



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER M-467**

**Appeal M-9400503**

**Regional Municipality of Hamilton-Wentworth**



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## NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act, (the Act). The Regional Municipality of Hamilton-Wentworth (the Region) received two requests from two individuals for access to records pertaining to an incident in which they were involved at a sewage treatment plant operated by the Region. A total of 159 records responsive to the requests were identified by the Region. The Region granted access to some of these records and relied on the following exemptions contained in the Act to deny access to others:

- closed meeting - section 6(1)(b)
- economic or other interests - sections 11(d), (e) and (f)
- solicitor-client privilege - section 12
- information to be published - section 15(b)
- discretion to refuse requester's own information - section 38(a)
- invasion of privacy - sections 38(b) and 14.

The requesters appealed the Region's decision to deny access and agreed to combine their requests into one appeal. During the mediation of the appeal, the number of records at issue was narrowed to seven. A Notice of Inquiry was provided to the appellants and the Region. Representations were received from both parties. In its representations, the Region indicated that it was no longer relying on the exemptions contained in sections 6 and 11 of the Act.

The records which remain at issue, described in greater detail in Appendix "A" to this order, consist of three letters and four memoranda. I will refer to them by the numbering scheme provided by the Region in the Index which it prepared for the appellants.

## DISCUSSION:

### **SOLICITOR-CLIENT PRIVILEGE/DISCRETION TO REFUSE REQUESTER'S OWN PERSONAL INFORMATION**

The Region claims the application of Branch 1 of section 12 to all 7 records which remain at issue. In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Region 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 or her 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.

I have carefully reviewed the contents of the seven records at issue in this appeal and have made the following findings:

- (1) Records 3, 47, 48, 63 and 158-159 are not communications between a legal advisor and a client. Rather, they are more properly characterized as reports and compilations, prepared by some of those involved, of the events surrounding the incident at the sewage treatment plant. I find that they do not relate to the seeking, formulating or giving of legal advice.
- (2) I find that Records 3, 47, 48, 63 and 158-159 were not created or obtained specifically for the lawyer's brief for existing or contemplated litigation.
- (3) I find that Records 55 and 57 qualify for exemption under the first part of Branch 1 of the section 12 exemption as they represent a confidential written communication between a legal advisor (the Region's Assistant Corporate Counsel) to a client (the Commissioner of its Legal Services Department) and relate directly to the provision of legal advice to employees of the Region.
- (4) I find that Records 55 and 57 contain the personal information of the appellants. Under section 38(a) of the Act, the Region has the discretion to deny access to an individual's own personal information in instances where certain exemptions, including section 12, would otherwise apply to that information. Accordingly, I find that Records 55 and 57 qualify for exemption under section 38(a).

### **INFORMATION TO BE PUBLISHED**

The Region claims the application of section 15(b) to Records 3, 47, 48, 63 and 158-159. Section 15(b) is available only in circumstances where an institution intends, within 90 days, to publish the record or the information contained in the record. In its representations, the Region indicates that these records may be made available to the appellants through the discovery process in a lawsuit which they are pursuing against certain employees and elected officials of the Region.

In my view, section 15(b) is not available to exempt from disclosure records which may be made available at some unascertained date through an alternate access mechanism. I have not been provided with any evidence to indicate that the Region intends to publish the records at issue or the information which they contain within 90 days after the request was made.

Accordingly, I find that section 15(b) has no application to any of the records at issue in this appeal.

### **INVASION OF PRIVACY**

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information

about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

I have reviewed Records 3, 47, 48, 63 and 158-159, which the Region has withheld from disclosure to the appellants under section 38(b). In my view, the information contained in these records satisfies the definition of personal information. I further find that the personal information which is contained in Records 47, 48 and 63 relates to the appellants and other individuals.

The personal information contained in Records 3 and 158-159 relates solely to the appellants. These records were prepared by the authors in their professional capacity and any information which may relate to the authors cannot be characterized as their personal information within the meaning of the Act. As such, disclosure to the appellants of Records 3 and 158-159 cannot result in an unjustified invasion of another individual's personal privacy and section 38(b) does not apply.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the Region determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Region has the discretion to deny the requester access to that information.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy.

If none of the presumptions contained in section 14(3) apply, the Region must consider the application of the factors listed in section 14(2) of the Act, as well as all other considerations which are relevant in the circumstances of the case.

The Region submits that the factors described in sections 14(2)(e), (f) and (h) are relevant in the circumstances of this appeal. The Region indicates that litigation is currently underway between the appellants and the authors of Records 47, 48 and 63 and that these individuals would be subject to pecuniary or other harm if the records are ordered disclosed. Further, it argues that the information contained in the records is highly sensitive in nature and was submitted by the authors in confidence.

The appellants submit that the factors contained in sections 14(2)(a) and (d) are relevant in the circumstances of this appeal. They have not, however, described in any detail how the disclosure of the personal information contained in these records is either desirable for the purpose of subjecting the activities of the Region to public scrutiny or is relevant to a fair determination of their rights.

I have reviewed Records 47, 48 and 63, along with the representations of the parties, and make the following findings:

- (1) I have not been provided with sufficient evidence to substantiate the contention of the Region that the employees who submitted Records 47, 48 and 63 will be subject to any pecuniary or other harm should the records be disclosed.
- (2) I have not been provided with any evidence that Records 47, 48 and 63 were submitted to the Region by the employees with an expectation of confidentiality.
- (3) The appellants have not provided sufficient evidence that the factors favouring disclosure which are contained in sections 14(2)(a) and (d) are relevant in the circumstances of this appeal.
- (4) I agree with the Region that certain information contained in Records 47, 48 and 63 may be considered to be "highly sensitive" within the meaning of section 14(2)(f) of the Act. Accordingly, I must balance the right of the appellants to access to their own personal information with the fact that some of the information may be characterized as "highly sensitive" for the purposes of the Act.

I find that the disclosure of those portions of Records 47, 48 and 63 which contain "highly sensitive" information would result in an unjustified invasion of the personal privacy of the employees. Section 38(b) applies to exempt those portions of Records 47, 48 and 63 which I have highlighted on the copies provided to the Region's Freedom of Information and Privacy Co-ordinator with a copy of this order.

- (5) The remaining portions of Records 47, 48 and 63 which are **not** highlighted should be disclosed to the appellants as to do so would not constitute an unjustified invasion of the personal privacy of the employees.

### **ORDER:**

1. I order the Region to disclose to the appellants Records 3 and 158-159 in their entirety, and those portions of Records 47, 48 and 63 which are **not** highlighted on the copies forwarded to the Region's Freedom of Information and Privacy Co-ordinator with a copy of this order, within thirty-five (35) days of the date of this order, but not earlier than the thirtieth (30th) day.
2. I uphold the Region's decision to deny access to Records 55 and 57 and those portions of Records 47, 48 and 63 which are highlighted on the copies forwarded to the Region's Freedom of Information and Privacy Co-ordinator with a copy of this order.
3. In order to verify compliance with this order, I reserve the right to require the Region to provide me with copies of the records which are disclosed to the appellants pursuant to Provision 1.

Original signed by: \_\_\_\_\_

Donald Hale  
Inquiry Officer

\_\_\_\_\_ February 21, 1995

**APPENDIX "A"**

**INDEX OF RECORDS**

<b>RECORD NUMBER</b>	<b>DESCRIPTION OF RECORD</b>	<b>EXEMPTIONS CLAIMED</b>	<b>DISPOSITION</b>
158-159	Report dated May 11, 1994 from L. Wolfe to P.J. Halliday	12, 14(2)(e), 15(b), 38(a) and 38(b)	Disclosed in full
63	Letter dated May 11, 1994 from A. Berryman to Ward 6 Councillors	12, 14(2)(e), 15(b), 38(a) and 38(b)	Disclosed in part
57	Memorandum dated May 12, 1994 from E. Holt to R. Roszell	12 and 38(a)	Exempt from disclosure under section 12
55	Memorandum dated May 16, 1994 from E. Holt to R. Roszell	12 and 38(a)	Exempt from disclosure under section 12
48	Letter dated May 10, 1994 from J. Roberts to all Regional Councillors	12, 14(2)(e), 15(b), 38(a) and 38(b)	Disclosed in part
47	Letter dated June 27, 1994 from D. Kozlovic-Mros to Ward 5 Councillors	12, 14(2)(e), 15(b), 38(a) and 38(b)	Disclosed in part
3	Report dated July 5, 1994 from P. Halliday to Environmental Services Committee	12, 14(2)(e), 15(b), 38(a) and 38(b)	Disclosed in full