identified as File 7 (#3) and File 10 (#3) do not qualify for exemption under section 12 of the *Act*.

ORDER:

1. I uphold the municipality's decision to deny access to the following records:

   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); and File 15 (#17 and 18).

2. I order the municipality to disclose the records identified as File 7 (#3) and File 10 (#3) to the appellant by **January 23, 2006** but not before **January 18, 2006**.

3. In order to verify compliance with Provision 2 of this order, I reserve the right to require the municipality to provide me with a copy of the records which are disclosed to the appellant, upon request.

Original Signed by: December 14, 2005
Frank DeVries
Adjudicator