

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3959-I

Appeal MA15-632

Township of Clearview

October 1, 2020

Summary: The Township of Clearview (the township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records relating to four decisions it made regarding certain municipal road matters. After its search, the township issued a decision allowing partial access to the records. Ultimately, the township claimed the exemptions at sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations) and 12 (solicitor-client privilege) to withhold the remainder of the information. The appellant raised the possible application of the public interest override at section 16 of the *Act*, which was added as an issue to the appeal. In this interim order, the adjudicator finds the section 12 exemption (solicitor-client privilege) applies to the records for which the township claimed that exemption. The adjudicator reserves his decision on access to the remaining records to deal with outstanding issues.

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

OVERVIEW:

[1] The Township of Clearview (the township) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records relating to four decisions it made regarding certain municipal road matters. The request concerns the township's decision to enter into settlement agreements with a specified

party which would result in the closing of a section of a specified county road and applications at a hearing of the Niagara Escarpment Hearing Office and the Ontario Municipal Board (the Joint Board) on the matter. In its representations, the township explains that the "Joint Board" hearing refers to a proceeding conducted by the Ontario Environmental Review Tribunal that commenced in May 2010.

[2] The request states:

1. We request the following information in relation to [the township's] decision to enter into Minutes of Settlement (the MoS) with [named company] effective January 25, 2010, for the time period between September 1, 2008 and February 25, 2010:
 - a. All records (including notes, emails, correspondence, meeting minutes and agendas, staff or committee reports, drafts of the MoS, etc.) in the possession of Clearview (including staff, municipal councillors, the Mayor, and agents or representatives thereof) in relation to the negotiation and finalization of the MoS.
2. We request the following information in relation to Clearview's decision to execute a three-party Road Settlement Agreement (the RSA) with [named company] and the County of Simcoe on or about February 25, 2010, for the time period between September 1, 2008 and March 25, 2010:
 - b. All records (including notes, emails, correspondence, meeting minutes and agendas, staff and committee reports, drafts of the RSA, appraisals of the land value of County Road 91, etc.) in the possession of Clearview (including staff, municipal councillors, the Mayor, and agents or representatives thereof) in relation to the negotiation and finalization of the RSA;
 - c. All records (including notes, emails, correspondence, meeting minutes and agendas, staff and committee reports, etc.) in the possession of Clearview (including staff, municipal councillors, the Mayor, and agents or representatives thereof) regarding estimate(s) of the cost to Clearview to implement the proposed road improvements in the RSA; and
 - d. All records (including notes, emails, correspondence, meeting minutes and agendas, staff or committee reports, etc.) in the possession of Clearview (including staff, municipal councillors, the Mayor, and agents or representatives thereof) regarding any appraisal(s) of the land value of the closed portion of County Road 91.
3. We request the following information in relation to Clearview's decision to proceed with a Schedule A+ Road Works Municipal Class Environmental Assessment (Class EA) per the Ontario *Environmental Assessment Act* for the

development of Sideroad 26/27 in Clearview, for the time period between September 1, 2008 and October 28, 2014:

- e. All records (including notes, emails, correspondence, meeting minutes and agendas, staff or committee reports, etc.) in the possession of Clearview (including staff, municipal councillors, the Mayor, consultants, and agents or representatives thereof) in relation to Clearview's decision to proceed with a Schedule A+ Road Works Class EA for Sideroad 26/27.
4. We request the following information in relation to Clearview's decision to execute Municipal Road Transfer Agreement (MRTA) with the County of Simcoe regarding County Road 91, for the time period between September 1, 2008 and March 25, 2010.
- f. All records (including notes, emails, correspondence, meeting minutes and agendas, staff or committee reports, MRTA drafts, etc.) in the possession of Clearview (including staff, municipal councillors, the Mayor, and agents or representatives thereof) in relation to the negotiation and finalization of the MRTA.

[3] In response, the township issued a decision granting the appellant partial access to the records it identified as responsive to the request. Initially, the township relied on the discretionary exemptions in sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 9(1)(d) (relations with government agency) and 12 (solicitor-client privilege), as well as the mandatory exemption in section 10(1)(a) (third party information) to withhold the remainder of the records.

[4] The appellant was not satisfied with the decision and appealed it to this office. Mediation of the appeal was attempted. During mediation, the township issued a revised decision granting the appellant access to additional records. The township maintained its denial of access to the remaining records pursuant to the same exemptions it initially relied on. It also relied on the mandatory personal privacy exemption in section 14(1) of the *Act* to withhold some information in the records. Also during mediation, the appellant raised as an issue in the appeal the possible application of the public interest override in section 16 of the *Act*.

[5] As mediation did not resolve the appeal, it was moved to the adjudication stage of the appeal process for a written inquiry under the *Act*. The IPC adjudicator assigned to the file sought and received representations from the town, an affected party and the appellant. These representations were shared in accordance with the IPC's *Code of Procedure*. The appeal was then assigned to me to continue with the inquiry and issue the decision.

[6] After I reviewed the parties' representations along with the withheld information, I decided to issue this interim order that only addresses a group of records claimed to

be exempt under section 12. With regard to the remainder of the records, including other records withheld under section 12, I have decided to seek representation in reply from the township so that it can address issues raised by the appellant in her representations.

[7] In this order, I uphold the township's decision to withhold the records listed below and claimed exempt under section 12 (solicitor-client privilege). I defer my findings on the other records and exemptions pending receipt of further representations from the parties.

RECORDS:

[8] According to the township's index of records and representations provided during this appeal, 271 records remain in dispute in the appeal. Some of the records that remain in dispute have been partially disclosed, however, the bulk of records have been fully withheld.¹ The township relies on various exemptions to withhold this information including section 6(1)(b) (closed meeting), section 7(1) (advice or recommendations) and section 12 (solicitor-client privilege). The public interest override is also an issue.

[9] The township has claimed the exemption at section 12 for most of the withheld information, including the following records that consist of emails, many with attachments, and all of which were fully withheld:

6, 7, 9, 10, 11, 12, 13, 14, 15, 17, 18, 23, 28, 34, 36, 38, 39, 40, 45, 48, 54, 83, 85, 86, 98, 99, 100, 101, 102, 103, 104, 106, 107, 112, 122, 159, 160, 184, 185, 186, 188, 189, 192, 251, 305, 308, 345, 346, 351, 352, 357, 359, 360, 361, 362, 363, 364, 365, 370, 371, 372, 373, 374, 375, 376, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 393, 399, 400, 411, 412, 414, 415, 416, 417, 418, 419, 421, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 440, 441, 442, 443, 444, 449, 451 and 505².

ISSUES:

- A. Does the discretionary exemption at section 12 apply to the records?
- B. Should the township's exercise of discretion under section 12 with respect to these records be upheld?

¹ After mediation, there were 476 records remaining in dispute and the township indicated in its representation that it had decided to release a further 205 records in full.

² Although the township has also claimed the section 12 exemption for other records, this interim order is only dealing with the records listed here.

DISCUSSION:

Preliminary Matter

[10] This interim order will only address a group of records claimed to be exempt under section 12. After my review of the records and the parties' representations, I have decided to seek representation in reply from the township so that it can address issues raised by the appellant. However, for the group of records dealt with in this interim order, records where the township has claimed Branch 1 solicitor-client communication privilege, it was clear that no further representations were necessary for my determination.

[11] Therefore, this interim order will address certain records that were withheld by the township under section 12, specifically the records the township withheld under Branch 1, solicitor-client communication privilege. There are other records that the township withheld under this exemption claiming they were exempt under Branch 2 litigation privilege only. Those records will not be discussed in this interim order. The remainder of the issues including exemptions at section 6(1)(b) (closed meeting), section 7(1) (advice or recommendations) and the public interest override as well as the remaining records withheld under section 12 will be determined in a subsequent order once further representations are received.

Issue A: Does the discretionary exemption at section 12 apply to the records?

[12] 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.

[13] Section 12 contains two branches. 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. The institution must establish that one or the other (or both) branches apply. The township argues that the Branch 1 solicitor-client privilege applies to the records at issue in this order.

Branch 1: common law privilege

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

Solicitor-client communication privilege

[15] 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.³ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.⁴ 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.⁵

[16] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.⁶

[17] 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.⁷ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.⁸

Representations

[18] The records at issue in this appeal relate to the settlement of a "Joint Board" hearing. As noted, the township explains that the "Joint Board" hearing refers to a proceeding conducted by the Ontario Environmental Review Tribunal that commenced in May 2010. The township submits that the appellant seeks to gain access to various agreements and settlements that were entered into by an affected party, the township and the County of Simcoe. The township submits that the Joint Board heard evidence for 139 days including from expert witnesses and ultimately the specified project was permitted to go ahead, subject to a number of conditions.

[19] The township cites Order P-1551 and submits that the rationale for the first branch, solicitor-client communication privilege is "to ensure that a client may confide in his or her lawyer on a legal matter without reservation." The township identifies the records for which it is claiming solicitor-client communication privilege and submits that they have been identified as falling within this exemption because they are:

- direct communications between solicitor and client (or its agent or employee), where the "client" is the municipality, and privilege will attach to communications between counsel and township staff and employees that work on behalf of the municipality to implement the direction of Council

³ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁴ Orders PO-2441, MO-2166 and MO-1925.

⁵ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

⁶ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁷ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁸ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

- of a confidential nature (all correspondence claimed in this branch is between solicitor and client as part of the continuum of communications)
- made for the purpose of obtaining professional legal advice.

[20] The township refers to *Balabel v. Air India* for direction on the “continuum of communications” where it stated:

In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the 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.

[21] The appellant submits that the index of records provided by the township does not provide sufficient detail for her to comment on the parties to any given communication (e.g. author/recipient of each record was not provided) and submits that she relies on the IPC to review these records to assess the validity of the section 12 exemption claim.

[22] The appellant submits that the request focuses on records related to settlement agreements “in public interest litigation, not private litigation.” She submits that in a public hearing of the Joint Board (OMB and Environmental Review Tribunal), the “public interest mandate” is foremost for the Board. They refer to *Ottawa (City) v. Minto Communities Inc.*⁹, where the appeal process of the OMB is discussed:

Furthermore, it is important to keep in mind that the appeal process before the Ontario Municipal Board is not merely a *lis* between parties, but a process requiring the OMB to exercise its public interest mandate. The decision to be made by the Board transcends the interests of the immediate parties because it is charged with responsibility to determine whether a land planning proposal is in the public interest. At first instance, that public interest is determined by Municipal Council, but on an appeal the Board has the obligation to exercise its independent judgment on the planning merits of the application and to assess the proposal and the positions of the parties from the perspective of applicable legislation, regulations, provincial plans, the provincial policy statement, official plans and bylaws and even the potential impact on neighbouring municipalities. In doing so, it brings its own expertise to bear.

⁹ 313 DLR (4th) 419; [2009] CarswellOnt 7349 (Ont. Div. Ct.)

Analysis and finding

[23] I have reviewed the records for which the township is claiming the section 12 exemption and I agree that they are exempt from disclosure under Branch 1, solicitor-client communication privilege. The records contain direct communications of a confidential nature between a solicitor and township staff.

[24] Based on my review of the records, I find that they consist of direct communications by way of email exchanges, many with attachments, between township staff and the town's solicitor. It is evident that these communications were made for the purpose of obtaining or giving professional legal advice. The various attachments that passed between the township and its solicitor were clearly aimed at keeping both parties informed for the purpose of that advice. As noted, the rationale for this type of privilege is to ensure that a client may freely confide in their lawyer on a legal matter. Confidentiality is an essential component of the privilege, and I am satisfied after reviewing the records and the township's representations, that the communications were made in confidence.

[25] Although the appellant refers to the appeal process at the OMB in reference to its public interest mandate, it is not apparent how this would affect solicitor-client communication privilege or the exemption at section 12 and I find that it does not. I will, however, consider the appellant's arguments in the context of my review of the township's discretion.

[26] While the appellant argues that there is a public interest aspect in the circumstances surrounding the creation of the records, this is not a relevant consideration in my determination of whether these records are exempt under section 12. Furthermore, the public interest override in section 16 does not apply to records claimed exempt under section 12. However, I will consider the public interest in my consideration of the board's exercise of discretion below.

[27] In summary, I find that the records at issue fall within the scope of Branch 1 solicitor-client communication privilege exemption at section 12 of the *Act*, subject to my consideration on the exercise of discretion below.

Issue B: Should the township's exercise of discretion under section 12 with respect to these records be upheld?

[28] 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.

[29] 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.

[30] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations. This office may not, however, substitute its own discretion for that of the institution.¹⁰

Representations

[31] In its representations, the township submits that in exercising its discretion to withhold the records under section 12, it attempted to balance the purpose of the section 12 exemption and all other relevant interests and considerations, on the basis of the facts and circumstances of this particular case. The township submits that it has provided as much of the information as possible without jeopardizing the sanctity of settlement discussions and privileged advice and communications. The township acknowledged that it has a relationship with the appellant, as a result of the Joint Board hearing, and submits that the request was processed in good faith, in accordance with the historic practices with respect to similar requests.

[32] The appellant submits that the township failed to take into account relevant considerations. She submits that information that informed the township's decision to enter into road settlements should be made available to the public. The appellant refers to a compelling need to receive this information and details interests of other parties in having this information publicly released. The appellant submits that the information is no longer sensitive to the township as it has entered into settlement agreements and supported the specified party's application before the Joint Board years ago. The appellant submits that the litigation has been terminated and no future litigation against the township is contemplated.

Finding

[33] Having regard to the circumstances of this appeal including the records at issue in this interim order, the parties' representations, as well as the importance of solicitor-client privilege as recognized by the Courts, I am satisfied that the township has appropriately exercised its discretion under section 12 of the *Act*. I am satisfied that the township took into account relevant considerations and did not take into account irrelevant ones when considering whether the information should be withheld under section 12. Further, I am satisfied that the township considered any public interest in the release of the information. Accordingly, I uphold the township's exercise of discretion to withhold the information under section 12.

¹⁰ Section 54(2).

ORDER:

1. I uphold the township's application of the exemption at section 12 with respect to the records it withheld under that exemption and dealt with in this interim order.
2. I remain seized of this appeal to determine the remaining issues.

Original signed by _____

Alec Fadel
Adjudicator

October 1, 2020 _____