



REPORT
**Nova Scotia Freedom of Information
and Protection of Privacy
Report of Review Officer
Dulcie McCallum
FI-08-47(M)**

Report Release Date: August 27, 2010

Public Body: The Municipality of East Hants

Issues: Whether the Municipality of East Hants [“Municipality”] appropriately applied *Part XX* of the *Municipal Government Act* [“*MGA*”] and in particular:

1. Whether the solicitor-client privilege exemption in s. 476 of the *MGA* allows the Municipality to withhold the Record.
2. Whether the Municipality has properly exercised its discretion to apply the solicitor-client exemption in s. 476 of the *MGA*.
3. Whether the Municipality has waived privilege to the responsive Record.
4. In the exercise of its discretion, whether the Municipality properly considered public interest in accordance with s. 486 of the *MGA*.

Record at Issue: Pursuant to s. 491 of the *MGA*, the Municipality has provided the Freedom of Information and Protection of Privacy Review Office with a copy of the complete Record, including the information withheld from the Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the Review Officer or her delegated staff. The Applicant in this Review specifically requested the Review Officer to release the Record. It is important to note that only a public body can make the decision to release a Record either as its response to an Application for Access to a Record or in response to a Recommendation from the Review Officer. The Review Officer will never release records to any applicant. The Record at issue is one ten-page letter from a solicitor to the Municipality, which was withheld in full. After the investigation was complete the Applicant was provided with additional

information about the letter: the author and date of the correspondence.

Summary:

An Applicant requested a Review of the Municipality's decision to refuse access to a Record based on a discretionary exemption, s. 476 [solicitor-client privilege] of the *MGA*. The Applicant claimed the Record should be released based on public interest.

Findings:

The Review Officer made the following findings:

1. The Record is a letter from an outside solicitor to the Municipality providing it with a legal opinion. While the contents of the Record are a mixture of fact and opinion, the text as it stands when first provided to the Municipality constitutes a document that could be *prima facie* protected by solicitor-client privilege.
2. Solicitor-client privilege is not absolute under access to information legislation and should not be applied as a blanket exemption. If it was intended that once a Record met the definition of solicitor-client privilege it was to be automatically withheld, s. 476 would have read "shall" and as such would have been a mandatory exemption.
3. The Municipality spent considerable time discussing the Record and how it is a legal opinion that is protected by solicitor-client privilege in its favour as the "client." The Municipality did not seem to make any distinction between the privilege at law and the privilege as it is to be applied as a discretionary exemption. The direction in the Purpose section of the *MGA* that exemptions are to be "limited and specific" apply equally to the s. 476 exemption as it does to all other exemptions provided for in the legislation.
4. Under a discretionary exemption, it is incumbent on public bodies to consider all relevant factors in exercising discretion. In this case, I find the Municipality failed to properly exercise discretion as it did not consider all relevant factors but rather chose to apply s. 476 as if it were a mandatory exemption; solicitor-client correspondence *ipso facto* withheld.
5. When making a decision under a discretionary exemption, including solicitor-client privilege, and the Record is intimately involved as part of a public process where the issues raised are attracting a great deal of attention from the public, it is incumbent on a public body when it first receives an Application for Access to a Record to factor in public interest in the exercise of its discretion.
6. The Municipality by its own conduct waived the privilege; it provided copious amounts of information to the public about the

process and the fact that the legal opinion had resulted in a change to the petition process. At least one Councillor disclosed some or all of the legal opinion to at least one member of the public who shared that information with others who acted upon that legal advice. The Municipality summarized the changes resulting from the legal opinion in media reports.

7. During the Review process, the Municipality refused to receive submissions from the Applicant regarding public interest.
8. The Applicant met his/her onus by providing a preponderance of evidence to demonstrate public interest in the issue which is the topic of the Record.
9. By its own Representations and actions, the Municipality has agreed with the fact that public interest is a factor. The Municipality concedes the fact that there is considerable public interest in the matter surrounding the Record that is the paving petition, and uses it as its rationale for providing substantial amounts of information to the interested public. It was the basis on which it held the first public meeting with respect to a paving petition.
10. Ironically, the Municipality indicates that it considered the fact that it had previously released a considerable amount of information to all stakeholders involved with this issue as a factor in exercising its discretion to apply the exemption. That amounts to saying “we gave out tons of information to lots of members of the public because of the considerable interest in the paving issue so we are refusing to give out the record requested by this particular Applicant.” This approach lacks logic and coherency.
11. The Responsible Officer [FOIPOP Administrator] believes that because the Council rejected the paving petition and chose to proceed differently, which s/he submits it has the authority to do, it makes the Applicant’s access to information request moot. This conclusion is neither correct for the purpose of processing the Applicant’s Application for Access to a Record nor for deciding the Applicant’s Request for Review with the Review Office under the *MGA*. The issue of whether or not the Applicant is entitled to a copy of the Record remains alive and is not rendered moot because the Council made a different decision about the paving, which is irrelevant for the purpose of this Review.
12. The Responsible Officer seems to be under some misunderstanding about the process about his/her role in rendering a decision under the *MGA*. As the delegated authority from the Head of the public body [Municipality], the FOIPOP Administrator is given the authority to make a decision under the

statute. S/he may seek information, advice, and guidance from a variety of sources including legal advice but this is not necessary.

13. It is open to the Review Officer to recommend a new decision. The recommendations can include issues with respect to process used by the Municipality as well as the substance of its decision [refer to FI-07-27].

Recommendations: The Review Officer made the following recommendations to the Municipality:

1. To release the complete Record to the Applicant; and
2. To approach the Department of Justice Information Access and Privacy Office and/or Service Nova Scotia and Municipal Relations to inquire whether or not training and support are available to smaller agencies such as this Municipality with respect to decision-making under the *Part XX* of the *MGA*.

Key Words: blanket denial, clearly, Councillor, divergent views, fairness, FOIPOP Administrator, municipality, override, paving, petition, process, public interest, public participation, purpose, responsible officer, solicitor-client privilege, waiver.

Statutes Considered: *Municipal Government Act, Part XX, ss. 462(b), 476, 486.*

Case Authorities Cited: *NS Review Reports FI-02-58, FI-05-08, FI-08-06, FI-00-116, FI-00-29, FI-00-50, FI-07-27; BC Order 02-38; ON Orders P-944, MO-2456; Peach v. Nova Scotia (Transportation and Infrastructure Renewal), 2010 NSSC 91; S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd., [1983] B.C.J. 1499 (S.C.); Ontario (London Public Library Board), 2010 Can LII 10811; Harish v. Stamp (1979), 27 O.R.(2d) 395 (C.A.); R. v. Hobbs, 2009 NSCA 90; Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23; Knight's Minister Exploration & Co. v. Corcoran & Co. 1993 Can LII 2728 (BCSC).*

Other Cited: *McNairn and Woodbury's Government Information, Access and Privacy.*

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BACKGROUND

On May 8, 2008, the Responsible Officer [“FOIPOP Administrator”] for the Municipality of East Hants County [“Municipality”] responded to an inquiry from the Applicant. S/he was advised that the information s/he requested was not routinely available. The Municipality provided the Applicant with a copy of a Form 1 to file an Application for Access to a Record.

On May 30, 2008 the Applicant made an Application for Access to a Record to the Municipality as follows:

A legal opinion was solicited by the Council regarding petitions. Presumable [sic] the legal opinion was tabled in Council and the law changed regarding the future of petitions in Hants East. The legal opinion may be a matter of record, however, we are having a difficult time to see it. There is no personal information involved. No one has satisfactorily explained why such an important document cannot be viewed. It has implications for many other betterment changes as well.
[Emphasis in original]

On June 26, 2008, the Municipality provided the Applicant with a decision that read as follows:

Your application for access to information under Part XX of the Municipal Government Act was received at this office on June 4th, 2008.

You have requested access to a written opinion prepared by the Municipality’s legal counsel on the matter of the petitions.

Access to the record requested is refused for the following reason:

1. The information you requested is subject to solicitor-client privilege.

Section 476 of the Municipal Government Act, contains the following provision:

Solicitor-client privilege

476 The responsible officer may refuse to disclose to an applicant information that is subject to solicitor-client privilege. 1998, c. 18, s. 476

You have the right to ask, within 60 days of being notified of this decision, for a review of the decision by a [sic] Review Officer. If you wish to ask for a review, you must do so on Form 7, a copy of which is attached.

[Emphasis in the original]

The decision letter did not provide any additional explanation to the Applicant as to how s. 476 of *Part XX of the Municipal Government Act* [“MGA”] was applied or how the Municipality exercised its discretion to withhold the contents of the Record.

On June 30, 2008, the Applicant filed a Request for Review, which Form 7 requested access to a copy of the Record, a legal opinion, and was accompanied by a letter, which provided as follows:

We respectfully request the Review Officer to make the alleged legal opinion, noted in attached Form 7, publicly available to the citizens of East Hants.

The legal opinion in question has been the basis of the Municipal Council changing the betterment petitioning process. [Name], Chief Administrative Officer and FOIPOP Officer for the Municipality indicates it violates attorney client privilege. I argue that since the Council is composed of representatives of the citizens, that the citizens be considered the clients.

The document’s questionable interpretation has sparked such a furor in the community (currently dozens of letters to the local newspaper) that the Municipality is now – apparently – seeking more legal opinions. The situation appears to be getting worse instead of better. It discusses no one’s personal information and no individual will be harmed by its release (unless some elected or administrative personnel are embarrassed by its handling).

Did it not have to be tabled in Council? Did it not have to be discussed and voted upon and therefore available for public consumption? Petitions that had been approved and accepted by Council were affected retroactively! Apparently some bureaucrats and publicly elected officials were notified of the process changes, but not others? In a written communication to [recipient’s name], [Name] indicated that anyone could have massaged the numbers, however, the “yes” votes on the accepted and approved petition were not notified that they could also “devise” new deed ownership. Where [two people] benefited from knowledge about the purported legal opinion, the yet unseen, alleged legal opinion seems scurrilous at least. The document has been the basis for a major municipal change in the betterment petitioning process and public members affected by it have no access to it.

We trust that the Review Officer will release the document to the citizens of East Hants [sic] opening it up to public interpretation and debate.

On July 10, 2008, the Applicant emailed the Warden for the Municipality asking for particular information with respect to the legal opinion in the Record. The Warden referred that email to the Chief Administrative Officer. On July 15, 2008, the Chief Administrative Officer provided a detailed response to the questions in the Applicant’s earlier email. Although not the subject of this Review, the contents of the response have provided useful background and factual information relating to the events surrounding the issue of the petitioning process.

On April 16, 2009, the Review Office requested that the Municipality re-consider how to exercise its discretion concerning whether or not to release the Record based on the considerable public interest in the matter. The Review Office also inquired as to whether or not the Municipality would consider receiving submissions from the Applicant with respect to public interest and from the Review Office regarding the solicitor-client privilege exemption. Specifically the Review Office proposed to share other case-law that outlines how public interest is a factor to weigh in applying the solicitor-client privilege exemption. On April 21, 2009, the Applicant was advised that this proposal had been sent to the Municipality.

On April 21, 2009, the Applicant provided additional information to the Review Office, which will be reported in the Applicant's Representations below.

On May 1, 2009, the Municipality responded to the Review Office with respect to its proposal to receive submissions regarding public interest and solicitor-client privilege, which will be reported in the Public Body's Representations below. In that correspondence, the Municipality indicated it was not prepared to receive a submission from the Applicant regarding public interest. The Municipality indicated that it was open to receiving case precedents about solicitor-client from the Review Office, but the FOIPOP Administrator indicated that s/he was not a lawyer and thus could see no purpose in reviewing case law and the Municipality's lawyer on this file had already reviewed how it was processing the file. In the same correspondence, the Municipality claimed that nothing would influence the withholding of the Record, so the Review Office attempts at an informal resolution were discontinued.

On May 14, 2009, the Applicant provided a detailed package of materials including his/her complaint letter to the Utilities and Review Board and a covering letter, the details of which will be reviewed in the Applicant's Representations below.

On February 11, 2010, the Municipality provided a Representation in response to information and case precedents shared by the Review Office, a summary of which will be included in the Public Body Representation's below. At that time the Municipality consented to the Review Office sharing the essence of its Representations with the Applicant. On April 6, 2010, the Review Office summarized those Representations in correspondence to the Applicant, with a view to finding a mutual resolution for the parties.

On May 10, 2010, the Applicant provided a response that included Representations, the details of which will be reviewed in the Applicant's Representations below along with the decision to proceed with the Review.

After the Investigation Summary was provided to both parties on May 31, 2010, the Municipality indicated that it had not intended to withhold the name of the solicitor or the date of the legal opinion forming the Record. On July 7, 2010, the Municipality emailed the Applicant additional information, including: the date on the Record, the author and some of the issues it had identified for which the legal advice was sought. A new redacted copy of the Record was not provided to the Applicant by the Municipality.

On July 27, 2010 the Municipality provided the Review Office with the ad, agenda, presentation and minutes from the public meeting held on September 20, 2007.

On August 11, 2010, during the formal Review, I conducted property searches of properties owned by individuals with whom the substance of the legal opinion had purportedly been shared. On August 12, 2010, the Municipality, at my request, provided a copy of the second paving petition submitted to the Warden by three property owners.

RECORD AT ISSUE

Pursuant to s. 491 of the *MGA*, the Municipality has provided the Freedom of Information and Protection of Privacy Review Office with a copy of the complete Record, including the information withheld from the Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the Review Officer or her delegated staff.

The Applicant in this Review specifically requested the Review Officer to release the Record. It is important to note that only a public body can make the decision to release a Record either as its response to an Application for Access to a Record or in response to a Recommendation from the Review Officer. The Review Officer will never release records to any applicant.

The Record at issue is one ten-page letter from a solicitor to the Municipality, which was withheld in full. After the investigation was complete the Applicant was provided with additional information about the letter: the author and date of the correspondence.

APPLICANT'S REPRESENTATIONS

On March 26, 2009, the Applicant orally provided background information to the Review Office and made the following points, which have been paraphrased:

- The whole process started when the Municipality took a petition regarding a specific issue that would affect the whole community and then obtained a “legal opinion” on how to count the votes on the petition.
- This led to some very strange outcomes; for example a property owner could add a number of names onto the deed and each name would be counted as a vote. Citizens were doing this to affect the outcomes of projects affecting the whole community.
- The Municipality and citizens have since been embroiled in disputes regarding how votes should be counted, and the process has been constantly changing.
- The document that initiated this has significant public interest and many citizens feel that the opinion was misinterpreted by the Municipality.
- The taxpayers should be considered as the client in this case, as their interests are being considered directly; they are the ones who pay for the voted-on projects.

The Applicant indicated s/he would be sending more information. On March 27, 2009, the Applicant provided the Review Office with a large package of documentation including the

paving petition, correspondence and newspaper articles, and an accompanying Representation in which the Applicant stated:

- *After the Municipality of East Hants approve [sic] and accepted the petition they designed, the rules of the game began to change.*
- *Once we received the letter from the Province indicating the project was to go ahead, a highly placed resident (who happens to be [an identifiable individual]) began to influence the Municipality to change the rules & then handily took advantage of the changes.*
- *This matter is clearly in the public interest. The signatures on the petition clearly indicate that.*
[Emphasis in original]

On April 21, 2009, the Applicant notified the Review Office that s/he was in the process of preparing his/her public interest argument. S/he also provided updated information about the subject paving project.

On May 14, 2009, the Applicant provided a package of information with respect to his/her claim that the Record should be made available based on public interest, which included news, articles, press releases and letters [51 pages]. All of the evidence related directly to the paving petition and the legal opinion making up the Record. The Applicant made the following Representations:

- *Given that the “new legal opinion” sought is about a public process, the opportunity to represent the public interest is warranted and important.*
- The Applicant submitted that public interest is formulated around six points. The first is that the Municipality called a public meeting on September 20, 2007 about this issue as it was considered a matter of public interest. S/he also submitted that this should be sufficient to prove the requirement of public interest.
- If that point is not sufficient, the following five points further demonstrate public interest:
- First, the large number of different people (families) associated with the issue:
 - On Sunday May 17, 2007, a public meeting was held for 106 people interested in the subject.
 - Prior to the former petition process being ousted, four meetings of residents were held in addition and at least four more since the change.
- Second, the petition process about which the “new legal opinion” was sought is a public process:
 - The petition process is managed and administered by the Municipality but manifested by the public. The public does all the work to raise the public profile and get the signature for the petition.

- The Municipality creates the petition process including procedures and actions, which the citizens must adopt, including creating the formal document for signing and providing it to the citizens to sign.
 - Failure to reach a two thirds majority causes a petition to be rejected.
 - The petition at issue was “accepted” and “approved” by the Municipality after the citizens had followed the Municipal process and rules for five years.
 - *Every person who participated in the only area known to be affected by the Municipality’s “new legal opinion” has a strong interest in what happened to their laudable efforts to engage in the formal democratic petition process that was dictated to them by the Municipality.*
- Third, the interest in the public petitioning process was inflamed when the results of the “new legal opinion” were released and media attention began to mount:
 - *The Municipality’s interpretation of the so-called “new legal opinion” seems exceedingly illogical in that it allows every name on a deed to have one vote, as opposed to the previous system (and that of neighbouring municipalities) where every property has one vote. [Emphasis in original]*
 - *This interpretation opens the formal petition process to grave opportunism by permitting some land holders . . . to add names to their deeds in order to sway a vote.*
 - This very kind of opportunistic behaviour occurred when two people added 80 names of friends, neighbours, relatives and acquaintances to their six property deeds to sway the subsequent petition process, all of which is a matter of public record in the newspaper, on television and on the internet.
 - One Councillor, after the in-camera session dealing with the legal opinion, leaked its contents to a property owner suggesting s/he add names to his/her deed to sway a subsequent petition.
 - Many believe that the Municipality misinterpreted the legal opinion to thwart this one paving petition. The petition process began in November 2005 and after it was accepted the legal opinion was sought in September 2007. The legal opinion was subsequently re-evaluated and the process was changed back.
 - Since only one petition was affected by the legal opinion it gives the appearance of manipulating the process to thwart only the individuals from that area.
 - Fourth, the legal opinion was of concern for others because of its potential serious ramifications for residents currently paying for other petition process-approved projects or for upcoming projects for upgrades with financial implications.
 - Fifth, the Applicant submits to having the ability to disseminate information including through press releases, emails, notices on mailboxes, distributing leaflets, phone list, hosting regular meetings, maintaining accurate public records, writing and talking to the press, preparing videos for distribution and accessing a group of an extended list of interested individuals.
 - The interest of all the individuals is non-commercial and is not motivated by private interests. Individuals are devoting their own time and money to attempt to be dealt a fair hand from the Council.

Addressing the precedents set in previous Review Reports, the Applicant provided:

- ***[T]his matter clearly does not represent a communication of a confidential nature because the “new legal opinion” was directed at a public process and was, in fact, applied to the public and the process when it was used to overturn the previously approved and accepted petition. Since it was put in use, it is not confidential.***
- *Attempting to construe this as a confidential document is an appalling abuse of the role of senior administrators and councillors. The fact that the “new legal opinion” was later overturned again should demonstrate the desperate need to hide some aberration . . .*
- *That the Municipality decided to change the rules, just long enough to thwart one specific petition, is grievous. This is not a debate. This is an injustice.*
[Emphasis in the original]

On May 10, 2010, the Applicant provided Representations during the Investigation phase of the Review process. The new information from that Representation is summarized as follows;

- Relying on the *Peach v. Department of Transportation and Infrastructure Renewal* in the Nova Scotia Supreme Court, the Applicant believes the Municipality should describe more than the first three pages of the Record, there should be more details of the other seven pages, and that whole pages need not be severed but only sentences or words.
- Based on *Peach*, the fact that much of the information has already been admittedly released by the Municipality points to a ruling that favours release of the Record. In addition, Council members discussed the legal opinion with residents of the road who shared it with others. Releasing this much information to the public argues for having the document released, not to further secure its secrecy.
- The Municipality has conceded the public interest yet has presented nothing to merit its exercise of discretion to withhold the Record.
- In conclusion, the release of the Record is redundant since much of the information has been released thus waiving the solicitor-client privilege and the Municipality has not shown that it considered public interest nor justified its discretion to withhold the Record.

On June 15, 2010, the Applicant provided a Representation in response to receiving the Investigation Summary. Information that had not been previously provided is summarized as follows:

- The advertised public meeting held by the Municipality which was attended by 50 plus people including media, the audio for which was recorded. Most of the Councillors were present and participated. Because the Municipality considered this issue important enough to host the first public meeting held for a road project in the county demonstrates its agreement of the public interest in the case. *[T]he Municipality would seem to have sought the legal opinion on the basis of there being substantial public interest generated by the issues at hand . . .*
- The privilege only applies to the advice and not the facts so likely there is a good portion of the ten pages to which the privilege does not apply.

- It was necessary for staff to share the information with residents in order to issue a new petition. The former petition that had been accepted and recognized by the Council was overturned and explained to the residents on the basis of the new legal opinion. The staff explained that the legal opinion stated that petitions should be based on a vote of name on a deed, not one vote per deed as was done in the past. The Councillors' and staff's discussion of the issue piqued the interest and concern of many people outside the specific paving petition.
- Residents were told the legal opinion was about:
 - Assessing betterment charges
 - Overturning the well worn public process
 - Relying on the opinion by the Municipality
 - Overturning a previously existing public process
 - Reasoning behind a new petition having to be executed
 - Addressing residents' concerns with respect to placing existing betterment charges throughout the Municipality in jeopardy
- Finally the Municipality's claim for privilege seems somewhat bizarre because it gave no reason for claiming it but rather deferred to a blanket denial of the document.
[Emphasis in original]

On July 8, 2010 the Review Office sought details with respect to the public meeting referred to by the Applicant in his/her June 15, 2010 Representation. In response, the Applicant indicated that the Council passed a motion at its August 29, 2007 Council meeting to the effect that there was to be no further action on the paving of Renfrew and Monte Vista Roads until after a public meeting was held, scheduled for September 20, 2007. The Applicant indicates that 75 people attended the public meeting including 9 Councillors and that about 15 individuals addressed the meeting.

On August 5, 2010, the Applicant provided his/her final Representations to the Review Office. Along with a re-capping of arguments previously made, additional information included:

- The Applicant indicates that his/her understanding is that a decision of public interest is about the only item that can mitigate the solicitor client privilege waiver.
- The contents of the Record were discussed openly and were not kept secret. A Counsellor discussed them with a local resident who is an identifiable individual, staff talked to people who called about it, it was discussed in the newspaper by the CAO, Counsellors and residents.
- Once the opinion has been enacted, used or employed the contents are in the public interest.

PUBLIC BODY'S REPRESENTATIONS

On May 1, 2009, the Municipality responded to the Review Office with respect to its proposal to receive submissions regarding public interest and to re-consider its exercise of discretion regarding applying the solicitor-client privilege. The response in part, is as follows:

- *Unfortunately your correspondence does not provide me with a reason to enter into that process of reconsideration.*
- *I disseminated a great deal of information to the public that was germane to the primary concern of many residents around the decision to pave or not pave Monte Vista/Renfrew Roads. The information I did not release was a specific legal opinion on how, on a go forward basis, petitions should be structured to count majority opinion.*
- *. . . [L]egal advice must be given and received through a venue that ensures an effective understanding of the matter appropriately communicated as well as understood. The disclosure of confidential information on this matter, as you know from your review of the file, would not provide those with an interest in having paving proceed, any material advantage as a result of having reviewed the material. Failure to disclose the information prevents these same people from coming to that conclusion independently, but is not sufficient grounds, in my opinion, to justify breaking solicitor-client privilege.*
- *I am not prepared to consider a submission from the applicant on this matter. The matter is appropriately before your office.*
- *I should advise that I am not a lawyer and I see no purpose in reviewing case law as the matter has already been appropriately put to our lawyer on this file who has confirmed for me the appropriateness of the direction we have already taken.*

As part of the Investigation stage of this Review, the Municipality provided a Representation on February 11, 2010. That Representation is summarized as follows:

- *. . . the documents you sent me consist of legal arguments around the topic of solicitor client privilege that require a legal lens to be properly understood. Because I am not a lawyer, I do not feel qualified to draw definitive conclusions from this material.*
- *The Representation however goes on to state, I also conclude however that I must ensure I do not release “advisory” or “opinion” information bundled up with statements of facts. Further, I do not believe I can disclose statements of fact which would, because of how they are woven together disclose by inference or extrapolation, the nature of the legal advice given.*
- *In addition, the Municipality notes that the Record is in conversational style and the statements of fact are interwoven with statements of opinions, statements of analysis and statements of advice.*
- *In summary, the Representation states that the document in question should be treated as a fully integrated piece, interwoven with a variety of information presented as; facts, discussions, explanations, opinions, analysis, conclusions, arguments; and advice, little of which lend itself to meaningful separation.*
- *In addition, because the Council was not bound by the information contained in the petition or the petition process itself, the issues raised by the Applicant are moot and there is no genuine reason to alter the disclosure decision.*

The Representation goes on to discuss another piece of correspondence from a solicitor, a copy of which was also provided. While that other letter was provided in good faith to demonstrate that the Council can proceed in whatever fashion it wishes with respect to a matter that has been the subject of a petition, this document is irrelevant in this Review. The only issue in the Review is whether the Municipality has properly applied the *MGA* to the responsive Record. I have no jurisdiction under the *MGA* to evaluate how the Council proceeded or whether it properly applied any legal opinion[s] it received. As the Municipality's Representation stated:

The decision made by Council on this issue was a political decision. That decision could change in the future if the complexion or mind of Council changes. The issue of paving may even become moot, if the provincial authorities eventually pave the roads in question on their own dime.

On July 27, 2010, the Municipality indicated it did not intend to submit any further Representations.

ISSUES UNDER REVIEW

1. Whether the solicitor-client privilege exemption in s. 476 of the *MGA* allows the Municipality to withhold the Record.
2. Whether the Municipality has properly exercised its discretion to apply the solicitor-client exemption in s. 476 of the *MGA*.
3. Whether the Municipality has waived privilege to the responsive Record.
4. In the exercise of its discretion, whether the Municipality properly considered public interest in accordance with s. 486 of the *MGA*.

DISCUSSION

The issues listed above are the core issues with respect to the Municipality's refusal to provide access to the Record requested by the Applicant. To be clear at the outset of the Discussion, the evidence discussed in this Review Report is being used to determine the core issues of solicitor-client privilege, exercise of discretion and public interest. Decisions made by Council, the paving petition and the number of times it changed the process, actions by representatives of the Council or by some of the property owners are not under Review. It is not the role of the Review Officer to make any findings with respect to these matters, for example, if the interpretation of the legal opinion with respect to the paving process is correct.

WHETHER THE LETTER REQUESTED BY THE APPLICANT QUALIFIES AS SOLICITOR-CLIENT PRIVILEGED

The only exemption at issue in this Review is one based on the solicitor-client privilege exemption of the *MGA*, which reads as follows:

*476 The responsible officer **may** refuse to disclose to an applicant information that is subject to solicitor-client privilege.*
[Emphasis added]

Solicitor-client privilege is considered a cornerstone of our legal system, having been described as:

. . . a substantive rule for the exclusion of evidence in legal proceedings. A person who is privy to matters that originated in privileged circumstances is entitled to resist disclosure of those matters. Information protected by the privilege includes confidential communications, passing both ways, between a lawyer and his or her client that took place in the course of a professional relationship, whether or not in contemplation of litigation. However, the communications must be in the context of the client seeking legal advice from the solicitor.

*McNairn and Woodbury's Government Information, Access and Privacy
[FI-02-58]*

The solicitor-client privilege exemption is discretionary. Many public bodies treat the solicitor-client exemption as a mandatory exemption and thus rarely consider whether or not in the given circumstances they ought to exercise their discretion. Discretion under the *MGA* is different than that of a client choosing to waive privilege. Rather it is a decision made under the *MGA* as part of processing an Application for Access to a Record and deciding when the Record can rightfully be withheld under a specific exemption. Although the FOIPOP Administrator may be the client as well as the decision-maker in this case, these are two separate roles and must be distinguished accordingly. One of the most appropriate circumstances where a FOIPOP Administrator may exercise his/her discretion to disclose a Record to which an exemption applies – and likely why the Legislative Assembly chose to make it discretionary – is where the public interest will be served by releasing the Record.

This *discretionary* exemption permits a public body to withhold a document that is subject to solicitor-client privilege. Section 476 does not contemplate a public body using it as a blanket denial of all communications with solicitors. The first step is to ascertain whether or not the document contains information that can be defined as solicitor-client privileged.

With respect to s.16 [equivalent to s. 476 of the MGA], in earlier reviews I have cited an opinion of the British Columbia Information and Privacy Commissioner. The Commissioner wrote that “a public body may withhold information that consists of, or would reveal, a confidential communication between a lawyer and his or her client directly related to the giving or receiving of legal advice.” He added that a further four conditions must be established:

- 1. There must be a communication, whether oral or written;*
- 2. The communications must be of a confidential nature;*
- 3. The communication must be between a client (or her/his agent) and a legal adviser;*
- 4. The communication must be directly related to the seeking, formulating or giving of legal advice.*

[FI-05-08]

These conditions must all be met, that is the list is not to be read conjunctively. On an examination of the Record, I find it is clearly a written communication between a solicitor and his/her client, which is the Municipality, thus meeting the first and third conditions. As stated in previous Review Reports [*see FI-08-06*], though not marked confidential it is reasonable to assume that the intention of the author, a solicitor, was that the Record would remain confidential as it was considered privileged when created by the lawyer: it was a communication considered to be passed in confidence between a lawyer and a client. The dominant purpose from the perspective of the lawyer would be to provide legal advice in confidence. Based on that, I find the Record meets the criteria of confidentiality, the second condition. The remaining fourth condition is whether or not the entire Record contains advice. Clearly, on a read of the Record, I find that it contains advice. Therefore, the Record is *prima facie* protected by solicitor-client privilege. The next question is whether the solicitor-client privilege exemption should be applied to the Record.

The Applicant argued that because the taxpayers pay for the legal opinion from outside counsel and the Municipality acted upon that advice, the opinion should be public and the public should be considered the client. That position is not consistent with the law and is rejected. It should also be noted that while the Applicant has recognized the Record as being a legal opinion, his/her issue for this Review is whether public interest over-rides the decision to withhold the Record.

IF THE RECORD QUALIFIES AS FALLING WITHIN THE DEFINITION OF SOLICITOR-CLIENT PRIVILEGE, WHETHER THE MUNICIPALITY HAS PROPERLY EXERCISED ITS DISCRETION

The onus is on the Municipality to demonstrate that the Applicant is not entitled to the Record. Section 498(1) of the *MGA* reads as follows:

At a review or appeal into a decision to refuse an applicant access to all or part of a record, the burden is on the responsible officer to prove that the applicant has no right of access to the record or part.

In doing so, the Municipality needs to show that it considered all the relevant factors in the exercise of its discretion in deciding not to release the Record [*see FI-08-06 for the factors that should be considered*]. The Municipality did not give any reasons in its decision letter to the Applicant to explain how it exercised its discretion on the basis of the solicitor-client exemption. During the Review process it only pointed to the fact that a great deal of information had already been made public as a factor not to disclose and briefly pointed to the issue being moot. It made no Representations regarding public interest with respect to its exercise of discretion. It would appear that once the Municipality decided that the exemption could apply, the decision was made to withhold. As such, it has not met the onus to show that discretion was properly exercised by considering all relevant factors.

WHETHER THE MUNICIPALITY HAS EXPLICITLY OR IMPLICITLY WAIVED PRIVILEGE

In this case, the Municipality has relied on the solicitor-client privilege in s. 476 of the *MGA* to withhold the Record in full. This is consistent with the Municipality's claim that it has not expressly waived the privilege. The question for this Review is whether the Municipality or any of its agents have done or said anything that constitutes or amounts to waiving the privilege. Solicitor-client privilege is a privilege enjoyed by the client, not the solicitor. An express waiver or conduct by the client that amounts to a waiver will result in the information in the Record no longer being protected by the privilege.

[20] There are two things that must be proved for an implied waiver: knowledge of the existence of the privilege and a voluntary evincing of an intention to waive the privilege. The evidence from the department makes it clear that the parties intended the communication to be confidential. Counsel for the Respondent argues the Department employee did not intend, by summarizing the opinion, to waive privilege in the Department of Justice letter.

[21] The Department Employee's seeking of permission from the Department of Justice for release of the letter itself is said to show that he did not intend to release the privilege. I have difficulties with that. Firstly, implied waiver does not turn on the subjective intent of the disclosing party. The question is about what intention the disclosing party "voluntarily evinces". To produce a summary of the opinion for a municipality, and apparently to provide a summary for use in discussions with a marsh association, and to discuss the opinion with municipal councillors evinces an intention to waive confidentiality.

[Peach v. Nova Scotia (Transportation and Infrastructure Renewal), 2010 NSSC 91]

In the *Peach* case of Nova Scotia's Supreme Court, Judge Moir refers to a British Columbia case that stated, "[t]hus waiver of privilege as to part of a communication, will be held to be waiver as to the entire communication." [*S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, [1983] B.C.J. 1499 (S.C.)]

The relevant chronology of events leading up to and parallel to the Application for Access to a Record, with respect to whether or not there has been conduct that amounts to a waiver of the privilege is as follows:

November 2006	The Municipality authorized staff to work with property owners seeking to petition the Municipality for paving of the Monte Vista and Renfrew Roads.
April 2, 2007	The first paving petition was received by the Municipality.
May 2, 2007	The Municipality accepted the petition as valid. Due to funding limitations from the province actual paving was to take place in two phases, the first in the 2008-2009 budget year and the remainder in 2009-2010.

July 23, 2007	One property owner queried how Council determined the catchment area for the paving petition.
August 17, 2007	The Municipality sought legal advice [according to the Municipality's July 7, 2010 email to the Applicant].
August 29, 2007	A Council Meeting was held where it was decided that a public information meeting was required.
September 5, 2007	The Municipality received the legal opinion.
September 13, 2007	An in-camera Council Meeting was held to receive legal advice.
September 20, 2007	The Planning Advisory Committee of the Municipal Council held a Public Information Meeting
December 2007	A Council Motion was made to initiate a new paving petition process.
December 24, 2007	The transfers of property titles from two landowners to 14 landowners on properties on the road subject of paving petition ["the transferred titles"].
January 3, 2008	The Deed transfers are registered with the Land Title Office.
February 29, 2008	A letter is sent from Municipality to all property owners regarding the fact that a new petition is being circulated with a place to vote Yes or No for paving.
May 20, 2008	A second paving petition was filed by three property owners with the Municipality with a cover letter requesting that the petition be evaluated by Council and declare it as a failed petition because there were no yes votes; the petition is signed by all the individuals newly registered on the transferred titles.
July 23, 2008	A news article was published quoting a landowner and a Municipal Councillor, both acknowledged a conversation which involved adding owners to a property.
August 4, 2008	Transfer of property title from 14 landowners on one title back to two landowners.
August 6, 2008	The Deed transfer was registered with the Land Title Office.
August 24, 2008	A Council Motion was made to initiate a review of the petition process.
May 27, 2008	A second paving petition was tabled by Council until after a review of process is completed.

On April 2, 2007, the dispute over why the Municipal Council decided to reject the already approved and accepted paving petition was the subject of considerable local public attention and national media reports. The legal opinion was given to the Municipal Councillors at an in-camera meeting and was purportedly the basis of their decision to withdraw their support for the paving petition. The FOIPOP Administrator/Chief Administrative Officer provided the Applicant with a detailed response by letter to his/her questions regarding the legal advice, in which s/he set out how the legal advice was used by the Council. After the legal advice had been considered in-camera, one Municipal Councillor is alleged to have disclosed that portion of the legal advice that related to how the votes are counted in the petition process to one of the local property owners on the subject road of the paving petition. There is convincing evidence outlined in the timeline above that the legal opinion shared with some of the property owners was then acted upon to affect the success of the petition or the overall petition process.

I want to make one thing perfectly clear. The history of how the events transpired is relevant for the Review process for one reason and one reason only. The transfers at the land

title office and the names on the second petition have been confirmed and definitively demonstrate that the essence of the legal opinion as to how to count votes on a petition was made known to some property owners and that one or more of them acted upon that legal opinion. I find on the balance of probabilities that the substance of the legal opinion was in whole or in part shared by a representative of the Council with one or more property owners who then acted upon it by transferring land titles and filing a new petition.

In addition, correspondence with the Applicant and other property owners provide sufficient detail with regard to the legal opinion to add more evidence constituting waiver including the fact that the Municipality has spoken publicly in writing and orally about the legal opinion it received and claims its conduct [such as cancelling the first paving petition] is consistent with the legal advice it received. Whether the roads are under municipal or provincial jurisdiction, whether the first or second petitions are valid, whether the road should or should not be paved – all of these issues are not for me to decide in this Review and have only been factored into this analysis to make a finding with respect to the issue of whether the Municipality has waived the privilege.

The question for me as the Review Officer is whether there is sufficient evidence that forms the basis for me to conclude that the Record, which contains a legal opinion, has been made public in such a way as to constitute a waiver of the privilege by the Municipality and its agents. The answer is yes. The Municipality ought not to be able to release portions of the legal opinion, release parts which it chooses, release the core of the opinion regarding how to decide whether or not a petition succeeds, release some or all to whomever it chooses, and still be able to claim solicitor-client privilege. When one of the Councillors discussed the legal opinion contained in the Record with a member of the public, that conduct constituted a waiver of the privilege. Also, the Councillor disclosed matters which are at the core of the issues raised by the Applicant and other members of the public involved in these contentious events. When the Chief Administrative Officer wrote in detail about the legal advice but did not release it in its entirety, that conduct constituted an implied waiver. *Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [refer to Ontario (London Public Library Board), 2010 Can LII 10811].* It is unfair to the Applicant for the Municipality to be able to pick and choose the portions of the legal advice it chooses to make public while holding back other portions which may or may not line up with the processes it put in place with respect to petitions, specifically the paving petition.

[14] A client who puts in issue the advice received from his or her solicitor risks being found to have waived the privilege with respect to those communications.

*[15] The decision of the Ontario Court of Appeal in **Harish v. Stamp** (1979), 27 O.R.(2d) 395 (C.A.) is instructive ...*

In my respectful view, having regard to the evidence which had already been given, the learned trial Judge erred in holding that there has been no waiver of the solicitor-client privilege. Reference may usually be made to McCormick on Evidence, 2nd ed. (1972), p. 194:

Waiver includes, as Wigmore points out, not merely words or conduct expressing an intention to relinquish a known right but conduct, such as a

partial disclosure, which would make it unfair for the client to insist on the privilege there after.

[Emphasis in original]

[R. v. Hobbs, 2009 NSCA 90]

I find that there is no evidence that the Council took steps to contain the Record or to limit the use of it by individual Councillors. I find that the Municipality by its own conduct has waived the privilege and thus the Record can no longer be withheld under s. 476 of the *MGA*. As the Municipality did not rely on any other exemptions under the *MGA*, I consider this Finding sufficient to dispose of this Review. In any event, I turn now to the question of public interest.

WHETHER THERE IS A CLEAR PUBLIC INTEREST IN OVERRIDING THE SOLICITOR-CLIENT EXEMPTION

The onus is on the Applicant to demonstrate that it is in the public interest for the Municipality to release the Record.

*The Act exempts various categories of documents from disclosure. This case concerns records that **may** be disclosed pursuant to a discretionary ministerial decision . . . The Act provides that some records in the ministerial discretion category are subject to a further review to determine whether a compelling public interest in disclosure clearly outweighs the purpose of the exemption under s. 223 of FIPPA.*

[Emphasis in original]

[Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23]

In Nova Scotia the provincial and municipal access to information statutes enable public bodies and the Review Officer to consider whether disclosure for any reason whatsoever is clearly in the public interest. The public interest provision in the *MGA* reads as follows:

486(1) Whether or not a request for access is made, the responsible officer may disclose to the public, to an affected group of people or to an applicant information

(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people; or

(b) the disclosure of which is, for any other reason, clearly in the public interest.

The wording of s. 486(1) of the *MGA* is sufficiently plain and the section contains no restrictions as to which statutory exemptions it can be applied to and thus, in exercising discretion under the discretionary exemptions, public bodies need to consider public interest a factor.

. . . the Ontario Access and Privacy Commissioner said he expected a public body to exercise its discretion "in full appreciation of the facts of the case and after having considered the legal principles established for the exercise of discretion and the purposes of the Act . . . In deciding whether to apply a discretionary exemption to a particular record, the (public body) will typically consider the contents of the document, the

significance of the record to the institution and the circumstances in which the document was created.”

[FI-00-116; FI-00-50; ON Order P-944]

One of the factors a public body should consider in exercising its discretion is whether or not disclosure of the subject information is, for any reason, clearly in the public interest. The public interest override is a question of fact and will be applied where the circumstances suggest it is appropriate and especially in cases where it is raised by an applicant. The following questions have been formulated by the former Review Officer with respect to addressing the issue of public interest:

Has the matter been a subject of recent public debate?

Would dissemination of the information yield a public benefit by assisting public understanding of an important policy, law or service?

Do the records show how the public body is allocating financial or other resources?

If it is agreed that the matter is one of public interest, other factors to be considered are:

Is the Applicant's primary purpose to disseminate information in a way that could reasonably be expected to benefit the public or to serve a private interest?

Is the Applicant able to disseminate the information to the public?

[FI-00-29]

The section states that it can be applied where there is a risk of significant harm to the environment, or health or safety of the public or ***for any other reason that is clearly in the public interest***. This can be applied, therefore, whenever it is clearly within the public interest to do so, notwithstanding the applicability of any other discretionary exemption, including the solicitor-client privilege. It is wholly appropriate, therefore, and indeed, necessary, for the Municipality to consider public interest in deciding whether or not to release the Record to the Applicant notwithstanding that it may contain solicitor-client privileged information.

In meeting the onus to demonstrate public interest, the Applicant has provided the Review Officer with considerable information and documentation. I find the following is a summary of the facts relevant to the issue of public interest:

1. The Municipality was fully aware of all of the public attention the issues surrounding the paving petition[s] were receiving.
2. It was this public attention that led the Municipality to seek the legal opinion making up the Record.
3. The Municipality tried to provide a great deal of information to members of the public including the Applicant about the petition process and why it was seeking a legal opinion.
4. For the first time, the Municipality held a public information session with respect to a paving project.
5. With respect to the public information meeting, the following details assist in understanding the extent of the interest in the events:
 - An advertisement was issued as a public notice prior to the meeting.

- The meeting was held September 20, 2007 with a set agenda with the only topic being the road paving proposal, which was the subject of the paving petition.
 - A slide show presentation by the Municipality included:
 - Background on paving petitions.
 - Acknowledgement that:
 - Municipal Council authorized staff to work with property owners seeking to petition for the paving.
 - Staff prepared the petition for property owners, which petition shows the “owner name” column containing only one or two names of the registered owners, those who could “vote”.
 - The petition was submitted to the Municipality on April 2, 2007, and was accepted by Council as valid.
 - After the paving petition was accepted as valid, “due to concerns about the petition raised by area residents” it was decided to take no further action and hold the public meeting.
 - Thirty residents, including the Applicant addressed the recorded Meeting which was 2 hours and 45 minutes long.
 - The Meeting was well attended. There were 109 properties subject to the paving and some of those who spoke owned more than one subject property and at least one was there to represent other residents. Approximately 63 properties were represented at the meeting.
 - One speaker indicated that s/he had held three public meetings on the issue at his/her home.
6. The Municipality knew the media was devoting a great deal of attention to this issue because of the different sides of the issue but also because local public figures were property owners who resided on the roads at issue. Representatives of the Municipality frequently provided comments to television and print media.
 7. The Municipality knows that the petition process itself is a public process involving a group of citizens or a particular cluster of constituents making their wishes known to the elected Council.
 8. Based on all of the evidence provided about community involvement, the Applicant has demonstrated his/her ability to disseminate the information and that this is not a solely private interest.

These facts support a Finding that the Applicant has met all of the factors laid out in *FI-00-29*.

This Application for Access to a Record arises out of a purely public process. As the Applicant indicated in his/her Representations on May 14, 2009:

“new legal opinion” sought is about a public process

***The petition process about which the “new legal opinion” was sought is a public process
[Emphasis in original]***

The petition process is a means by which local constituents can show sufficient support for an idea that they are urging their locally elected Council to act upon. It is a means by which the voices of citizens are heard. The petition leading up to this request for information had been developed cooperatively with staff at the Municipality, it had been approved publicly by the Council and had met the criteria the proponents understood were the requirements to have a petition approved and acted upon. It had the support of the province for funding and is designated on the list of approved projects.

The Municipality argues that notwithstanding the approval of the petition, it has the residual discretion to change the petition rules or disapprove of a previously approved project. That may or may not be accurate but that is not a question for me to answer. Why the approval of a petition is relevant to the issues before me is that the contents of the Record relate directly to how a completely public process is defined for constituents. Purportedly the legal opinion changed the way in which citizens can engage with the Council through the petition process and how the votes are counted to have that petition succeed or not.

It is also important to point to the fact that the Municipality has not argued lack of public interest and, by its conduct, conceded the point. In its communications with the Applicant and its Representation to the Review Office, the Municipality has clearly acknowledged the public interest in this issue. In fact, it has based much of its actions after the fact, such as providing considerable information to the public and to citizens, on the public interest. I find there to be a disconnect between how the Municipality clearly talks and behaves in a way that acknowledges the considerable public interest but does not take it into account in making its decision under the *MGA*.

The purpose of the *MGA* provides, in part, as follows:

462 The purpose of this Part is to . . .

(b) provide for the disclosure of all municipal information with necessary exemptions, that are limited and specific, in order to

- i. facilitate informed public participation in policy formulation,*
- ii. ensure fairness in government decision-making, and*
- iii. permit the airing and reconciliation of divergent views.*

This Review marks the first occasion that has come before me where the circumstances correspond to all three of these specific statutory purposes. These three purposes point to the issue of the public interest aspect of access to information from public bodies. Based on the findings of fact, which clearly reveal a situation where all three purposes are implicated, I find that the Applicant has met the onus to demonstrate that release of the Record is clearly in the public interest and is consistent with the purposes of the *MGA*.

I find that the Municipality did not turn its attention to the purposes outlined in the *MGA* or the issue of public interest even though it knew just how much public interest there was in this issue. The Municipality is familiar with the petition process, which is clearly a public one. It ought to have known that in this situation, the *MGA* required it to consider the question of public interest and to release as much information as possible to promote public input and permit the airing of all of the relevant information to everyone involved. This meant it ought to have considered the clear and unmistakable public interest in exercising its discretion with respect to the request for access to the legal opinion [refer to *BC Order 02-38*]. As a result, how the Municipality exercised its discretion under s. 486 is flawed.

For section 16 [equivalent to s. 486 of the MGA] 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.

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]. [ON Order MO-2456]

Solicitor-client privilege is intended to benefit and protect the interests of the client. The Findings in this Review are not about weakening or placing in jeopardy a lawyer’s fundamental responsibility and ethical duty to hold in strict confidence information s/he provides to his/her client. This is a case where the Applicant seeks the whole of the information contained in a legal opinion about a public process from his/her duly elected officials, whose duty it is to serve and protect the interests of its constituents and where there is no private interest at stake.

Releasing the full legal opinion contained in the Record to everyone would have given the Municipality the opportunity to promote three of the purposes articulated in the *MGA*, assist the public to understand an important law or policy and to enable everyone to have the benefit of knowing the entire legal opinion. Some property owners had access to some of the legal opinion, the CAO and at least one Council member made portions of the legal opinion public – thus contributing to the confusion in the community about a public petition process rather than promoting greater understanding. In all of these circumstances based largely on evidence

provided by the Applicant, the public interest tests of *for any other reason* and *clearly in the public interest* have been met.

This is consistent with other instances where the privilege has been set aside for public policy reasons.

Further, solicitor-client privilege has not been impliedly waived – Marathon not have raised reliance on legal advice in the pleadings or in any other way ... However, in my view, the applicants have established that the solicitor-client privilege should be set aside on the basis of public policy – that is, that the circumstances of this case are such that the benefits of maintaining the privilege are outweighed by the benefits to be derived from full disclosure.

[Emphasis added]

[Knight's Minister Exploration & Co. v. Corcoran & Co. 1993 Can LII 2728 (BCSC)]

The Supreme Court of Canada has made it clear that the definition of public interest, for which there is none provided in the *MGA*, is an evolving one *[refer to FI-08-107 where this was discussed in detail]*.

I find that the test of clearly in the public interest has been met and find that the Municipality did not give any evidence that public interest formed part of its consideration in exercising its discretion. The fact that the Municipality would not accept submissions from the Applicant during the Review confirms that it did not consider public interest. When making a decision under a discretionary exemption, where the Record is intimately involved as part of a public process, and the issues raised are attracting a great deal of attention from the public, it is incumbent on a public body when it first receives an access to information request to factor in public interest in the exercise of its discretion including when the exemption claimed is solicitor-client privilege.

Unlike the Supreme Court of Nova Scotia, where I deem it appropriate I can substitute my discretion for that of the Municipality. In this case, given the unquestionably clear public interest and for all the reasons above, I find that the Municipality ought to have exercised its discretion to not apply the solicitor-client exemption and to release the Record in full.

WHO MAKES THE DECISION WITH RESPECT TO ACCESS?

As I stated before in a previous Review Report *[refer to FI-08-06]*, what is expected under access to information legislation is that the FOIPOP Administrator, as the Responsible Officer for the public body delegated under the *MGA*, will make a decision based on the legal principles regarding the right to access information, the purposes of the *MGA*, including ensuring fairness in government decision-making, and all of the relevant circumstances surrounding the creation of the Record.

In this case, throughout the Review process, the FOIPOP Administrator has referred to him/herself as not being a lawyer and, therefore, is not prepared to make decisions regarding disclosure further than that which was made at the time of the request, stating the matter is before me to “decide.” In this case, like the previous case cited, I believe it is important to point out to

the FOIPOP Administrator that as the designated decision-maker, it is for him/her to be the one to make the actual decision. Other municipal staff/agents, including solicitors, may have a valuable opinion or information to contribute to the process, which the FOIPOP Administrator may consider and incorporate into what should be his/her reasoned and seasoned decision when the Application for Access to a Record was received.

FINDINGS

1. The Record is a letter from an outside solicitor to the Municipality providing it with a legal opinion. While the contents of the Record are a mixture of fact and opinion, the text as it stands when first provided to the Municipality constitutes a document that could be *prima facie* protected by solicitor-client privilege.
2. Solicitor-client privilege is not absolute under access to information legislation and should not be applied as a blanket exemption. If it was intended that once a Record met the definition of solicitor-client privilege it was to be automatically withheld, s. 476 would have read “shall” and as such would have been a mandatory exemption.
3. The Municipality spent considerable time discussing the Record and how it is a legal opinion that is protected by solicitor-client privilege in its favour as the “client.” The Municipality did not seem to make any distinction between the privilege at law and the privilege as it is to be applied as a discretionary exemption. The direction in the Purpose section of the *MGA* that exemptions are to be “limited and specific” apply equally to the s. 476 exemption as it does to all other exemptions provided for in the legislation.
4. Under a discretionary exemption, it is incumbent on public bodies to consider all relevant factors in exercising discretion. In this case, I find the Municipality failed to properly exercise discretion as it did not consider all relevant factors but rather chose to apply s. 476 as if it were a mandatory exemption; solicitor-client correspondence *ipso facto* withheld.
5. When making a decision under a discretionary exemption, including solicitor-client privilege, and the Record is intimately involved as part of a public process where the issues raised are attracting a great deal of attention from the public, it is incumbent on a public body when it first receives an Application for Access to a Record to factor in public interest in the exercise of its discretion.
6. The Municipality by its own conduct waived the privilege; it provided copious amounts of information to the public about the process and the fact that the legal opinion had resulted in a change to the petition process. At least one Councillor disclosed some or all of the legal opinion to at least one member of the public who shared that information with others who acted upon that legal advice. The Municipality summarized the changes resulting from the legal opinion in media reports.
7. During the Review process, the Municipality refused to receive submissions from the Applicant regarding public interest.
8. The Applicant met his/her onus by providing a preponderance of evidence to demonstrate public interest in the issue which is the topic of the Record.
9. By its own Representations and actions, the Municipality has agreed with the fact that public interest is a factor. The Municipality concedes the fact that there is considerable public interest in the matter surrounding the Record that is the paving petition, and uses it as its rationale for providing substantial amounts of information to the interested public. It was the basis on which it held the first public meeting with respect to a paving petition.

10. Ironically, the Municipality indicates that it considered the fact that it had previously released a considerable amount of information to all stakeholders involved with this issue as a factor in exercising its discretion to apply the exemption. That amounts to saying “we gave out tons of information to lots of members of the public because of the considerable interest in the paving issue so we are refusing to give out the record requested by this particular Applicant.” This approach lacks logic and coherency.
11. The Responsible Officer [FOIPOP Administrator] believes that because the Council rejected the paving petition and chose to proceed differently, which s/he submits it has the authority to do, it makes the Applicant’s access to information request moot. This conclusion is neither correct for the purpose of processing the Applicant’s Application for Access to a Record nor for deciding the Applicant’s Request for Review with the Review Office under the *MGA*. The issue of whether or not the Applicant is entitled to a copy of the Record remains alive and is not rendered moot because the Council made a different decision about the paving, which is irrelevant for the purpose of this Review.
12. The Responsible Officer seems to be under some misunderstanding about the process about his/her role in rendering a decision under the *MGA*. As the delegated authority from the Head of the public body [Municipality], the FOIPOP Administrator is given the authority to make a decision under the statute. S/he may seek information, advice, and guidance from a variety of sources including legal advice but this is not necessary.
13. It is open to the Review Officer to recommend a new decision. The recommendations can include issues with respect to process used by the Municipality as well as the substance of its decision [*refer to FI-07-27*].

RECOMMENDATIONS

The Review Officer is not restricted by the *MGA* as to what Recommendations can be made. The *MGA* provides as follows:

492(2) In the report, the review officer may make any recommendations with respect to the matter under review that the review officer considers appropriate.

I make the following recommendations to the Municipality:

1. To release the complete Record to the Applicant; and
2. To approach the Department of Justice Information Access and Privacy Office and/or Service Nova Scotia and Municipal Relations to inquire whether or not training and support are available to smaller agencies such as this Municipality with respect to decision-making under the *Part XX* of the *MGA*.

Respectfully,

Dulcie McCallum
Freedom of Information and Protection of Privacy Review Officer for Nova Scotia