



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-477

Appeal M-9400058

The Corporation of the Town of Pickering



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/Téloc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Corporation of the Town of Pickering (the Town) received a request from the appellant, who is one of the principals of a marina business in the Town. The marina operates on leased property, whose ownership is in dispute. The dispute regarding ownership is the subject of ongoing litigation between the Town and the Attorney General of Ontario, as plaintiffs, and the appellant's landlord and another corporation, as defendants.

The request relates to the appellant's concerns about the ownership of this land. In this regard, the appellant requested access to any and all records containing information pertaining to meetings, negotiations, reports, letters, minutes, recommendations and any other communications which have taken place between the Town and several named corporations and individuals.

A number of records were disclosed in response to the request, and during the appeals process. Access was denied to other records pursuant to the following exemption:

- solicitor-client privilege - section 12.

The records at issue are described in Appendix "A" to this order.

A Notice of Inquiry was sent to the appellant and the Town. Representations were received from the Town. The appellant indicated that instead of making representations in response to the notice, she would rely on previous correspondence sent to the Commissioner's office in connection with this appeal.

The records at issue in this appeal were received by the Commissioner's office **after** the initial Notice of Inquiry was sent to the parties. A review of the records indicated that the mandatory exemption in section 10(1) of the Act (third party information) might apply to some of the information at issue, which related to several parties (the affected parties) who were not originally notified of this appeal.

Accordingly, a supplementary Notice of Inquiry was sent to the appellant and the Town, inviting them to comment on the possible relevance of section 10(1). In addition, a Notice of Inquiry canvassing all the issues in the appeal was sent to the affected parties. In response to the Notices of Inquiry referred to in this paragraph, representations were submitted on behalf of three of the affected parties.

In addition to the exemptions previously mentioned, the representations provided on behalf of two of the affected parties raised the possible application of the exemption relating to personal information, which appears in section 14(1) of the Act. Because this is a mandatory exemption, I will consider its possible application as well.

PRELIMINARY ISSUES:

STATUS OF APPELLANT

During the inquiry, one of the parties submitted a copy of a Certificate of Dissolution with respect to the corporation on whose letterhead the request was initially made, and that party submits that this should lead to the termination of the appeal. However, in my view, it is a significant factor that the original request was phrased in the first person singular. Moreover, during these proceedings, correspondence has been received on more than one corporate letterhead from the individual who signed the request letter.

The individual who signed the request disputes that the corporation is dissolved at this time. However, she has advised the Commissioner's office that she wishes to conduct this appeal in her personal capacity. In my view, this is not inconsistent with the way the proceedings have been conducted up to this point. Moreover, I am reluctant to rely on a technicality to terminate this appeal, thus forcing the appellant to submit a new request, and likely resulting in a duplication of effort on the part of all concerned. Accordingly, I am prepared to proceed on the basis that the appellant is the individual who signed the request letter, in her personal capacity.

WHETHER THE REQUEST FALLS OUTSIDE THE SCOPE OF THE ACT

The representations submitted by counsel for two of the affected parties argue that the request is outside the scope of the Act because of its relation to an action currently before the Ontario courts. However, counsel offers no authority to substantiate this argument, other than a vague reference to the "purposes of the Act" and a statement that the request is for access to "information which [the requester] is not entitled to have as a non-party to the action, under the guise of a request for information under the provisions of the Act."

I do not agree with this argument. I have reviewed the purposes of the Act, which are set out in section 1. One of these purposes is "to provide a right of access to information under the control of institutions ...". In my view, the request which led to this appeal, and the disclosure already made in response to it, is entirely consistent with this purpose.

Moreover, the fact that the information in question relates to litigation has no bearing whatsoever on whether or not it falls within the scope of this legislation. It is clear that the legislature considered types of information it wished to exclude from the application of the Act, and enacted provisions to accomplish this. For instance, section 52(2) excludes certain types of archival records. Notably, however, no exception from the operation of the Act has been enacted for records which relate to litigation. Instead, the legislature chose to provide an exemption based upon solicitor-client privilege, which is one of the exemptions under consideration in this appeal.

In a related argument, counsel for these same affected parties asserts that the records are not under the control of the Town and are thus outside the scope of the Act. In my view, it is significant that this argument was not raised by the Town, which would be more able to assess the issue of control than the affected parties who have raised this issue. Moreover, based upon the indicators of control established in previous

orders (see, for example, Order M-371), and the Town's obvious ability to deal with the records, as it has done throughout this appeal, I am of the view that it does in fact have control of them.

Moreover, in order for the Act to apply to records, it is not necessary for them to be under the control of a government organization; section 17 of the Act creates access rights for records in the custody **or** under the control of government organizations. In the circumstances of this appeal, it is clear that, in addition to being under the Town's control, copies of the records are also in its custody.

Accordingly, I find that the records at issue are within the scope of the access scheme created by the Act.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 12 consists of two branches, which provide an institution 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).

I have reviewed the records and the representations submitted by all parties. This review has resulted in the findings summarized below with respect to the application of this section.

Branch 1

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 49)

I find that the following records are exempt under the first part of Branch 1 of this exemption, since their disclosure would reveal confidential communications between solicitor and client directly related to seeking formulating or giving legal advice: Records 1.1, 4, 7, 11, 12, 20, 22, 26, 27, 36.2, 36.7, 54 and 55.

I also find that record 21.1 is exempt under the second part of Branch 1 of this exemption (sometimes called the "litigation privilege") because it was created or obtained especially for the lawyer's brief for existing litigation.

Some of the records which would otherwise qualify for the "litigation privilege" aspect of Branch 1 relate to settlement discussions and appear to have been received from or sent to other parties to the litigation. Usually, disclosure of a document to a party adverse in interest would constitute waiver of privilege, but in my view this does not arise with respect to records pertaining to settlement negotiations. On this basis, I find that the following records are also exempt under the second part of Branch 1: Records 1.2, 1.3, 2, 4.1, 6, 8, 9, 10, 13, 14, 16, 18, 19, 20.1, 23, 25, 26.1, 28, 29, 32, 34, 35, 36.4, 36.6, 37, 37.1, 37.2, 38, 39, 40, 41, 42, 44, 48, 49, 52, 53, 53.1, 56, 57, 58, 59 and 60.

Branch 2

I find that Records 3, 5, 15, 17, 21, 24, 30, 31, 33, 43, 45, 46, 47, 50 and 51 are exempt from disclosure under Branch 2 of the section 12 exemption, having been created by or for counsel for the institution for use in existing litigation.

Records which are not exempt under this section

I find that Records 1, 5.1, 36, 36.1, 36.3, 36.5 and 36.8, which consist of council meeting agendas and by-laws, do not qualify for exemption under either Branch 1 or 2 of section 12.

OTHER EXEMPTIONS

At the outset of this order, I indicated that I would consider the possible application of the exemptions in section 10 (third party information) and section 14(1) (invasion of privacy) to the records. The only records which I have found not to be exempt under section 12 of the Act are Records 1, 5.1, 36, 36.1, 36.3, 36.5 and 36.8, and accordingly my consideration of the possible application of these exemptions will be limited to those records.

Before a record can be exempt under section 10(1), one of the elements to be established is that the information to be disclosed must have been "supplied" in confidence to the Town. As noted, the records under consideration consist of council agendas and by-laws. It has not been established that the contents of

these records were "supplied" to the Town in any sense, and accordingly, the section 10(1) exemption does not apply to them.

Before a record can be exempt under section 14(1), it must contain "personal information" as defined in section 2(1) of the Act. Many past orders have held that information relating to individuals in their professional, as opposed to personal, capacity, is not personal information. I find that none of the records under consideration with respect to this exemption contains any references to any identifiable individual in a personal capacity. Therefore, none of these records contains personal information. Accordingly, the exemption in section 14(1) does not apply.

Since no other exemptions have been claimed, these records should be disclosed to the appellant.

ORDER:

1. I uphold the Town's decision to deny access to Records 1.1, 1.2, 1.3, 2, 3, 4, 4.1, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 20.1, 21, 21.1, 22, 23, 24, 25, 26, 26.1, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36.2, 36.4, 36.6, 36.7, 37, 37.1, 37.2, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 53.1, 54, 55, 56, 57, 58, 59 and 60.
2. I order the Town to disclose the following records to the appellant within thirty-five (35) days after the date of this order, but not earlier than the thirtieth (30th) day after the date of this order: Records 1, 5.1, 36, 36.1, 36.3, 36.5 and 36.8.
3. In order to verify compliance with Provision 2 of this order, I reserve the right to require the Town to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
John Higgins
Inquiry Officer

_____ February 28, 1995

APPENDIX "A"

INDEX OF RECORDS AT ISSUE

RECORD NUMBER	DESCRIPTION	DISPOSITION
1	Agenda - Special Council Meeting, October 4, 1993	Disclose
1.1	Attachment to Record 1 - Solicitor's Report to Council with draft by-law, settlement agreement and resolution	Do not disclose
1.2	Attachment to Record 1 - letter to Council from defendants' consultant	Do not disclose
1.3	Chronology of events	Do not disclose
2	Settlement proposal submitted without prejudice to Town by defendants, December 16, 1991	Do not disclose
3	Meeting notes - meeting at defendants' counsel's office, August 9, 1990, re settlement	Do not disclose
4	Letter from Town's counsel to Town, May 26, 1978	Do not disclose
4.1	Enclosure to 4: letter from defendants' counsel to Town's counsel, May 19, 1978	Do not disclose
5	Note enclosing by-law 389/76	Do not disclose
5.1	Enclosure to 5 - by-law 389/76	Disclose
6	Letter to Town's counsel from defendants' counsel, September 20, 1984, re settlement negotiations	Do not disclose
7	Letter to Town from Town's counsel, September 6, 1984	Do not disclose
8	Letter to Town's counsel from defendants' counsel, August 25, 1984, re settlement	Do not disclose
9	Letter to defendants' counsel from Town's counsel, September 6, 1984 re settlement	Do not disclose
10	Letter to defendants' counsel from Town's counsel, August 1, 1984, re settlement	Do not disclose
11	Letter to Town's counsel from Town solicitor, August 7, 1984	Do not disclose
12	Letter to Town solicitor from Town's counsel, June 12, 1984	Do not disclose
13	Letter to Town's counsel from defendants' counsel, June 6, 1984, re settlement	Do not disclose

RECORD NUMBER	DESCRIPTION	DISPOSITION
14	Letter from Town's counsel to defendants' counsel, June 12, 1984, re settlement	Do not disclose
15	Minutes of a meeting between representatives of defendants, Town, Ministry of the Attorney General, March 29, 1984, re settlement	Do not disclose
16	Letter to defendants' counsel from Town's counsel, March 9, 1984, re settlement negotiations	Do not disclose
17	Notes re telephone conversations, meeting, re litigation, February 6, 1984	Do not disclose
18	Letter to Town's counsel from defendants' counsel, February 3, 1984 re settlement	Do not disclose
19	Letter to Town's counsel from defendants' counsel, February 3, 1984 [not including enclosure: Feb 2/81 letter, which was disclosed]	Do not disclose
20	Letter to Town from Town's counsel, January 17, 1984	Do not disclose
20.1	Enclosure to Record 20 - letter to Ministry of the Attorney General from defendants' counsel, January 11, 1984, re settlement	Do not disclose
21	File memo re telephone conversation with Town's counsel - October 14, 1983	Do not disclose
21.1	Photographs	Do not disclose
22	Letter to Town solicitor from Town's counsel, October 13, 1992	Do not disclose
23	Letter directly to defendants from Town solicitor, October 5, 1992, re settlement proposal	Do not disclose
24	Letter to Gardner Roberts from Town solicitor, October 5, 1992	Do not disclose
25	Settlement proposal by defendants, December 16, 1991, with annotations	Do not disclose
26	Letter to Town's counsel from Town solicitor, August 28, 1992, re settlement	Do not disclose
26.1	Enclosure - settlement proposal letter, defendants to Town solicitor, August 21, 1992	Do not disclose
27	Letter to Town's counsel from Town solicitor, August 19, 1992	Do not disclose
28	Settlement proposal working paper	Do not disclose
29	Letter to defendants from Town solicitor, March 31, 1992, responding to settlement proposal	Do not disclose
30	Notes - March 26, 1992	Do not disclose

RECORD NUMBER	DESCRIPTION	DISPOSITION
31	Notes - meeting of August 9, 1990	Do not disclose
32	Letter to Town's counsel from defendants' counsel, June 6, 1985, re ancillary matters	Do not disclose
33	Notes re meeting of April 28, 1994	Do not disclose
34	Draft settlement agreement, undated	Do not disclose
35	Draft settlement agreement, dated May 31, 1993	Do not disclose
36	Agenda, special council meeting of April 18, 1994	Disclose
36.1	Resolution re special meeting, April 18, 1994 (attachment to 36)	Disclose
36.2	Report to Council by Town solicitor (attachment to 36), April 12, 1994	Do not disclose
36.3	By-law 4317/93 (executed)	Disclose
36.4	Same as Record 35	Do not disclose
36.5	Unexecuted copy of by-law 4412/94	Disclose
36.6	Same as Record 34 but with map annexed	Do not disclose
36.7	Minutes - Special Council Meeting of April 18, 1994	Do not disclose
36.8	By-law 4412/94 (executed copy)	Disclose
37	Letter from defendants to Town solicitor, March 23, 1994	Do not disclose
37.1	Letter from Town solicitor to defendants' counsel, March 17, 1994, enclosure to 37	Do not disclose
37.2	Working copy - settlement agreement, March 22, 1994 (enclosure to 37)	Do not disclose
38	Draft settlement agreement, February 14, 1994, annotated	Do not disclose
39	Same as 38, with different annotations	Do not disclose
40	Letter from defendants' consultants to Town solicitor, January 28, 1994, re settlement	Do not disclose
41	Memo from defendants' consultant to Town solicitor, January 17, 1994, re settlement	Do not disclose
42	Memo from defendants' consultant to Town, December 20, 1993, re proposed settlement	Do not disclose
43	Notes of meeting between Town/defendants re settlement, February 8, 1994	Do not disclose

RECORD NUMBER	DESCRIPTION	DISPOSITION
44	Letter to Town, January 10, 1994, with comments, re draft agreement	Do not disclose
45	Meeting notes, January 11, 1994	Do not disclose
46	Meeting notes, December 13, 1993	Do not disclose
47	Meeting notes, November 23, 1993	Do not disclose
48	Memo, defendants' consultant to Town solicitor, November 22, 1993	Do not disclose
49	Letter to defendants from Town solicitor, October 6, 1993, re settlement	Do not disclose
50	Meeting notes - Special Council meeting, September 20, 1993	Do not disclose
51	Meeting notes - Special Council meeting, October 4, 1993	Do not disclose
52	Letter from defendants to Town solicitor, September 27, 1993, re settlement	Do not disclose
53	Letter to defendants from Town solicitor, September 21, 1993, re settlement	Do not disclose
53.1	Same as Record 1.3	Do not disclose
54	Same as Record 1.1	Do not disclose
55	Letter from Town solicitor to Town's counsel, August 12, 1993	Do not disclose
56	Letter from Ministry of the Attorney General to Town solicitor and solicitor for defendants, April 19, 1993, re settlement	Do not disclose
57	Defendants' letter to Town solicitor proposing settlement terms, June 10, 1993	Do not disclose
58	Letter to defendants from Town solicitor, May 5, 1993, re settlement agreement	Do not disclose
59	Memo from defendants to Town solicitor May 5, 1993, re draft settlement agreement	Do not disclose
60	Draft settlement agreement, undated, and covering letter, January 29, 1993 from defendants' solicitor	Do not disclose