



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-233

Appeal M-9300149

City of Scarborough



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ORDER

BACKGROUND:

The City of Scarborough (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to:

copies of all written documentation distributed by Law Department staff to politicians during the period January 3 through March 26, 1993 which relates specifically to my employment with the City of Scarborough and the circumstances surrounding my termination of employment.

The City identified two records as being responsive to the request. A letter dated February 17, 1993 and a memorandum dated March 2, 1993. The City denied access to these two records, based on the exemptions contained in sections 7 and 12 of the Act. The requester appealed the City's decision to deny access.

During the course of mediation, the City agreed to withdraw its claim for the application of section 7 of the Act and to release paragraph 2 of the February 17, 1993 letter to the appellant.

Further mediation was not successful and notice that an inquiry was being conducted to review the City's decision was sent to the appellant and the City. Representations were received from both parties.

ISSUES:

The issues to be determined in this appeal are:

- A. Whether the records contain "personal information" as defined by section 2(1) of the Act.
- B. Whether the discretionary exemptions provided by sections 12 and 38(a) of the Act apply to the records.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the records contain "personal information" as defined by section 2(1) of the Act.

"Personal information" is defined in section 2(1) of the Act, in part, as follows:

"personal information" means recorded information about an identifiable individual, including,

...

(e) the personal opinion or views of the individual except where they relate to another individual,

...

(g) the views or opinions of another individual about the individual,

...

Record 1 is a letter dated February 17, 1993 from the City Solicitor to the Mayor of the City. Record 2 consists of a memorandum dated March 2, 1993 from the Director, Planning and Development Law, to the Mayor of the City.

I have examined the records and, in my opinion, only Record 2 contains personal information. As this information consists of the views or opinions about the appellant it is, therefore, the personal information of the appellant as defined by section 2(1)(g) of the Act.

It has been established in a number of previous orders that information provided by an individual in a professional capacity or in the execution of employment responsibilities is not the personal information of the individual who supplies the information (Orders 113, 139, 157 and P-257). Since the author of Record 2 provided her views in the course of her employment as Director, Planning and Development Law, her comments cannot be considered to be her personal information.

To summarize, the only personal information at issue in this appeal is contained in Record 2 and consists of the personal information of the appellant only.

ISSUE B: Whether the discretionary exemptions provided by sections 12 and 38(a) of the Act apply to the records.

Section 12 of the Act provides as follows:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

This section consists of two branches, both of which have been claimed by the City, which provide it 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).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution 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 M-213]

As indicated previously, Record 1 is a letter written by the City Solicitor to the Mayor of the City. Having reviewed this record and the representations of the City, I am satisfied that the letter can be characterized as a confidential written communication between a client and a legal advisor and that the document relates directly to the provision of legal advice. Accordingly, I find that Record 1 qualifies for exemption under the first branch of section 12 of the Act.

In Order 210, Commissioner Tom Wright was called upon to interpret the meaning of "legal advice" for the purposes of the exemption provided under section 19 of the provincial Act (the equivalent of section 12 of the Act). He dealt with this issue in the following fashion:

The term "legal advice" is not defined in the Act. In my view, the term is not so broad as to encompass all information given by counsel to an institution to his or her client. Generally speaking, legal advice will include a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications. It does not include information given about a matter with legal implications, where there is no recommended course of action, based on legal considerations, and where no legal opinion is expressed.

I believe that these comments are helpful in interpreting the scope and meaning of the fourth part of the test under branch one of section 12. That is, that the communication in question must be related to seeking, formulating or giving legal advice. With respect to Record 2, the City states that the record contains legal opinions respecting the subject of whether the appellant's allegations of fraud and illegality may be substantiated and what the appropriate responses to these allegations should be.

Although Record 2 satisfies the first three requirements of Branch 1, it does not, in my opinion, meet the fourth part of the Branch 1 test as the information must relate directly to the seeking, formulating or giving of legal advice. In my view, Record 2 does not contain information relating directly to these subjects. Rather, it relates to the author's views concerning the job performance of the appellant and attempts to answer allegations made by the appellant in an earlier communication to the Mayor. Although the author of Record 2 is a solicitor, I find that her comments regarding the appellant are more administrative, rather than legal, in nature.

In my view, the City has failed to establish that the second part of Branch 1 of the section 12 test has been met since there is no evidence before me that Record 2 was "created or obtained especially for a lawyer's brief", which is a necessary component of the "litigation privilege" part of the exemption.

I must now consider whether Record 2 falls within Branch 2 of the section 12 test. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2. They are as follows:

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.

[Order 210]

I am satisfied that Record 2 was prepared by counsel employed by the City, which thereby meets the first part of Branch 2. With respect to the second part of Branch 2, the City makes the following submission:

... the record was prepared by counsel employed by the City of Scarborough and ... it was prepared for use in giving legal advice to the Mayor with respect to how she should respond to certain allegation of impropriety, fraud and illegality raised by [the appellant].

We acknowledge that the memo also contains a certain amount of factual information, however, as indicated in the March 2, 1993 memo this factual information is irretrievably inter-connected with the allegations of misfeasance to which the writer of the March 2, 1993 memo was responding.

I do not agree. As stated earlier with respect to my discussion of Branch 1 of the section 12 test, the information contained in Record 2 does not relate directly to the provision of legal advice, but rather consists of the author's comments respecting the appellant's managerial style. As well, there is no evidence that the record was prepared in contemplation of litigation or for use in litigation.

Finally, the City submits that:

A lawyer owes a duty of secrecy to his or her client(s) and cannot provide effective professional service to the client unless the client can be assured that all communications between them will be held secret and confidential. This does not mean that only those matters which are considered in the strictest and most technical sense to be of a legal nature must be kept confidential but that all communications and all matters disclosed or discussed between a lawyer and his or her client must be kept confidential.

The test proposed by the City is much more restrictive in nature than that provided either at common law or by section 12 of the Act. The exemptions contained in the Act are to be applied narrowly and not in accordance with the manner proposed by the City. The scope of the application of the exemption is defined by the wording of section 12 and is less encompassing than that proposed by the City. I find, accordingly, that sections 12 and 38(a) of the Act have no application to Record 2.

ORDER:

1. I uphold the City's decision to withhold access to Record 1.
2. I order the City to disclose Record 2 to the appellant within 15 days of the date of this order.
3. In order to verify compliance with the provisions of this order, I order the City to provide me with a copy of the record which was disclosed to the appellant, **only** upon request.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ December 6, 1993