



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER M-286**

**Appeal M-9300139**

**City of Kitchener**



80 Bloor Street West,  
Suite 1700,  
Toronto, Ontario  
M5S 2V1

80, rue Bloor ouest  
Bureau 1700  
Toronto (Ontario)  
M5S 2V1

416-326-3333  
1-800-387-0073  
Fax/Télé: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

# INTERIM ORDER

## BACKGROUND:

The City of Kitchener (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to records related to the proposed Federal Women's Correctional Facility. The City disclosed the majority of the records to the requester, indicating:

One hundred and eighty-five pages of photocopied documents are being released in response to this request. In addition, you have previously received duplicate copies of the Correctional Facility documents disclosed under requests 010/92 and 012/92 totalling 203 pages. The combined total represents all of the records in the custody or under the control of the municipality which we are able and prepared to release.

The City denied access to certain documents and portions of documents on the basis of sections 10, 12 and 14 of the Act. The requester appealed the City's decision.

During mediation, the appellant indicated he was not appealing the decision to deny access to information for which section 14 was claimed. As well, the appellant indicated that he was not interested in pursuing access to one of the severed documents for which section 10 was claimed. The appellant did indicate, however, that he was appealing the decision that additional records responsive to his request did not exist.

As resolution of the appeal through mediation was not effected, notice that an inquiry was being conducted to review the City's decision was sent to the City, the appellant and a number of affected parties. Representations were received from the City only.

Eight records remain in issue in this appeal: four for which the section 10 exemption is claimed and four for which the section 12 exemption is claimed.

## ISSUES:

The issues arising in this appeal are:

- A. Whether the mandatory exemption provided by section 10 of the Act applies.
- B. Whether the discretionary exemption provided by section 12 of the Act applies.
- C. Whether the City conducted a reasonable search for responsive records.

## SUBMISSIONS/CONCLUSIONS:

**ISSUE A: Whether the mandatory exemption provided by section 10 of the Act applies.**

The City submits that the section 10 exemption applies to portions of Records 62E, 80E, 81E and 101E. The withheld information consists of the asking prices for various parcels of land submitted by the owners of the land or the owners' representatives. Section 10(1) of the Act reads:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

The City has not indicated which part of section 10(1) it is relying on, however, it is clear from the record that section 10(1)(d) is not applicable in this appeal. In order for the record to be exempt from disclosure under sections 10(1)(a), (b) or (c) of the Act, each part of the following three-part test must be satisfied:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the types of harm specified in section 10(1)(a), (b) or (c) will occur.

[Orders 36, M-10 and M-183]

The burden of proving the applicability of the section 10 exemption lies on the party resisting disclosure of the record (Orders 42, 101, P-228, M-10 and M-29). In the circumstances of this appeal, the City has objected to the disclosure of the record on the basis of section 10 of the Act. No representations were received from the affected parties.

The City submits that the asking prices of the properties were submitted to the City in confidence, and that releasing the information might affect the City's reputation and compromise future business dealings of the City. As well, the City identifies that the asking prices in issue represent only a portion of the actual prices received (the remainder of which are no longer in the possession of the City), and that the release of these selected prices could be prejudicial to the process of site selection.

The City also submits that the asking prices, along with other site information, was collected by the City on behalf of Public Works Canada (PWC), the Federal Government's representative in the acquisition and development process. The City submits that it was acting as an intermediary in the acquisition process, with no direct control over site selection, and that it was collecting the information to forward on to PWC for its exclusive use. Accordingly, the City submits that the release of the severed portions of the records would be inappropriate.

In order to satisfy part three of the test, the prospect of disclosure of the record must give rise to a reasonable expectation that one of the types of harm specified in section 10(1)(a), (b) or (c) will occur.

The City identifies that prejudice may result to the City in the event that the records are disclosed. However, the scheme of the Act contemplates that harm to the competitive or financial position of an institution should be addressed by a claim for exemption pursuant to section 11 of the Act and not section 10 (Order P-218).

The affected parties in this appeal have not provided any representations. If, as the City submits, disclosure of the record could prejudice significantly the competitive position of the affected parties or result in undue loss to the affected parties, representations from the affected parties to that effect would have been expected. However, despite being afforded the opportunity to do so, the affected parties chose not to make representations or indicate that it was relying on the City's representations. In these circumstances, the City's arguments about harm to the affected parties are not convincing.

Having reviewed the records and the representations, I am not satisfied that disclosure of the information contained in the records could reasonably be expected to result in the harms described in sections 10(1)(a), (b) and (c) of the Act, and I find that none of these sections apply.

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

[IPC Order M-286/March 11,1994]

The City submits that section 12 of the Act applies to the following records:

1. A memo from an Alderman to the City Solicitor dated February 9, 1993.
2. A responding memo from the City Solicitor to the Alderman dated February 10, 1993.
3. A memo from the Mayor to the City Clerk dated February 15, 1993.
4. Notes made by the City Solicitor dated January 31, 1992.

Section 12 of the Act reads:

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.

Section 12 consists of two branches, which provide the City 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).

### **BRANCH 1**

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

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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.

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

The City claims that Records 1, 2 and 3 qualify for exemption under the first part of Branch 1 of the exemption. Record 1 is a request from a City Councillor to the City Solicitor concerning a possible course of action to take in a particular matter, and Record 2 is the City Solicitor's advice in response to Record 1. Record 3, which is a memo from the Mayor to the City Clerk, with a copy to the City Solicitor, is a memo which identifies the advice given in Record 2, and identifies a course of action.

Having reviewed the records and the representations, I agree that Records 1, 2 and 3 are confidential written communications between the City and its legal advisor. I also agree that the communication was directly related to seeking, formulating or giving legal advice. Consequently, I am satisfied that these records qualify for exemption under section 12 of the Act.

## **BRANCH 2**

The City submits that Record 4 qualifies for exemption under Branch 2 of the section 12 exemption.

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.

[Order M-86]

Commissioner Tom Wright considered similar wording found in the section 19 exemption of the provincial Freedom of Information and Protection of Privacy Act, in Order 210:

The second branch of the section 19 [section 12 of the Act in issue in this appeal] exemption requires that the record be prepared **for use** in giving legal advice, or in contemplation of or **for use** in litigation. This is a narrower wording than if the requirement were that the record be prepared **for the purpose** of giving legal advice. In my view, it contemplates that the record itself will be used in giving legal advice.

I agree.

Record 4 is a document containing notes made by the City Solicitor during a meeting. In the representations received from the City, the City identifies that the City Solicitor attended the meeting for the purpose of understanding the process and in order to give legal advice to the City. I am satisfied that this record qualifies for exemption under the second branch of the section 12 exemption.

Accordingly, I have determined that Records 1, 2, 3 and 4 qualify for exemption under section 12 of the Act.

The appellant asserts that he has had access to Records 1 and 2, as these records were shown to him by a representative of the City. The notice of inquiry which was sent to the parties identified this assertion, and requested representations on the issue of whether the solicitor-client privilege, if it existed, was waived. The appellant has not provided additional representations. The individual who provided the representations on behalf of the City has identified that he has no knowledge of whether or not the records were ever disclosed to the appellant. In the absence of any additional evidence regarding the issue of waiver, I am not satisfied that the evidence provided to me supports the view that the solicitor-client privilege was waived.

I have found that Records 1, 2, 3 and 4 qualify for exemption under section 12 of the Act. Section 12 is a discretionary exemption, and the City is required to provide evidence regarding the basis upon which the discretion was exercised to apply section 12 to these records.

I have been provided with representations which lead me to conclude that the City is under a misapprehension regarding the application of solicitor-client privilege. The representations identify that the City Solicitor is bound to maintain the privilege for the records. It appears that the City believes that the solicitor-client privilege is one that the City Solicitor is required to claim when, in fact, the solicitor-client privilege is a privilege which the City, as client, enjoys, and which the City can choose to claim or waive. Accordingly, references to the obligation on the City Solicitor to maintain confidentiality are not a relevant factor in this appeal.

As set out above, there exists an obligation on the City to identify the considerations which went into the decision to exercise discretion to apply the section 12 exemption. I am not satisfied that the head has properly exercised his discretion to rely on the section 12 exemption in the circumstances of this appeal. Given the circumstances of this appeal, I order the head to reconsider the question of discretion.

**ISSUE C: Whether the City conducted a reasonable search for responsive records.**

The appellant believes that records in addition to the ones provided to him, as well as in addition to the ones he has had access to in the past, exist. The appellant has also identified certain information which suggests that additional records exist.

The City was notified of the issue of whether or not additional records exist, and has identified in its submissions that the City was indeed in possession of records responsive to the request, but that these records were collected by the City on behalf of PWC. The City's submissions set out the following:

... the appellant was informed during the course of his request of a large comprehensive file containing all of the documents submitted by third parties offering possible sites for the Correction Facility as well as related background information. This file was hand delivered in its entirety to Public Works Canada during a meeting held at the City of Kitchener in 1992. A copy of this file was not retained by the Municipality on the basis that neither City staff nor Council were charged with making a decision on site selection. ...

The City indicates that at the time of the request the documents were neither in the City's custody nor control; and the City also outlines discussions it had with the appellant regarding possible alternative methods the appellant could use in attempting to obtain access to the records.

The City has provided eight separate affidavits sworn to by City staff responsible for the searches conducted for responsive records at the department/division level. These affidavits identify that the searches resulted either in the provision of the responsive records to the Freedom of Information Co-ordinator, or in no responsive records being found. One of the affidavits is sworn by the Director of Economic Development who also identifies that the records submitted by third parties offering possible sites for the correctional facility, which were collected on behalf of the Federal Government, were hand delivered to PWC, and that a comprehensive file was not retained by the City.

With respect to the records which the appellant claimed should exist, and which the appellant claims are referred to in other documentation provided to him, the City has addressed each of the claims in their submissions. In one instance, the City identifies that the records referred to were included in the material provided to PWC. In the other two instances, the City identifies the reasons why no responsive records exist.

Having carefully reviewed the representations, I am satisfied that the City has taken all reasonable steps to locate any records responsive to the appellant's request.

**ORDER:**

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1. I order the City to disclose Records 62E, 80E, 81E and 101E to the appellant within 35 days of the date of this Interim Order and **not** earlier than the thirtieth (30th) day following the date of this Interim Order.
2. In order to verify compliance with the provisions of this Interim Order, I order the City to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, **only** upon request.
3. I order the head to reconsider the exercise of his discretion pursuant to section 12 of the Act within 15 days of the date of this Interim Order. I further order the City to provide me with written representations as to the factors considered in the exercise of discretion within 20 days of the date of this Interim Order.

Original signed by: \_\_\_\_\_  
Holly Big Canoe  
Inquiry Officer

\_\_\_\_\_ March 11, 1994