



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-518

Appeal M-9500003

Town of Gravenhurst



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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 Corporation of the Town of Gravenhurst (the Town) received a request to review all files in connection with a specified land development proposal, including correspondence, reports, internal memoranda, notes and legal opinions. The Town identified a number of records in various files and allowed partial access to the records. The requester appealed the decision to deny access to the remaining records.

During mediation, the Town disclosed one record in its entirety, together with portions of another. The appellant eliminated four records from the scope of the appeal, and the name of an individual in the undisclosed portion of one record.

The records that remain at issue in this appeal consist of a two-page letter (Record 1) withheld in its entirety and the remaining two and a half pages of a four-page report prepared by the Chief Planner for the Town (Record 4).

The Town relies on the following exemptions to deny access to the records:

- closed meeting - section 6(1)(b) (Record 4)
- solicitor-client privilege - section 12 (Record 1)

A Notice of Inquiry was provided to the appellant and the Town. Since it appeared that Record 4 may contain the personal information of the appellant, the Town was asked to consider the application of section 38(a) of the Act to Record 4. Representations were received from both parties.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Town submits that section 12 applies to Record 1.

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).

During mediation, the Town indicated that Record 1 in this appeal is the same record which was found to be exempt from disclosure pursuant to section 12 in a previous order. In Order M-162, Inquiry Officer Anita Fineberg found that this record was exempt pursuant to Branch 2 of the exemption. She commented as follows:

I have carefully reviewed Record 1, and it is my view that it qualifies for exemption under
[IPC Order M-518/May 4,1995]

Branch 2 of the section 12 test. The record was prepared by counsel retained by the Town. While portions of the record are factual in nature, these are inter-mingled with, and the letter as a whole relates to, material prepared for use either in giving legal advice or for use in litigation. With respect to the latter part of the test, it is my view that no distinction should be made between court actions and matters heard before administrative tribunals, such as the Ontario Municipal Board.

In the Notice of Inquiry, the appellant was invited to provide evidence why a different conclusion should be reached in the circumstances of this appeal. The appellant submits that since the Ontario Municipal Board hearing to which the record relates has been completed, the solicitor-client privilege should no longer apply.

In my view, while in some cases, the privileged character of communications between a solicitor and client may be lost with the termination of litigation, this does not apply to records which are exempt under Branch 2 of the exemption (Order P-667).

I have reviewed the record together with the representations of the parties. I concur with Inquiry Officer Fineberg and find that Record 1 is properly exempt under Branch 2 of the section 12 exemption.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/CLOSED MEETING

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 find that Record 4, as a whole, contains the personal information of the appellant and other individuals. As indicated in a previous order of this agency, Order M-352, if any part of a record contains the personal information of the requester, disclosure of the record should be considered under Part II of the Act, which deals with an individual's right of access to his/her own personal information.

In Part II of the Act, section 36(1) 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(a) of the Act, the institution has the discretion to deny access to an individual's own personal information in instances where certain exemptions in Part I would apply to that information.

The closed meeting exemption in section 6(1)(b) of the Act is one of the exemptions which is listed in section 38(a).

I will first consider whether Record 4 qualifies for exemption pursuant to section 6(1)(b) as a preliminary

step in determining whether the exemption in section 38(a) applies to the record.

In order to qualify for exemption under section 6(1)(b), the Town must establish that:

1. a meeting of a council, board, commission or other body or a committee of one of them took place; **and**
2. that a statute authorizes the holding of this meeting in the absence of the public; **and**
3. that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

As part of its representations, the Town has included a copy of the minutes of a meeting of its Planning and Development Committee held on August 2, 1994. The minutes reveal that the Committee went into a closed session for a portion of the August 2, 1994 meeting. The Town has also provided a copy of the Committee's main agenda, showing a closed session, as well as the agenda for the closed session itself. I am satisfied that a closed meeting of the Committee was held on August 2, 1994. The first part of the test has been met.

With respect to part two of the test, the Town relies upon section 55(1) of the Municipal Act as the statutory authority to hold this meeting in the absence of the public. Section 55(1) of the Municipal Act provides as follows:

The meetings, except meetings of a committee including a committee of the whole, of every council and of every local board as defined by the Municipal Affairs Act, except police services boards and school boards, shall be open to the public, and no person shall be excluded therefrom except for improper conduct.

Based on the evidence before me, I find that the August 2, 1994 meeting was a meeting of a committee of council within the meaning of section 55(1) of the Municipal Act and that the Town had the statutory authority to hold a closed meeting of the Committee. I find that the second part of the section 6(1)(b) test has been met.

I will now consider whether the disclosure of Record 4 would reveal the actual substance of the deliberations of this closed meeting. The terms "substance" and "deliberations" have been previously defined. The term "substance" has been defined as the "theme or subject of a thing" and the word "deliberations" has been defined to mean "discussions conducted with a view towards making a decision" (Orders M-184 and M-196).

In this appeal, Record 4 was attached to the agenda for the closed session. Based on the evidence before me, I find that the disclosure of Record 4 would reveal the actual substance of the deliberations of the

Committee in its closed session. Therefore, the third part of the section 6(1)(b) test has been met.

Since all three parts of the test have been satisfied, I find that the closed meeting exemption applies to the undisclosed portions of Record 4. I have previously found that Record 4 contains the personal information of the appellant and as a result of these findings, the discretionary exemption in section 38(a) of the Act also applies, which permits the Town to deny access to this information.

The appellant, in his representations, has raised the issue of the public interest in disclosure of the record under section 16 of the Act.

Section 16 provides as follows:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Section 6(1)(b) is not included among the exemptions listed above where the issue of a public interest in disclosure may apply. Therefore, I am precluded from examining whether a public interest exists in the disclosure of the record which I have previously found to be exempt under section 6(1)(b).

ORDER:

I uphold the decision of the Town.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

_____ May 4, 1995