



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-516

Appeal M-9400713

Town of Meaford



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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 Town of Meaford (the Town) received a request for a copy of all records regarding a particular property in the Town from the date an Order to Remedy by tearing down barns was issued to the date of the request.

The Town granted access in full to some of the responsive records and denied access to 24 records. The Town claimed the following exemptions in denying access:

- third party information - section 10(1)
- solicitor-client privilege - section 12

The requester appealed the Town's decision.

During mediation of the appeal, the Town granted access in full to 11 of the 24 records.

The 13 records remaining at issue in this appeal consist of letters and tender proposal documents. These records have been referred to by the Town as Records 4(b), (c), (d), (e), (f), (g), (h), (j), (k) and 5(b), (c), (d) and (e).

A Notice of Inquiry was sent to the appellant, the Town, the mortgagee of the property and their agent, and the five companies which submitted tenders to tear down the barns on the subject property. Representations were received from the Town only.

DISCUSSION:

THIRD PARTY INFORMATION

The Town claims that section 10(1) of the Act applies to exempt Records 5(b), (c), (d) and (e) from disclosure.

For the records to qualify for exemption under sections 10(1)(a), (b) or (c) of the Act, the party resisting disclosure must satisfy each part of the following three-part test:

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 harms specified in sections 10(1)(a), (b) or (c) will occur.

Failure to establish the requirements of any part of this test will render the section 10(1) exemption claim invalid.

Parts One and Two of the Test

Having carefully reviewed the records, I find that they contain financial and/or commercial information for the purposes of part one of the section 10(1) test.

To satisfy part two of the test, the Town must establish that the information contained in the records was **supplied** to the Town and, secondly, that such information was supplied **in confidence** either implicitly or explicitly.

Based on my review of the records and the evidence before me, I find that the information contained in the records was supplied to the Town by the affected parties.

The Town states that these records were supplied implicitly in confidence and tenders are not usually disclosed until such time as they are opened. However, other than stating that the records were supplied in confidence, I have been provided with no other information to substantiate this claim. In addition, my review of these records does not reveal anything on their face value or content to indicate that they were, in fact, supplied in confidence.

Part Three of the Test

To satisfy this part of the test, the Town must describe a set of facts or circumstances which would lead to a reasonable expectation that one of the harms described in section 10(1) will occur if the information contained in the records is disclosed. The evidence which is presented to establish this connection must be clear and convincing.

The Town has not indicated whether it is relying on section (a), (b) or (c) of section 10(1). In its index, it states that disclosure of records 5(b) and (c) "could result in flawed quotation in future if required" and that disclosure of records 5(d) and (e) "could result in knowledge concerning tender process". In its representations, the Town indicates that "any disclosure of that information prior to a decision being made by the Town could provide financial harm to the person submitting tenders."

The Town has not detailed how or why disclosure of the records could reasonably be expected to result in any of the harms listed in section 10(1). In my view, I have not been provided with sufficient evidence to establish the requirements of the third part of the test and, consequently, I find that section 10(1) of the Act does not apply.

SOLICITOR-CLIENT PRIVILEGE

The Town claims that section 12 applies to Records 4(b), (c), (d), (e), (f), (g), (h), (j) and (k).

Section 12 of the Act consists of two branches, which provide the Town 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 Town indicates that it is relying on both branches of this exemption.

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)

The Town submits that all of these records were prepared by or for counsel retained by the Town either for use in giving legal advice or for use in litigation. The Town states that a civil proceeding involving the Town was commenced in relation to the property in question on November 21, 1994.

Having reviewed the records and the representations, I am satisfied that Records 4(d), (g) and (h) are written communications of a confidential nature between solicitor and client, directly related to the seeking, formulating or giving of legal advice. The requirements of the first test under Branch 1 of the exemption have been met, and I am satisfied that section 12 of the Act applies.

Records 4(b), (c), (e), (f) and (j) involve written communications between the Town's legal advisor and the mortgagee of the property and/or its agent. These correspondents are not solicitor and client. While it appears that litigation was contemplated at the time the letters were written, I am not satisfied that these records were created or obtained especially for the lawyer's brief.

Record 4(k) is a communication between the mortgagee and its agent. If it is the case that the agent is acting as legal advisor to the mortgagee, this record could have involved a privileged communication between the two. However, as evidenced by Records 5(b) and (c), this record was forwarded to the Town by the mortgagee's agent, and any privilege which would have attached to this record at common law has been waived by the mortgagee.

In summary, I have found that only Records 4(d), (g) and (h) are exempt under Branch 1 of the section 12 exemption.

A record can be exempt under Branch 2 of section 12 regardless of whether the common law criteria relating to Branch 1 are satisfied. 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 210]

Record 4(k) was prepared by the agent for the mortgagee, and was not prepared by or for the Town's counsel. The requirements of Branch 2 have not been met, and section 12 does not apply.

As Records 4(b), (c), (e), (f) and (j) involve written communications between the Town's legal advisor and the mortgagee of the property and/or its agent, the records cannot be said to have been prepared by or for the Town's counsel in contemplation of litigation or for his use in litigation, or for his use in giving legal advice. The purpose of the communication was to determine whether a resolution was possible. I find, therefore, that the requirements of Branch 2 have not been met and section 12 does not apply.

During mediation, the appellant argued that there exists a compelling public interest in the disclosure of the record. This raises the possible application of the public interest override set out in section 16 of the Act. However, in this order, the only records I have found to be exempt are covered by section 12 of the Act. The public interest override does **not** apply to records which are exempt under the section 12 exemption.

ORDER:

1. I uphold the decision of the Town not to disclose Records 4(d), (g) and (h).
2. I order the Town to disclose Records 4(b), (c), (e), (f), (j) and (k), and Records 5(b), (c), (d) and (e) in their entirety to the appellant within thirty-five (35) days of the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.

3. In order to verify compliance with the provisions 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: _____
Holly Big Canoe
Inquiry Officer

_____ May 2, 1995