

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

---

## ORDER MO-3929

Appeal MA19-00222

The Corporation of the Town of Niagara-on-the-Lake

June 12, 2020

**Summary:** The Town of Niagara-on-the-Lake received a request for access to minutes of a particular meeting between four named individuals. The town denied access to two records based on the solicitor-client privilege exemption in section 12 of the *Municipal Freedom of Information and Protection of Privacy Act*. The adjudicator finds that the records are not protected by solicitor- client privilege, and orders the town to disclose them to the appellant.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 12.

**Orders and Investigation Reports Considered:** Order PO-3651.

### OVERVIEW:

[1] The Town of Niagara-on-the-Lake (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the minutes of a meeting that was held in February 2019 with four named individuals in attendance, including the town's chief administrative officer and mayor. In particular, the requester specified that he was seeking access to the full meeting minutes and the names of all individuals who attended.

[2] The town issued a decision denying access to the records that it identified as responsive to the request. In doing so, the town cited the solicitor-client privilege exemption in section 12 of the *Act*. The requester appealed the town's decision to this office.

[3] During the mediation stage of the appeal process, the appellant advised the mediator that he was seeking access to all of the records subject to the town's decision. The town continued to maintain that the records are protected by solicitor-client privilege and would not be disclosed. The town confirmed that it was not basing its decision on any other exemptions under the *Act*.

[4] A mediated resolution was not achieved and the file was transferred to the adjudication stage of the appeal process. I decided to conduct an inquiry under the *Act*, during which I invited both the town and the appellant to provide written representations for my consideration. I received representations from the town, which were shared with the appellant in accordance with *Practice Direction Number 7* and the IPC's *Code of Procedure*. The appellant did not provide representations.

## **RECORDS:**

[5] The town identified two records, totalling three pages, as being responsive to the appellant's request. Both records consist of handwritten notes taken during a meeting in February 2019.

## **DISCUSSION:**

### **Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the records at issue?**

[6] The solicitor-client privilege exemption at section 12 of the *Act* reads 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.

[7] Section 12 contains two branches of solicitor-client privilege. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution...") is a statutory privilege. Both branches are described in more detail below.

[8] The town has the onus of establishing that one (or both) of the branches apply to the records claimed to be exempt from disclosure.

#### ***Branch 1: common law privilege***

[9] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

### *Solicitor-client communication privilege*

[10] 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.<sup>1</sup> The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.<sup>2</sup> The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.<sup>3</sup>

[11] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.<sup>4</sup>

[12] 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.<sup>5</sup> The privilege does not cover communications between a solicitor and a party on the other side of a transaction.<sup>6</sup>

### *Litigation privilege*

[13] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need 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.<sup>7</sup> Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.<sup>8</sup> It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.<sup>9</sup> The litigation must be ongoing or reasonably contemplated.<sup>10</sup>

[14] Common law litigation privilege generally comes to an end with the termination

---

<sup>1</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>2</sup> Orders PO-2441, MO-2166 and MO-1925.

<sup>3</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

<sup>4</sup> *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

<sup>5</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

<sup>6</sup> *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

<sup>7</sup> *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4<sup>th</sup>) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

<sup>8</sup> *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

<sup>9</sup> *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

<sup>10</sup> Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

of litigation.<sup>11</sup>

### ***Branch 2: statutory privilege***

[15] Branch 2 is a statutory privilege that applies where the records were “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.” The statutory and common law privileges, although not identical, exist for similar reasons.

#### *Statutory solicitor-client communication privilege*

[16] Like the common law solicitor-client communication privilege, this privilege covers records prepared for use in giving legal advice.

#### *Statutory litigation privilege*

[17] This privilege applies to records prepared by or for counsel employed or retained by an institution “in contemplation of or for use in litigation.” It does not apply to records created outside of the “zone of privacy” intended to be protected by the litigation privilege, such as communications between opposing counsel.<sup>12</sup>

[18] The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.<sup>13</sup>

[19] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.<sup>14</sup>

### ***Representations***

[20] The town submits that the records pertain to a “without prejudice” meeting held for the purposes of discussing the concerns of the development community, and to avoid a legal challenge to an Interim Control Bylaw (the bylaw). The town maintains that the meeting was similar to a settlement discussion, and that disclosure of the records could be prejudicial to the town’s position at the Local Planning Appeal Tribunal or in court at a later date.

---

<sup>11</sup> *Blank v. Canada (Minister of Justice)*, cited above.

<sup>12</sup> See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.

<sup>13</sup> *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

<sup>14</sup> *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

### ***Analysis and findings***

[21] The town has the onus of establishing that the exemption in section 12 applies to the records at issue. As stated, the town must demonstrate that the records are covered by either the common law privilege (Branch 1), the statutory privilege (Branch 2), or both. Given the brevity of the town's submissions, I have very little information before me to support the town's position, aside from the records themselves. Having considered the town's submissions and the content of the records at issue, I find, for the following reasons, that the exemption in section 12 does not apply.

[22] The town does not specifically identify which branch of section 12 it relies upon, but its claim that the meeting was akin to a settlement discussion suggests that it relies on statutory litigation privilege under Branch 2.

[23] Both the common law and statutory litigation privilege protect records created for the dominant purpose of litigation. While the statutory litigation privilege (Branch 2) is substantially similar to the common law litigation privilege (Branch 1), it offers greater protection because it does not cease to apply at the conclusion of the underlying litigation. The statutory litigation privilege in section 12 also protects records prepared for use in the mediation or settlement of litigation.<sup>15</sup>

[24] To be covered by either form of litigation privilege, litigation must be ongoing or reasonably contemplated.<sup>16</sup> Determining whether litigation was "reasonably contemplated" is a question of fact that must be decided in the specific circumstances of each case.<sup>17</sup> In Order PO-3651, Adjudicator Cathy Hamilton commented on what constitutes "contemplated" litigation, in part by saying:

[I]n order to conclude that there was "contemplated" litigation, there must be evidence that litigation was reasonably in contemplation, which requires more than a vague or general apprehension of litigation.

[25] In the appeal before me, the town has provided no evidence of ongoing or reasonably contemplated litigation between it and the development community. Rather, the town maintains that the meeting in February 2019 was held to *avoid* a legal challenge to the bylaw, and that it was therefore similar to a settlement discussion.

[26] As described above, the records at issue are handwritten notes documenting what happened during a meeting between what the town calls its "operating minds" and individuals representing the development community in Niagara-on-the-Lake. On

---

<sup>15</sup> *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

<sup>16</sup> Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

<sup>17</sup> Order PO-3561.

my review of them, the records suggest that the purpose of the meeting was to have a conversation about the development community's concerns with a particular town bylaw.

[27] I accept, based on my review of the records, that the town solicitor was present at the meeting. However, that fact on its own is not sufficient for establishing that the records are subject to litigation privilege.<sup>18</sup> Having regard to the information before me, I am not persuaded that there was more than a "vague or general apprehension of litigation" between the parties. Accordingly, I find that litigation was not ongoing or reasonably contemplated, as required for litigation privilege to apply.

[28] Although the town has not specified who authored the records at issue, or explained why they were created, given my finding that litigation was not ongoing or reasonably contemplated, it follows that the records were not prepared by or for the town's solicitor "in contemplation of or for use in litigation." It also follows that the records were not prepared for use in the mediation or settlement of contemplated litigation, such that settlement privilege would apply. As a result, I find that the records are not protected by the common law or statutory litigation privilege under Branch 1 or 2 of section 12.

[29] The town did not provide any submissions suggesting or supporting the application of the common law or statutory solicitor-client communication privileges. While I am aware of a notation in one of the records that is attributed to the town solicitor, I find that it does not attract solicitor-client communication privilege. This is because the notation reflects a suggestion that the solicitor offered to the development community's representatives, and the "privilege does not cover communications between a solicitor and a party on the other side of a transaction."<sup>19</sup> Accordingly, I find that neither the common law nor statutory solicitor-client communication privileges are established in the circumstances.

[30] As the town has not relied on any other exemptions under the *Act*, and no mandatory exemptions apply, I will order it to disclose the records in their entirety to the appellant.

## **ORDER:**

1. I order the town to disclose the records to the appellant by **July 6, 2020**.

---

<sup>18</sup> Orders P-1052, MO-1373, referencing *Nova Scotia Pharmaceutical Society v R* (1988) 225 APR 70 (NSTD) at p 73.

<sup>19</sup> *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

2. In order to verify compliance with this order, I reserve the right to require the town to provide me with a copy of its correspondence to the appellant, disclosing the records in accordance with order provision 1.
3. The timeline noted in order provision 1 may be extended if the town is unable to comply in light of the current COVID-19 situation. I remain seized of the appeal to address any such requests.

Original Signed by: \_\_\_\_\_

Jaime Cardy  
Adjudicator

\_\_\_\_\_ June 12, 2020