

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4339

Appeals MA20-00363 and MA20-00566

Township of Oro-Medonte

February 28, 2023

Summary: The Township of Oro-Medonte received two requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to legal opinions relating to short-term rentals. The township issued two decisions denying access to the legal opinions withholding them under section 12 (solicitor-client privilege) of the *Act*. The appellant appealed the township's decisions. In this order, the adjudicator upholds the township's decisions, and dismisses the appeals.

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

Orders Considered: Order MO-2945-I.

Cases Considered: *Stevens v. Canada (Prime Minister)* (1988), 161 D.L.R. (4th) 85.

OVERVIEW:

[1] The Township of Oro-Medonte (the township) amended a zoning bylaw in 2020 about short-term rentals (STRs) in the township. This order determines the issue of access to legal opinions the township received from a named law firm about STRs.

[2] The township received two multi-part requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to STRs in the township. The township issued two decisions denying access to the responsive records

under various exemptions.

[3] The appellant appealed the township's decisions to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution.

[4] In Appeal MA20-00363, after mediation, only part 6 of the appellant's request for "[a]ll advice received from [named law firm] related to STRs" remained at issue. The township denied access to one responsive record in full under section 12 (solicitor-client privilege) of the *Act*.

[5] In Appeal MA20-00566, after mediation, only part 4 of the appellant's request remained at issue. Part 4 of the appellant's request was for:

Any policy or proposed or draft enforcement policy or guideline for enforcing Township by-laws against STRs including the policy referred to by the Mayor at the public meeting related to the by-law passed re STRs.

[6] The township denied access to one responsive record in full under section 12.¹

[7] As a mediated resolution was not possible, the appeals were transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I commenced two inquiries, and I sought and received representations from the parties about the issues in the appeal.

[8] In this order, I uphold the township's decisions and dismiss the appeals.

RECORDS:

[9] The record at issue in Appeal MA20-00363 is a legal opinion (June legal opinion) and the record at issue in Appeal MA20-00566 is also a legal opinion (September legal opinion). I will refer to both records collectively as the legal opinions.

[10] The legal opinions are from a named law firm and they relate to STRs in the township. The legal opinions were both withheld in full by the township under section 12 of the *Act*.

¹ Initially, the township also claimed sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 8(1)(a), (b), (c), (g) (law enforcement matter, law enforcement investigation, reveal investigative techniques and procedures, intelligence information) over the responsive record. However, during the inquiry, the township only relied on section 12.

DISCUSSION:

Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the legal opinions?

[11] The township claims that the discretionary solicitor-client privilege exemption at section 12 applies to the legal opinions. The appellant argues that it does not.

[12] Section 12 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It states:

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 different exemptions, referred to in previous IPC decisions as “branches.” The first branch (“subject to solicitor-client privilege”) is based on common law. The second branch (“prepared by or for counsel employed or retained by an institution...”) is a statutory privilege created by the *Act*. The institution must establish that at least one branch applies. Because I find below that the common law (i.e., first branch) solicitor-client communication privilege applies, I will not set out or address the township’s arguments that the second branch also applies.

Branch 1: common law privilege

[14] At common law, solicitor-client privilege encompasses two types of privilege:

- solicitor-client communication privilege, and
- litigation privilege.

[15] Because I find below that solicitor-client communication privilege applies, I do not summarize or address the township’s arguments that litigation privilege also applies.

Common law solicitor-client communication privilege

[16] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.² This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.³

² Orders PO-2441, MO-2166 and MO-1925.

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

The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.⁴

[17] The privilege may also apply to the lawyer's working papers directly related to seeking, formulating or giving legal advice.⁵

[18] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.⁶ The privilege does not cover communications between a lawyer and a party on the other side of a transaction.⁷

Loss of privilege: waiver

[19] Under the common law, solicitor-client privilege may be waived.

[20] An express waiver of privilege will occur where the holder of the privilege knows of the existence of the privilege, and voluntarily demonstrates an intention to waive the privilege.⁸

[21] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.⁹

[22] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.¹⁰ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.¹¹

Representations of the parties

[23] The township submits that the legal opinions are clearly subject to solicitor-client privilege because they were prepared by legal counsel retained by the township in relation to STRs. The township submits that the opinions are marked "privileged and confidential" and the township expected that these legal opinions would remain confidential.

[24] The township observes that the appellant challenges the township's solicitor-

⁴ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

⁵ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁷ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

⁸ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

⁹ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

¹⁰ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

¹¹ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

client privilege over the legal opinions, alleging that the township waived it by mentioning the legal opinions in a public meeting held on June 25, 2020. The township submits that it has not waived privilege over the legal opinions and that the references made in the meeting about legal advice were made in a generalized manner with the intent to reassure residents.

[25] The township submits that the mere mention of a legal opinion is not sufficient to constitute waiver of solicitor-client privilege, and the IPC has held that 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. The township further submits that in many cases, including the circumstances of this appeal, the institution will intend to retain the privilege, while at the same time providing a minimal degree of public disclosure to ensure the proper discharge of its functions. The township submits that the IPC has held that in the usual case, this should not, of itself, constitute express or implied waiver of the privilege attached to the underlying solicitor-client privilege.¹²

[26] The appellant submits that the township has not adduced any evidence to substantiate its claim that the legal opinions are privileged. The appellant also submits that the township has waived privilege over the legal opinions and it did so through the conduct of the Mayor. The appellant alleges the Mayor has disclosed "detailed privileged information" contained within the legal opinions to residents of the township on several occasions, including:

- At the specified public meeting, where two specified residents stated that the Mayor had provided them with information from the opinions.
 - The first resident's statement, excerpts of which are set below, also included portions of an email from the Mayor (underlined):
 - "[Mayor] sent an email to my wife and me which indicated that 'it was council's unanimous decision to follow the advice of the township's legal counsel to ensure the township had the strongest approach to achieve the mutually desired outcomes.' Clearly if legal counsel's advice is agreed to unanimously, then no changes to the wording or content should be undertaken, thus, I agree with the wording with no changes."
 - "Thirdly, [the Mayor] went on to write '[named law firm] has recommended a strategy in order to put the township in the strongest position to achieve council's desired outcome.' Previously [the Mayor] had indicated to us that [named law firm] had never lost a case while representing the township. So I agree strongly with the amendment as written."

¹² Order PO-2485.

- "I hope my three minutes today has made the point that I support the amendment with no changes and no exceptions. This has been agreed to unanimously by Mayor and council which I applaud, [named law firm] and township legal counsel."
- The second resident mentions that the proposed amendment to the bylaw reflects the advice received from the named law firm.
- Through three emails from the Mayor to residents of the township which state that the named law firm is involved and their recommendations are being followed.

[27] The appellant submits that the following conclusions can be drawn from these instances:

- The township desired to enact a STR bylaw that would put it in the strongest legal position if challenged.
- The township engaged the services of the named law firm. It was held out as being "a legal firm recognized as one of the leading authorities on STRs" and one that had never lost a case for the township.
- The named law firm provided opinions providing the strategy and advice as to how to deal with the perceived disruptive STR issue, and drafted the STR Bylaw.
- The named law firm's strategy was to enact the STR Bylaw discussed publicly in the specified public meeting.
- The named law firm's advice was to put the township in the strongest position to achieve council's desired outcome, and the township was following their advice in proposing the enactment of the Ban STR Bylaw.

[28] Because of the above disclosures by the Mayor, the appellant submits that there has been an express, implied, and deemed waiver of solicitor-client privilege by the township.

[29] The appellant submits that there has been an express waiver of privilege because the Mayor disclosed specifics about the legal opinions to township residents. He also submits that the township has admitted that the legal opinions were shared with township staff and council, and there is no evidence they were instructed to keep the opinions privileged or whether the legal opinions were shared for the purpose of giving or receiving legal advice.

[30] The appellant argues that the Mayor's conduct constitutes a deemed waiver of

privilege based on the case of *Livent Inc. v. Drabinsky (Livent)*,¹³ which held that privilege may be waived when the client's conduct held a view or followed a course of action because of the legal advice given to them.

[31] The appellant submits that the "bottom line" cases referred to by the township are not supportive of the township's position because the township has not provided evidence that only a small part of the opinions were disclosed, there is no evidence why it was necessary or desirable to make the disclosures and, there is no evidence the disclosures were part of any mandate of the township.

[32] The appellant also made submissions about the township's inability to locate the email that was read during the specified meeting. He outlines several circumstances which he alleges explains the missing email and undermines the township's "bottom line" cases. I have reviewed but will not summarize this portion of the appellant's representations, because the arguments are speculative and make allegations about the conduct of the township that I find are not relevant to the issues before me.

[33] The township submits that the Mayor's conduct should not lead to a finding that he implicitly waived privilege because there was no intention to waive privilege. The township submits that a mere mention that the township has retained legal advice and is planning on following same does not show an intention to waive privilege.

[34] The township submits that disclosure of the "bottom line" of a legal opinion does not amount to a waiver of solicitor-client privilege. In support of its position, the township cites several IPC orders.¹⁴ The township submits that in noting that the named law firm had been retained, and a legal strategy was offered and was to be followed, the Mayor disclosed, at most, the "bottom line" of the opinions. The township further submits that the "bottom line" does not merely refer to a "single sentence from an opinion" as the appellant argues. The township argues that it also took steps to preserve the confidentiality of the opinions by marking them as "privileged and confidential." The township submits, therefore, that it intended to retain privilege while providing a minimal degree of disclosure.

[35] The township submits that the conduct of the Mayor does not constitute a deemed waiver of privilege despite the appellant's reliance on *Livent* for the proposition that privilege may be waived when the client's conduct held a view or followed a course of action because of the legal advice given to them. The township submits that in *Livent*, the client specifically disclosed that she was told to "put something in writing," and the court found sufficient evidence that she interpreted this in a way that caused her to write a memorandum which was intended to paint herself in a positive light while negatively portraying another party.

[36] The township submits that the Mayor has not disclosed any legal strategy as

¹³ *Livent Inc. v. Drabinsky*, 2003 CanLII 1927 (ON SC).

¹⁴ Orders MO-1172, MO-1233, MO-1714, MO-1867, MO-1991, MO-2222, and MO-2865.

specific as the one disclosed in *Livent*. The township submits that at most, the Mayor has indicated that the township is broadly following the recommendations of the named law firm with respect to a number of matters, and that he agrees with a proposed amendment to the township's zoning bylaw. The township argues that this is a vague statement that discloses no particular action taken as a result of legal advice, and thus should be distinguished from the disclosure of specific legal advice causing a specific course of action as in *Livent*.

Analysis and findings

[37] After reviewing the legal opinions at issue and the representations of the parties, I find that the legal opinions are exempt under the section 12 common law solicitor-client communication privilege. I also find that the township has not waived privilege over either legal opinions.

[38] Without revealing their substance, I find that the legal opinions contain advice from the named law firm to the township about STRs in the township. Given the subject matter and context of the records, I accept that the communications took place in confidence, and I note that the legal opinions are marked as privileged and confidential. I find that the legal opinions are confidential communications between a lawyer retained by the township and the township, made for the purpose of providing legal advice, which is precisely what the section 12 exemption aims to protect. As a result, I am satisfied that disclosure of the legal opinions would directly reveal the content of privileged solicitor- client communications.

Waiver

[39] The appellant argues that there has been a waiver of privilege over the legal opinions by the township, either express, implied, or deemed. He cites several instances where he alleges that the Mayor has disclosed advice or recommendations from the legal opinions.

[40] I note that the instances of alleged waiver by the township cited by the appellant predate the September legal opinion.¹⁵ I further note that the emails cited by the appellant as examples of waiver by the township also predate the June legal opinion. Therefore, I will only address the appellant's submissions about the township waiving privilege in the specified public meeting with respect to the June legal opinion.

[41] I have reviewed the appellant's submissions about the specified public meeting and compared them to the June legal opinion, and I find that these examples cited by the appellant do not disclose the contents or substance of the June legal opinion. For example, revealing that a named law firm provided a legal opinion to the township does not reveal the information, analysis or advice contained in the opinion.

¹⁵ The three emails cited by the appellant were from February and April 2020 and the public meeting was held in June 2020.

[42] Even if I were to accept that the specified meeting cited by the appellant revealed some privileged information from the June legal opinion, previous IPC orders have found that disclosing a small portion of the “bottom line” of a legal opinion does not constitute an intention to waive privilege in a record, and that fairness or consistency do not require a determination that this constitutes an implicit waiver of privilege.¹⁶ I agree with and adopt their reasoning in this order.

[43] I also find support in my conclusion in *Stevens v. Canada (Prime Minister)*¹⁷ (*Stevens*) and Order MO-2945-I. In *Stevens*, the Federal Court addressed the issue of waiver where a federal institution provided partial access under the federal *Access to Information Act* to legal accounts, withholding the narrative portion of the accounts while providing access to the dollar amounts. In dealing with the issue of waiver in the freedom of information context, the court held that, in making the relatively minimal disclosure of a small portion of the “bottom line” legal advice it received, the institution did not intend to waive privilege with respect to the record itself. The court held that, although the institution did provide a small portion of the “bottom line” legal advice it received, “fairness and consistency” did not require a finding that the privilege ceased and held that the institution had not, by disclosing bottom line advice, implicitly waived privilege.

[44] In Order MO-2945-I, former Assistant Commissioner Sherry Liang held that a town’s release of an executive summary of a legal opinion was done in the interest of public transparency and did not amount to a waiver of privilege. In finding that the disclosure of the executive summary of a legal opinion did not amount to waiver, she considered a number of cases where the IPC upheld privilege where public disclosure of some information gave rise to claims of implied waiver.

[45] Order MO-2945-I, and the cases former Assistant Commissioner Liang considered in it, along with these current appeals, involve instances where public bodies disclosed a portion of a conclusion reached in a privileged legal opinion and found that such relatively minimal disclosure did not amount to an implied waiver that would warrant disclosure of the privileged record under the *Act*.

[46] Additionally, while the appellant argues that the sharing of the legal opinions with township staff and council constitutes a waiver of privilege, I find that it does not. All of the township’s staff and council are part of the institutional client, and communication of legal advice among them does not waive the privilege.

[47] Finally, the appellant argues that the Mayor’s conduct constitutes a deemed waiver of privilege based on *Livent*, which the appellant argues stands for the proposition that privilege may be waived when the client’s conduct held a view or followed a course of action because of the legal advice given to them. I find that the

¹⁶ For example, orders MO-1172, MO-1233, MO-1316, and MO-1537.

¹⁷ (1998), 161 D.L.R. (4th) 85.

appellant's summary of the case to be an oversimplification. The finding in *Livent* was fact-specific to a commercial case, and I find that it is not persuasive, nor applicable to the appeals before me.

[48] Based on the evidence before me, I find that there is not an express, implied, or deemed waiver of privilege over the legal opinions. Accordingly, I find that the legal opinions are exempt under the discretionary solicitor-client privilege exemption at section 12 of the *Act*.

[49] The section 12 exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, I may determine whether the institution failed to do so.

[50] The township submits that it properly exercised its discretion to withhold the legal opinions under section 12. The township states that it took into consideration the public interest in maintaining privilege over privileged information and the legal risks that would arise if it were disclosed. The township further states that it considered that disclosure of the legal opinions would undermine the very purpose of solicitor-client privilege, which is to permit full, free and frank communication between lawyers and their clients. The appellant did not specifically address the township's exercise of discretion.

[51] After considering the representations of the parties and the circumstances of this appeal, I find that the township did not err in its exercise of discretion with respect to its decision to deny access to the legal opinions under section 12 of the *Act*. I am satisfied that the township considered relevant factors in the exercise of its discretion. In particular, I am satisfied that the township weighed and considered the implications to the township if the legal opinions were disclosed as well as any public interest in disclosing it.

[52] Accordingly, I find that the township exercised its discretion in an appropriate manner in these appeals, and I uphold it.

ORDER:

I uphold the township's decisions and dismiss the appeals.

Original Signed By: _____
Anna Truong
Adjudicator

February 28, 2023 _____