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

ORDER MO-2500

Appeal MA08-460

London Public Library Board

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BACKGROUND OF APPEAL:

In 2008, the London Public Library Board (the Library, LPL or Board) received correspondence from a public interest clinic which raised questions about the Library's internet filtering policy. The Library directed its administrative staff to consult counsel to obtain a legal opinion concerning some of the issues raised in the public interest clinic's correspondence. The legal opinion is the record at issue in this appeal.

NATURE OF THE APPEAL:

The Library received a request from an individual under the *Municipal Freedom of Information and Protection of Privacy Act* for access to:

> Records indicating legal opinions received by LPL with respect to legality of internet filtering policy including the response sought by the LPL Board to the June 17, 2008 letter from the [public interest clinic].

In response, the Library wrote to the appellant denying access to the responsive record, an opinion letter dated October 15, 2008 that had been prepared by a law firm. The Library indicated that the legal opinion qualified for exemption under section 12 of the *Act* (solicitor-client privilege).

The requester (now the appellant) appealed the Library's decision to this office.

During mediation, the appellant raised the possible application of the public interest override in section 16 of the *Act*. Accordingly, this issue was added to the appeal.

Before mediation was concluded, the Library wrote to the appellant to advise that it had approved for public release a summary of the October 15, 2008 legal opinion. The Library also advised that the summary will be posted publicly as part of the agenda for a future meeting. The summary is one page and is entitled "Summary – letter from [name of law firm] re: Internet Policy Statement".

The parties were unable to settle any of the issues in dispute at mediation and the appeal was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. I began my inquiry by sending a Notice of Inquiry to the Library. The Library provided representations and a copy of those submissions was provided to the appellant, along with a Notice of Inquiry which invited the appellant to provide representations. The Library also provided an affidavit in support of its position but I did not share the affidavit with the appellant due to confidentiality concerns. The appellant provided representations in response, a copy of which was provided to the Library, who then provided reply representations to me.

RECORD:

The record at issue consists of a 10-page letter dated October 15, 2008 prepared by a law firm and addressed to the Library.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 12 states as follows:

> 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. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

In this case, the Library submits that both branches apply to the record. The appellant does not dispute that the record falls within the ambit of solicitor-client communication privilege under Branches 1 or 2. In his representations, the appellant states that he "… does not dispute that the record is technically a legal opinion within the scope of the solicitor-client privilege".

With respect to the Library's claim that litigation privilege also applies to the record, the appellant claims that neither the litigation privilege in Branch 1 or 2 apply to the record.

I will begin my discussion with the application of the solicitor-client communication privilege at Branch 1.

Branch 1: common law privilege

Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

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 [Orders PO-2441, MO-2166 and MO-1925].

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.)].

The Library argues:

> With respect to solicitor-client privilege, the legal opinion constitutes a direct communication between the Library and its counsel after the Library sought out legal advice with respect to its internet filtering policies. The legal opinion was intended to be confidential.

As noted above, the appellant does not dispute that the record contains solicitor-client communication privileged information. I have carefully reviewed the record and am satisfied that it contains solicitor-client communication privileged information. The record was prepared by the counsel retained by the Library and sought counsel's advice about its current internet filtering policy. Having regard to the nature of the solicitor-client relationship between the author of the record and the Library along with the representations of the parties, I find that the record contains confidential communications between the Library and its counsel about legal matters. In my view, this information cannot be reasonably severed from the portions of the record which contains background facts. Accordingly, I find that the record falls within the ambit of the solicitor-client communication privilege under Branch 1, subject to the discussion of waiver, below.

Loss of privilege

Waiver

Under Branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

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 [Orders MO-1514 and MO-2396-F]
- the document records a communication made in open court [Orders P-1551 and MO-2006-F]

Representations of the parties

The Library submits that it has not waived any privilege.

The appellant's representations do not specifically address whether the Library waived privilege. However, in his representations, the appellant refers to the summary the Library approved for public release and argues:

> The [Library] was provided with a detailed letter from [a public interest organization] setting forth specific objections to the manner in which they went about adopting and implementing the filtering project. The "brief summary" to which the library refers simply was inadequate to respond to this letter and to the similar concerns [I raised at a public board meeting]. It is conclusionary in nature and does not adequately respond to the points raised [by the public interest clinic] to the degree necessary to apprise the public of the Board's responses. It fails to give the public adequate information about the rationale for the [Library's] decision, a decision which was a rather dramatic and marked departure from its adopted policies. **To the extent that this summary rises above this level, then it is suggested that the [Library] has waived the privilege and should release the full letter in any event.**

[My emphasis.]

However, I note that later in the appellant's representations he states:

> While there have been extensive records obtained from the [Library] with respect to the issue of filtering in general (that are not the subject of this appeal) the summary itself does not contain such a level of meaningful detail as to act as a substitute for the record itself.

Having regard to the appellant's representations, it appears that he does not dispute that the record contains information that is beyond the scope of the summary that the Library made available to the public. Accordingly, it appears that the parties agree that the summary essentially contains the "bottom line" legal advice the Library obtained.

Previous decisions of this office have considered the issue of whether disclosing the "bottom line" of a legal opinion constitutes waiver of solicitor-client privilege. In Order MO-2222, Adjudicator Colin Bhattacharjee stated:

> I have reviewed the legal opinion at issue in its entirety and compared it with the letter that the appellant received from the Township's Chief Administrative Officer. The sentence in the letter that the appellant has referred me to reads, "… the legal opinion we received indicates that your comments taken as a whole may indeed be defamatory." This represents just one portion of the conclusion reached in the legal opinion. I find that the letter does not disclose the bulk of the legal opinion, including the remaining elements that make up the conclusion, the legal analysis that led to this conclusion, or the recommendation.
>
> In Order MO-1172, Adjudicator Laurel Cropley found that disclosing the "bottom line" of a legal opinion did not constitute waiver of solicitor-client privilege in the particular circumstances of that appeal. In reaching this conclusion, she stated, in part:
>
> > 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.

Later in this order, she further states:

> … 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 agree with this reasoning. In my view, although the Township did disclose one portion of the legal opinion's bottom line to the appellant, this does not constitute waiver, either express or implied, of the solicitor-client privilege that attaches to the legal opinion as a whole. There is no evidence before me to suggest that the Township has disclosed the legal opinion to anyone outside the municipality or engaged in other acts that would constitute waiver of solicitor-client privilege. I find, therefore, that the Township has not waived solicitor-client privilege with respect to this record.

I also agree with the reasoning in Orders MO-1172 and MO-2222 and adopt it for the purposes of this appeal.

In concluding that fairness or consistency did not require a finding that privilege was waived, these orders adopt reasoning from the *S & K Processors* decision, cited above. In that case, McLachlin J. (as she then was) stated that:

> … waiver may also occur in the absence of an intention to waive, where *fairness and consistency so require*. Thus waiver of privilege as to part of a communication, will be held to be waiver as to the entire communication.

In my view, the summary does not specify the reasoning that went into the legal advice the Library's counsel provided to it. Instead, the summary states that the information contained in the opinion letter advises that "it is almost certain that the protection of minors is a sufficiently important objective to limit an individual's freedom of expression". The summary goes on to state that, in order to ensure that the Library's policies comply with the *Canadian Charter of Rights and Freedoms*, the "measures employed must place the least restrictions on the right as possible to achieve the stipulated objective (i.e. the protection of minors)".

Having regard to the above, I find that disclosure of the summary does not represent or lead to a conclusion that the Library, implicitly or explicitly, waived its privilege to the legal opinion at issue. As well, given the limited nature of the disclosure in the summary, I am not satisfied that fairness or consistency require a finding that waiver has taken place. In addition, I am satisfied that the Library has sought to preserve the confidentiality of the remainder of the legal opinion given that there is no evidence before me suggesting that the Library has disclosed it to anyone outside the Library.

Accordingly, I find that the privilege attaching to the record does not cease, and because the record is subject to common law solicitor-client communication privilege at common law, I find that it is exempt under branch 1 of section 12.

Under these circumstances, it is not necessary for me to consider whether branch 1 litigation privilege, or either of the branch 2 privileges, would also apply.

EXERCISE OF DISCRETION

The section 12 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

The Library states:

> The Library submits that it did not err in exercising its discretion in withholding the legal opinion requested by the appellant. The purpose of withholding the opinion was to protect the integrity of the solicitor-client relationship and the Library's ability to seek out frank and candid legal advice. Although the Library acknowledges the relevant considerations which may be taken into account in the exercise of discretion, including, *inter alia*, the principle that information should be available to the public, the Library reiterates that solicitor-client privilege has been held to a higher standard than other forms of privilege.
>
> On the facts of the case, disclosure of the legal opinion may actually work to circumvent a number of objectives contained in [the *Act*], namely, ensuring public confidence in the operation of the institution. In this case, the public should be assured that its institutions are able to seek full and frank legal advice before undertaking action which may adversely affect the public.

The appellant's representations do not suggest that the Library exercised its discretion in bad faith or for an improper purpose. Instead, the appellant questions the appropriateness of the Library's decision to deny him access to the record given the possible application of the public interest override at section 16.

In its reply representations, the Library states:

> In this case, the requester was not seeking his own personal information and the [Library] did not feel that there was a sympathetic or compelling need to have access to the information. Further, the [Library] has a long-standing policy that reports and discussions in relation to litigation or legal advice are to be received or held *in camera* in Board Executive sessions … The historical practice of the Board is to keep confidential any legal advice which is provided in the context of a solicitor-client relationship and not release it to the public.

I have carefully reviewed the representations of the parties and am satisfied that the Library properly exercised its discretion and in doing so took into account relevant considerations. I am also satisfied that the Library did not exercise its discretion in bad faith or for an improper purpose, nor did it take into account irrelevant considerations. In particular, the Library advises that one of the purposes of the *Act* is that information should be available to the public. In addition, it appears that the Library considered the confidential nature of the information. In my view, the appellant's submission that the Library should have considered the public interest is better addressed in my discussion of whether the public interest override at section 16 applies in the circumstances of this appeal.

Given that I have found that the information at issue is a privileged communication between the Library and its counsel, and the purpose of solicitor-client communication privilege is to protect such communications, I find that the Ministry properly exercised its discretion in the circumstances of this appeal.

PUBLIC INTEREST OVERRIDE

Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and 19 of the provincial *Act*, which are equivalent to sections 8 and 12 of the *Act*, are to be "read in" as exemptions that may be overridden by section 23, the provincial equivalent to section 16 of the *Act*. On behalf of the majority, Justice LaForme stated at paragraphs 25 and 97 of the decision:

> In my view s. 23 of the Act infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. It is also my view that this infringement cannot be justified under s. 1 of the *Charter*. … I would read the words "14 and 19" into s. 23 of the *Act*.

For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption. [Order P-244]

Representations of the parties

The Library states:

> There is no compelling public interest in disclosing the opinion. To this end, the Library respectfully submits that a significant amount of information has already been disclosed to the public and this is adequate to address any public interest considerations. Indeed, a brief summary of the opinion was circulated to affected members of the public.
>
> Further, there is no shortage of public debate with respect to this issue, indeed there are entire institutions who are devoted to investigating and interrogating the issue of internet filtering. The Library submits that the public interest exception does not outweigh the purpose of the established exemption…

> Given the voluminous information that is already in the public forum, coupled with the fact that there are many institutions and bodies who have undertaken the role of facilitating public debate with respect to this issue, the Library submits that the test for the public interest override is not met.

The appellant submits that the interest being advanced in this appeal is not private in nature. He describes the approach the Library applied to its internet filtering policy after its consideration of the legal opinion, as a "dramatic and marked departure from its adopted policies". The appellant argues that the Library's revised approach gave rise to controversy and that the legal opinion should be disclosed so that the public could better understand the rationale and legal analysis underlying the Library's decision to revise its internet filtering policy. In support of his position, the appellant states:

> … that regardless of whether the opinion letter was technically within the scope of the solicitor-client privilege, the [Library] should release the record to the public. In the context of this particular case, taking into account the nature of a Public Library Board, the core functions of the library as an institution, the mandates of the [Canadian Library Association's] position on Intellectual Freedom and the Code of Ethics, the public nature of the underlying issues about filtering, and the ongoing interest in the constitutionality of filtering the public libraries, the public interest in disclosure is compelling and clearly outweighs the [Library's] interest in suppressing the document under section 12.

With respect to the summary opinion the Library disclosed, the appellant submits that the information contained in the summary does not contain a "significant amount" of information about the subject-matter of the request. He argues that while there have been extensive records obtained from the Library with respect to the issue of filtering in general, the summary itself does not contain sufficient detail as to act as a substitute for the record itself. As previously mentioned, the appellant argues that the summary is "conclusionary in nature" and does not provide enough information for one to understand the legal analysis and rationale underlying the Library's decision.

The appellant also made the following arguments in response to the Library's representations:

- The fact that there has been "no shortage of public debate with this issue" demonstrates that there is a compelling public interest in the disclosure of the record at issue. The high level of public debate does not act as some sort of substitute for the actual content of the record, which was relied upon by the Library to resolve this issue.

- The fact that "voluminous information" is available in the public forum does not act as a substitute for the actual content of the record at issue. Similarly, the fact that there may be institutions or bodies whose mandate is to facilitate public debate regarding internet filtering does not act as a substitution for the actual content of the record at issue.

- The public interest in disclosure is compelling because of the nature of the public library, and the close connection between the core mission of public library services and the controversy over the Library's new approach.

- Disclosure of the record would inform the public about one of the Library's core functions – the means by which a collection is maintained, and the procedures that must be used to remove items from the collection that may be deemed by some as "inappropriate".

Finally, as part of his representations, the appellant provided a legal opinion he received from the public interest clinic whose correspondence resulted in the Library seeking the legal opinion at issue. The legal opinion filed in support of the appellant's position states:

> The *Criminal Lawyer's Association* case applies directly to the present case. Filtering use of public library internet access raises issues of great public importance, as it involves a public body acting to restrict freedom of expression through its internet traffic management practices. Non-disclosure of the [record] will restrict your freedom of expression in a number of ways. First, disclosure is required to permit you to "know the case" being raised against arguments that favour balanced filtering policies. The absence of any public legal dispute – the *absence* of litigation – restricts the [Library's ability to obtain legal analysis forged in the crucible of an adversarial process. In obtaining the [record], the [Library] has sought a response to [our] legal opinion. However, in refusing to make [the legal opinion] available, the [Library] has denied you – and itself – the opportunity to test the analysis [set out in the record]. These relate to access to information itself – core values in the constitutional guarantee of freedom of expression.

In his representations, the appellant asserts that "the gist of *Criminal Lawyers' Association* is that it is appropriate for the [Information and Privacy Commissioner/Ontario] to engage in a greater level of scrutiny required under the compelling public interest section". The appellant goes on to state:

> It is not enough for an institution resisting the application of the public interest override to merely state the bare conclusion that the override is not applicable because of the importance of the underlying privilege.

The legal opinion obtained by the public interest clinic also concludes that the public interest override in section 16 could apply in the circumstances of this appeal taking into consideration that:

- The opinion letter is the Library's primary response to its correspondence, with no other existing responses. Given it appears that the Library relied on the suggestions set out in the opinion letter, it should be disclosed so that the suggestions set forth in the record could be tested for the public good.

- Though there has been wide public coverage about internet filtering policies, there has not been wide public coverage of the legal opinion the Library obtained. In fact, there is no publicly available information about the Library's constitutional position, which is the subject-matter of the record.

The Library was given a copy of the appellant's representations along with the legal opinion the appellant obtained from the public interest clinic. The Library's reply representations submit that the majority of the court in *Criminal Lawyers' Association* did not hold that decisions about non-disclosure under the law enforcement and solicitor-client exemptions should be held to a higher scrutiny. In support of its position, the Library refers to paragraphs 90-92 of the Court of Appeal of Ontario's decision *Criminal Lawyers' Association*:

> …the compelling reasons justifying the stringent application of exceptions to solicitor-client privilege support an inference that even if the Commissioner were to apply s. 23, in most circumstances -- including, possibly, the current proceedings -- she would be unlikely to find that the public interest clearly outweighs the purpose for the exemption.
>
> In my view, allowing the [Information and Privacy Commissioner of Ontario] the jurisdiction to consider whether the public interest clearly outweighs the reasons for a right to solicitor-client privilege would not immediately do damage to the principles surrounding privilege. It must be kept in mind that the public interest also weighs in favour of a narrow application of such an exception.
>
> I would note that, in relation to both sets of potential dangers -- risk to ongoing investigations and solicitor-client privilege -- the issue before this court is not whether or not the documents should be disclosed; rather, it is whether or not s. 23 ought to apply to ss. 14 and 19.

The Library argues that the Court of Appeal in *Criminal Lawyers' Association* simply extended the scope of the public interest exemption to the solicitor-client privilege exemption. The Library states that the Court of Appeal's decision did not result in increasing the level of scrutiny that should be applied to decisions where access is denied pursuant to the solicitor-client privilege exemption under the *Act*.

With respect to the public debate issue and its relevancy in considering whether the public interest override at section 16 applies, the Library states:

> It is also contended by the appellant [in his] submissions that the large amount of public debate is "besides the point and if anything is a factor that favours the position of the Requester." The Library respectfully disagrees with this position as previous Orders of the Information and Privacy Commissioner/Ontario, such as Order P-613, make it clear that this is a very relevant factor. It is also not a factor that favours the position of the appellant, as it has been held that significant debate can adequately address any public interest considerations which otherwise would have mitigated toward disclosure. Similarly, the appellant's submission

> that there has been a high level of public debate also mitigates in favour of non-disclosure.
>
> The extensive debate and public coverage on the issue of internet filtering in public libraries should also be considered when adjudicating with respect to the issue of whether there is a relationship between the record and the [*Act's*] central purpose of shedding light on the operations of government. In analyzing this question, it has been held that the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has at its disposal to make effective use of the means of expressing public opinion or to make political choices (Order P-984). The appellant does not make any clear submissions in regards to how a legal opinion on Charter issues provided in the context of a solicitor-client relationship would further the public's ability to express an opinion other than to say that the public needs to understand the logic of the Board's resolution.

With respect to the appellant's argument that there has been no wide public coverage of issues relating to the specific legal opinion, the Library states:

> This also evidences the fact that there has been sufficient public coverage of this issue. The appellant asserts that this summary does not achieve the level of disclosure that was made in Orders P-532 and P-568 and that there has not been wide public coverage with respect to the rationale for the Board's change in policy. The Library submits that the focus of this inquiry is too narrowly characterized by the appellant. The proper focus is whether there has been sufficient public coverage of the internet filtering policy at the London Public Library. As the appellant admits on page 9, "the matter of internet filtering has certainly received wide public coverage". If a requester were able to narrow the matter at issue in this way, this factor would almost always mitigate in [their] favour… The issue should properly be characterized as the internet filtering policy of the London Public Library.

Finally, the Library submits that there is a public interest in the non-disclosure of the opinion letter. The Library argues that if public institutions are required to disclose legal opinions, they may be more reluctant to seek legal advice and lawyers will be less forthcoming in providing a frank response, thus undermining the entire purpose of the privilege. The Library also argues that the public interest is furthered when institutions are able to hold frank discussions about legal issues before adopting a particular position which may adversely affect the public interest.

Decision and Analysis

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Orders P-984, PO-2607]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of

their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Orders P-984 and PO-2556].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347 and P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)]. If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered "compelling" and the override will not apply [Orders PO-2072-F and PO-2098-R].

The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

The record at issue is a legal opinion obtained by the Library. After obtaining the legal opinion, the Library revised its internet filtering policy. The parties do not dispute that significant information about public libraries and internet filtering policies is publicly available. They also agree that the Library provided some information to the public about the reasons behind its decision to revise its internet filtering policy. However, the parties do not agree as to whether the information the Library provided is sufficient to inform the public about the Library's decision to revise its internet filtering policy.

The appellant's submission has two main points. The first one is the submission that the *Criminal Lawyers' Association* decision provides that a "greater level of scrutiny" should be applied when considering whether the public interest override at section 16 applies, given the Library's public role and mandate. I disagree. The Court of Appeal's decision merely "reads in" the law enforcement and solicitor-client privilege exemptions in addition to those which may be overridden by the pubic interest override in section 16. Moreover, and contrary to the position taken by the appellant, the Court of Appeal majority judgment in *Criminal Lawyers' Association* notes that exceptions to privilege such as section 16 are to be stringently applied (see also *Blank v Canada (Minister of Justice*, [2006] S.C.J. No. 39).

The impact of *Criminal Lawyers' Association*, therefore, is simply that parties seeking disclosure of a record which has been found to contain solicitor-client privileged information may now raise the possible application of the public interest override in section 16, which the appellant has done.

The appellant's second main point is that disclosure of the legal opinion would inform the citizenry about the Library's decision to revise its internet filtering policy. In support of his

position, the appellant argues that not enough information is publicly available about the Library's decision which resulted in a revised internet filtering policy.

The Library argues that in determining whether the public interest override at section 16 applies, the "proper focus is whether there has been sufficient public coverage of the internet filtering policy at the London Public Library", not whether disclosure of the actual content of the opinion letter gives rise to the public interest override. While the question of whether the public interest in disclosure has been satisfied by information that has already been made public may be a factor in deciding whether section 16 applies, this does not mean that I need not consider the contents of the record itself. The issue before me is whether the public interest override applies to the opinion letter, which I found qualifies for exemption under section 12. Accordingly, the content of the record itself, as compared with what has already been made public, is highly relevant in a determination of whether the public interest override in section 16 applies.

In considering whether there is a "compelling public interest" in disclosure of the opinion letter, a relevant factor is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Orders P-984, PO-2607]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Orders P-984 and PO-2556].

In other words, I must ask whether disclosure of the record would serve the purpose of informing or enlightening the citizenry about the Library's decision to revise its internet filtering policy.

The Library argues that the appellant "has failed to make clear submissions in regards to how a legal opinion on Charter issues provided in the context of a solicitor-client relationship would further the public's ability to express an opinion other than to say that the public needs to understand the logic of the Board's resolution."

I have considered the appellant's representations and am satisfied that disclosure of the opinion letter would inform the citizenry about the Library's decision to revise its internet filtering policy. In particular, disclosure of the opinion would inform the public about the nature of the legal advice the Library obtained about the impact of the Charter on one of its core functions – maintaining collections, which includes establishing procedures to remove or add items to its collections. As noted above, the legal opinion contains information about the legal reasoning and analysis underlying the legal advice the Library obtained about its internet filtering policy. The Library's decision to revise its internet filtering policy has a wide impact on the community it serves. Any decision to restrict or expand a community's public library access to information, whether the information is accessed through the internet or more traditional means, such as books, in my view rouses strong interest or attention.

Though I acknowledge that considerable information about the Library's internet filtering policy has been made available to the appellant and the public, I note that this information appears to be of a general nature. Accordingly, I agree with the appellant's submission that while there has

been wide public coverage of the issues surrounding the Library's internet filtering policy and its decision to revise its policy, there has been little information made public about the actual legal opinion the Library obtained. The summary the Library disclosed to the public reveals the "bottom line" advice the Library obtained. However, I stated earlier that the summary does not specify the reasoning that went into the legal advice or recommendations obtained by the Library. This is the information the appellant seeks and I am satisfied that disclosure of that information would better inform the public about the Library's decision to revise its internet filtering policy. Given the public debate and the involvement of various stakeholders in the Library's revised internet policy, I find on the evidence before me that disclosure of the opinion would rouse considerable strong interest or attention.

However, I am also satisfied that there is a public interest in the non-disclosure of the legal opinion in question. As noted above, any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)]. If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered "compelling" and the override will not apply [Orders PO-2072-F and PO-2098-R].

The Library argues, and I agree, that the public interest is furthered when institutions are able to hold frank confidential discussions with legal counsel about legal issues which may affect the public interest. In my view, it is also significant that the Library voluntarily waived privilege in order to disclose the bottom line of the opinion, bearing in mind that the Library is entitled to confidential legal advice. I also note that, in *Criminal Lawyers' Association*, the Ontario Court of Appeal said that "the *public interest* also weighs in favour of a narrow application of [an exception to privilege such as section 16] (emphasis added)." For all these reasons, I find that there is a public interest in the non-disclosure of the remainder of the legal opinion and that the public interest in non-disclosure identified by the Library is significant.

In the circumstances of this appeal, having found that a significant public interest in the non-disclosure of the legal opinion exists, I have concluded that the public interest in disclosure cannot be considered "compelling". As a result, I find that the public interest override at section 16 cannot apply in the circumstances of this appeal.

Alternatively, even if I was persuaded that the public interest identified by the appellant was "compelling" in the circumstances of this appeal, I would not be satisfied that this interest clearly outweighs the purpose of the solicitor-client privilege exemption, taking into consideration that the Library already disclosed the opinion's bottom line to the public.

In reaching that conclusion, I considered the purpose of the solicitor-client privilege exemption. With respect to common-law solicitor-client communication privilege under branch 1, the purpose is to protect confidential solicitor-client communications, which as noted above, is an important purpose. An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption. [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]. In my view, in this instance, particularly in view of the disclosure

that has been made, denying access to the remainder of the opinion is consistent with the purpose of the exemption.

On a related point, the appellant submits, as already noted, that the Library must do more than merely assert the importance of the solicitor-client privilege as a reason not to apply to the override in section 16. In that regard, I note that in *Blank v Canada (Minister of Justice)* (cited above), the Supreme Court of Canada stated (at paragraph 24):

> Thus, the Court explained in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, and has since then reiterated, that the solicitor-client privilege has over the years evolved from a rule of evidence to a rule of substantive law. And the Court has consistently emphasized the breadth and primacy of the solicitor-client privilege: see, for example, *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61; and *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31. In an oft-quoted passage, Major J., speaking for the Court, stated in *McClure* that "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance."

While I agree with the appellant that the mere recitation of the importance of solicitor-client privilege is not sufficient to negate the possible application of section 16, I nevertheless conclude that in the circumstances of this appeal, the public interest in disclosure does not "clearly outweigh" the purpose of protecting communications subject to common law solicitor-client privilege, which is the purpose of section 12. This view arises from the need to stringently apply statutory provisions that impinge on that type of privilege.

Having regard to the above, I find that the public interest override at section 16 does not apply to the information I found exempt under section 12.

ORDER:

I uphold the Library's decision and dismiss the appeal.

Original Signed By: February 26, 2010
Jennifer James
Adjudicator