



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

ORDER M-69

Appeal M-9200016

Township of Bagot & Blythfield



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ORDER

On October 1, 1992, the undersigned was appointed Inquiry Officer and received a delegation of the power and duty to conduct inquiries and make orders under the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act.

BACKGROUND:

The Township of Bagot & Blythfield (the Township) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to the requester's company, specifically in relation to its application for development approval. The Township granted partial access to the record, denying access to part of the record pursuant to sections 6(1)(b), 7(1) and 12 of the Act. The requester appealed the Township's decision.

Mediation of the appeal was not successful and notice that an inquiry was being conducted to review the Township's decision was sent to the appellant and the Township. Written representations were received from the appellant and the Township.

In its representations, the Township agreed to release additional pages of the record, and has given the appellant the opportunity to review these pages. Accordingly, these pages are no longer at issue in this appeal.

An appendix has been attached to this order so that reference can be made to the pages of the record which remain at issue. Appendix A sets out the exemptions claimed and identifies duplicate pages. With reference to the duplicate pages, the decision I reach on a particular page will be applicable to its duplicate.

PRELIMINARY MATTERS:

In its representations, the Township has not cited or made reference to the application of section 6(1)(b) of the Act to any part of the record. Accordingly, this exemption will not be considered in the context of this appeal.

The Township submits that some of the information contained in the record will fall under section 10 of the Act because disclosure of the information could affect the competitive position of the Township. In my view, harm to the competitive position of the Township should be addressed by a claim pursuant to section 11 of the Act, not pursuant to section 10. The Township has not identified any page of the record the disclosure of which might harm its competitive position and, accordingly, neither section 10 nor 11 will be considered in the context of this appeal.

The Township has not made reference to the application of an exemption to pages 40-69, 128-132, 156-158 and 174 of the record. Having reviewed these pages, I find that no mandatory exemption under the Act applies and, therefore, these pages should be disclosed to the appellant. However, only parts of pages 156-158 are relevant to the appellant's request and, therefore, only those parts of the document which relate to the appellant's company should be disclosed. I have attached a highlighted copy of pages 156-158 with the copy of this order provided to the Township, which indicates the severances which should be made prior to the release of the record.

Pages 110 to 115 of the record relate to a development project of a company other than that of the appellant. These pages are therefore outside of the scope of the request and should not be disclosed.

ISSUES:

The issues arising in this appeal are:

- A. Whether the discretionary exemption provided by section 7(1) of the Act applies.
- B. If the answer to Issue A is yes, whether there is a compelling public interest in the disclosure of the record which clearly outweighs the purpose of the exemption.
- C. Whether the discretionary exemption provided by section 12 of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemption provided by section 7(1) of the Act applies.

The pages for which the Township submits that section 7(1) of the Act applies are identified in Appendix A. Section 7(1) of the Act reads:

A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

"Advice" pertains to the submission of a suggested course of action which will ultimately be accepted or rejected by its recipient in the deliberative process (Order 118). "Recommendations" should be viewed in the same vein (Order P-348).

I have carefully reviewed the record and the representations of the parties. In my view, the information contained in pages 172, 173, 252, 257, 258 and 265 of the record does not purport to suggest one course of action or another. It is factual background information containing no suggested course of action. Therefore, those pages do not qualify for exemption under section 7(1).

In my view, disclosure of the remaining pages would reveal the advice and recommendations of consultants retained by the Township. Any factual information contained in these pages is so interwoven with the advice and recommendations that it cannot reasonably be severed pursuant to section 4(2) of the Act.

Section 7(2) of the Act lists certain exceptions to the 7(1) exemptions. Specifically, sections 7(2)(f) and (g) state:

Despite subsection (1), a had shall not refuse under subsection (1) to disclose a record that contains,

- (f) a feasibility study or other technical study, including a cost estimate, relating to a policy or project of an institution;
- (g) a report containing the results of field research undertaken before the formulation of a policy proposal;

The appellant claims that if the concerns of the Township's professional advisors form the basis for a municipal policy, then the advice provided by these individuals in aggregate constitutes a "feasibility study or other technical study" and/or "field research" undertaken on behalf of the Township.

I have examined the record and I do not agree. The record consists almost exclusively of correspondence between the Township and its professional advisors. Pages 74-76 do contain a report to the Township from a planning and engineering firm, however, the pages do not contain the "results of field research". I see nothing in the record which would lead me to conclude that, in aggregate, it constitutes a "feasibility study or other technical study". Accordingly, I find neither section 7(2)(f) nor (g) applies to any pages of the record.

In summary, I find that section 7(1) applies to pages 73-80, 84, 87, 88, 122, 127, 138-142, 179, 246-247, 249-250, 256, 261, 266 and 268-269 of the record. In my view, section 7 does not apply to pages 172, 173, 252, 257, 258 and 265 of the record.

ISSUE B: If the answer to Issue A is yes, whether there is a compelling public interest in the disclosure of the record which clearly outweighs the purpose of the exemption.

In Issue A, I found that section 7(1) applies to pages 73-80, 84, 87, 88, 122, 127, 138-142, 179, 246-247, 249-250, 256, 261, 266 and 268-269. The appellant submits that section 16 applies in the circumstances of this appeal. Section 16 of the Act states:

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

The Act is silent as to who bears the burden of proof in respect of section 16. Where the application of section 16 has been raised by an appellant, it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the record before making submissions in support of their contention that section 16 applies. To do otherwise would be to impose an onus which could seldom, if ever, be met by the appellant.

The appellant submits that the development proposal can have a significant impact on the economic base and future development of the Township. The appellant contends that the public interest is compelling in that, if the Township's position remains unchanged, it may set a precedent for other municipalities wishing to resist provincial requirements. As a result, the appellant states that it is critical that the public, the provincial government, as well as the appellant be permitted an opportunity to understand the basis for the Township's policy position. The appellant contends that only after full disclosure will all of these parties be able to formulate an appropriate response to the Township's position.

In my view, the interest described by the appellant is not sufficient to satisfy the requirements of section 16. It has been stated in a number of previous orders that in order to satisfy the requirements of this sections, there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption (Orders M-6, M-7, P-352, P-332). In the circumstances of this appeal, I am not convinced that there is a compelling public interest sufficient to outweigh the purpose of section 7(1) of the Act.

ISSUE C: Whether the discretionary exemption provided by section 12 of the Act applies.

The pages of the record for which the Township has claimed exemption under section 12 of the Act are identified in Appendix A. Because I have upheld the Township's application of section 7 to pages 249, 250 and 256, I will not consider the application of section 12 to these three pages.

Section 12 provides:

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.

This section consists of two branches, which provide the Township with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege; (Branch 1) and
2. a record which 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 (Branch 2).

The Township contends that the common law solicitor-client privilege extends to any ongoing correspondence to the Township from its legal advisor. The Township submits that this privilege applies to both legal advice and legal assistance, including communications setting out the status of or general information about an issue. In this respect, the Township submits that legal advice was given on an ongoing basis and, while an individual document may not contain advice, it is still privileged if it forms the basis of factual background upon which the advice was given.

I do not agree with the Township's position. Not all communications between a legal advisor and his or her client are privileged. In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Township must provide evidence that the record satisfies either of the following tests:

1. a) there is a written or oral communication, **and**
 - b) the communication must be of a confidential nature, **and**
 - c) the communication must be between a client (or his agent) and a legal advisor, **and**
 - d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49, M-2 and M-19]

Having reviewed the record, I find that all parts of the first test have been met in respect of all of the pages for which the section 12 exemption was claimed, with the exception of pages 4, 5, 11-14, 17-21, 24, 25, 28, 29, 30, 36, 37 and 267.

The communications on pages 12-14, 24-25 and 29 are between the Township's legal advisor and someone other than the Township or its agents. In my view, these pages do not meet part (c) of the first test above and therefore, section 12 does not apply.

Pages 4, 5, 11, 17-21, 28, 30, 36, 37 and 267 are not directly related to seeking, formulating or giving legal advice and, in my view, part (d) of the first test above has not been established. The Township has not provided any evidence which would indicate that any of the pages were created or obtained especially for the lawyer's brief for existing or contemplated litigation, and I find that the requirements of the second test under Branch 1 of the section 12 exemption have not been met.

A record can be exempt under Branch 2 of section 12 regardless of whether the common law criteria relating to Branch 1 are satisfied. Because the criteria relating to Branch 1 have not been satisfied in respect of pages 4, 5, 11-14, 17-21, 24, 25, 28, 29, 30, 36, 37 and 267, I will consider these pages in the context of Branch 2 of section 12. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for counsel employed or retained by an institution; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

The Township submits that it was aware of the possibility of litigation because its position on the development proposal has severely affected the economic viability of the appellant's company. Having reviewed the circumstances surrounding the preparation of the various pages of the record, in my view, the second part of the Branch 2 test has not been met. The pages were not prepared in contemplation of or for use in litigation.

In summary, I find that pages 1-3, 22, 23, 34, 38, 39, 70-72, 85, 86, 89-101, 103, 104, 106-110, 116-121, 138-141, 144, 147, 148, 150-153, 163-165, 190-192, 197-209, 221, 236-239, 253-255, 260, 262, 263, 270-272, 275 qualify for exemption under section 12. Pages 4, 5, 11-14, 17-21, 24, 25, 28-30, 36, 37 and 267 do not qualify for exemption under section 12.

ORDER:

1. I order the Township to disclose pages 4, 5, 11-14, 17-21, 24, 25, 28, 29, 30, 36, 37, 40-69, 128-132, 172, 173, 174, 252, 257, 258, 265 and 267 to the appellant within 15 days following the date of this order.
2. I order the Township to disclose to the appellant the portions of the pages 156-158 which are **not** highlighted in the copy of these pages which is being forwarded to the Township with this order, within 15 days following the date of this order.
3. I uphold the Township's decision to withhold the remaining pages of the record.
4. In order to verify compliance with this order, I order the Township to provide me with a copy of the record which is disclosed to the appellant pursuant to Provisions 1 and 2, only upon my request.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

December 2, 1992

APPENDIX A

PAGE	DESCRIPTION	EXEMPTIONS APPLIED	ACCESS DECISION
1-3	Letter from R. Dickinson (solicitor) to Township	s.12	ACCESS DENIED
4	" " " " "	s.12	DISCLOSED
5	" " " " "	s.12	DISCLOSED
11	" " " " "	s.12	DISCLOSED
12-14	Letter from solicitor to a firm of labour consultants	s.12	DISCLOSED
17-21	Letter from solicitor to Township	s.12	DISCLOSED
22, 23	" " " " "	s.12	ACCESS DENIED
24, 25	Letter from Ministry of Municipal Affairs to solicitor	s.12	DISCLOSED
28	Letter from solicitor to Township	s.12	DISCLOSED
29	Letter from R. B. James and Assoc. to solicitor	s.12	DISCLOSED
30	Letter from solicitor to Township	s.12	DISCLOSED
34	" " " " "	s.12	ACCESS DENIED
36, 37	Letter from solicitor to Jim Hunt and Vance Bedore, (Township's advisors) with enclosure of letter from Paul Murphy in the Renfrew Mercury	s.12	DISCLOSED
38, 39	Letter from solicitor to Township	s.12	ACCESS DENIED
40-69	Letter from solicitor to Ministry of Municipal Affairs (with two duplicates and a 2 page insert)	No exemption claimed	DISCLOSED
70-72	Letter from solicitor to Township	s.12	ACCESS DENIED

PAGE	DESCRIPTION	EXEMPTIONS APPLIED	ACCESS DECISION
73-76	Cover letter and two page insert of a report prepared by a planner of the firm retained by the Township	s.7(1)	ACCESS DENIED
77, 78	Memorandum from a councillor to Council	s.7(1)	ACCESS DENIED
79, 80	Letter from a planner retained by the Township to the Township	s.7(1)	ACCESS DENIED
84	Letter from engineer retained by the Township to the Township	s.7(1)	ACCESS DENIED
85, 86	Letter from solicitor to Township (duplicate of pages 120, 121)	s.12	ACCESS DENIED
87	Letter from the planner retained by the Township to Council (duplicate of page 122)	s.7(1)	ACCESS DENIED
88	Letter from engineer retained by the Township to the Township (duplicate of page 127)	s.7(1)	ACCESS DENIED
89-101	Report prepared by solicitor for the Township (duplicate of pages 198-209)	s.12	ACCESS DENIED
103, 104	Minutes of a Staff meeting containing advice of the solicitor	s.12	ACCESS DENIED
106-110	Letter from solicitor to Township (duplicate of pages 133-137)	s.12	ACCESS DENIED
110-115	Letter from solicitor to Township	s.12	ACCESS DENIED (Not responsive to request)
116-119	Letter from solicitor to Township (duplicate of pages 123-126)	s.12	ACCESS DENIED
120, 121	Letter from solicitor to Township	s.12	ACCESS DENIED
122	Duplicate of page 87		ACCESS DENIED

PAGE	DESCRIPTION	EXEMPTIONS APPLIED	ACCESS DECISION
123-126	Duplicate of pages 116-119		ACCESS DENIED
127	Duplicate of page 88		ACCESS DENIED
128-132	Cover letter from solicitor to Township with solicitor's letter to engineers retained by the appellant	No exemptions claimed	DISCLOSED
133-137	Duplicate of pages 106-110		ACCESS DENIED
138-141	Letter from solicitor to Township	s.12	ACCESS DENIED
142	Letter from engineer/planner retained by the Township to the Township	s.7(1)	ACCESS DENIED
144	Letter from solicitor to the Township	s. 12	ACCESS DENIED
147, 148	" " " " " "	s.12	ACCESS DENIED
150-153	Letter from solicitor to planning consultant and engineering consultants retained by the Township	s.12	ACCESS DENIED
154, 155	Letter from planner retained by the Township to the Township	s.7	ACCESS DENIED
156-158	Agenda for a meeting of the Township's solicitor, engineer and planner	No exemptions claimed	PARTIAL ACCESS (part not responsive)
163-165	Letter from solicitor to Township	s.12	ACCESS DENIED
172	Letter from engineer retained by the Township to the Township	s.7	DISCLOSED
173	" " " " "	s.7	DISCLOSED
174	Telecopier activity sheet	No exemptions claimed	DISCLOSED

PAGE	DESCRIPTION	EXEMPTIONS APPLIED	ACCESS DECISION
179	Letter from planner retained by the Township to the Township	s.7	ACCESS DENIED
190	Letter from solicitor to the Township	s.12	ACCESS DENIED
191, 192	Letter from the solicitor to the planner retained by the Township	s.12	ACCESS DENIED
197-209	Covering letter along with report prepared by the solicitor, planner and engineer retained by the Township (Pages 198-209 are a duplicate of pages 89-101)	s.12	ACCESS DENIED
221	Letter from solicitor to the Township	s.12	ACCESS DENIED
236, 237	" " " " " "	s.12	ACCESS DENIED
238, 239	" " " " " "	s.12	ACCESS DENIED
246, 247	Letter from the engineer retained by the Township to the Township	s.7(1)	ACCESS DENIED
249, 250	Letter from the engineer retained by the Township to the solicitor	s.7(1) and s.12	ACCESS DENIED
252	" " " " " "	s.7(1)	DISCLOSED
253-255	Letter from solicitor to the Township	s.12	ACCESS DENIED
256	Letter from the engineer retained by the Township to the Township	s.7(1) and s.12	ACCESS DENIED
257, 258	Letter from the engineer retained by the Township to the Township	s.7(1)	DISCLOSED
260	Letter from solicitor to the Township	s.12	ACCESS DENIED
261	Letter from construction supervisor of engineering firm retained by the Township to the Township	s.7(1)	ACCESS DENIED

PAGE	DESCRIPTION	EXEMPTIONS APPLIED	ACCESS DECISION
262, 263	Letter from solicitor to the Township	s.12	ACCESS DENIED
265	Letter from construction supervisor of the engineering firm retained by the Township to the Township	s.7(1)	DISCLOSED
266	" " " " " "	s.7(1)	ACCESS DENIED
267	Letter from the solicitor to the Township	s.12	DISCLOSED
268	Letter from construction supervisor of the engineering firm retained by the Township to the Township	s.7(1)	ACCESS DENIED
269	Letter from the engineer retained by the Township to the Township	s.7(1)	ACCESS DENIED
270, 271	Letter from the solicitor to Council	s.12	ACCESS DENIED
272	Letter from the solicitor to the engineering firm of Oliver, Mangione, McCalla	s.12	ACCESS DENIED
275	Letter from the solicitor to the Township	s.12	ACCESS DENIED