



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

ORDER M-542

Appeal M-9400664

Township of North Easthope



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>

NATURE OF THE APPEAL:

The Township of North Easthope (the Township) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for a copy of all documents and drawings, including the legal opinion obtained, with regard to a building permit for structural renovation to a particular barn. The renovation of the barn, which is apparently located in a residential area near the centre of the Hamlet of Gadshill, involved the installation of a liquid manure system.

The requester indicated that the request was submitted on behalf of the citizens of Gadshill, who had previously submitted to the Township a petition with 47 signatures. The petition objected to the installation of the liquid manure system in the barn due to the fact that such a use was not compatible with the adjacent residential properties and would adversely affect the value of these properties.

The Township provided access to the building permit issued for the repair of the interior of the barn, and indicated that minutes of all council meetings are available for public review at the Clerk's office during normal office hours. The Township denied access to the building permit application, three pages of drawings and the legal opinion requested claiming the following exemptions found in the Act:

- law enforcement - section 8(2)
- solicitor-client privilege - section 12
- invasion of privacy - section 14

The requester appealed this decision. During mediation of the appeal, the Township withdrew its application of section 8(2) of the Act.

A Notice of Inquiry was provided to the appellant, the Township, the owner of the barn and the engineering firm which produced the drawings. The mandatory exemption for third party information provided by section 10 of the Act was raised as an issue in this appeal by the Appeals Officer with respect to the building permit application and drawings. Representations were received from the appellant, the Township and the owner of the barn.

PRELIMINARY ISSUES:

In his representations, the owner of the barn indicates that he is not aware of any legal basis for denying access to the building permit application. He does object, however, to disclosure of the drawings. As the owner of the barn is not resisting disclosure of the building permit application, it should be disclosed to the appellant.

The owner of the barn submits that, having paid for the drawings, he is entitled to the normal proprietary rights in them except where those rights are lawfully restricted or withdrawn. As the drawings are in the custody or under the control of the Township, they are therefore subject to the Act.

The owner of the barn also states the drawings are subject to copyright. In Order M-29, Commissioner Tom Wright found that:

... providing **access** to information under the Municipal Freedom of Information and Protection of Privacy Act does not constitute an infringement of copyright. Specifically, sections 27(2)(i) and (j) of the Copyright Act provide that disclosure of information pursuant to the federal Access to Information Act or any like Act of the legislature of a province does not constitute an infringement of copyright.

I agree with Commissioner Wright, and I find that disclosure of the drawings would not constitute an infringement of copyright.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The section 12 exemption consists of two branches, which provide a head 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 Township claims that both Branch 1 and Branch 2 apply to the letter sent by the law firm to the Township.

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Township 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. See also Order M-2 and Order M-19]

The Township submits that the letter contains a legal opinion solicited from the law firm and in contemplation of potential litigation. I have reviewed the record and find that it is a confidential written communication between a solicitor and his client (the Township), and is directly related to the formulating and giving of legal advice. I therefore find that the record, in its entirety, falls squarely within the section 12 exemption.

The appellant submits that there is a public interest underlying her request and that section 16 of the Act applies in the circumstances of this case. However, section 12 is not subject to the public interest override provided by section 16 of the Act and a record which is exempt from disclosure under section 12 is not subject to the override provided by section 16 of the Act.

THIRD PARTY INFORMATION

The Township submits that sections 10(1)(a) and (b) apply to the drawings, while the owner of the barn submits that sections 10(1)(b) and (c) apply.

Each part of the following three-part test must be satisfied in order for a record to be exempt from disclosure under section 10(1)(a), (b) or (c) of the Act:

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 (a), (b) or (c) of section 10(1) will occur.

[Orders 36 and M-10]

The drawings are specifications provided by a licensed professional engineer. In my view, this type of information is technical information, and the first part of the test has been met.

The representations establish that the drawings were supplied to the Township by the owner of the barn. In regards to whether the drawings were supplied **in confidence**, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

The Township and the owner of the barn assert that the drawings were provided implicitly in confidence. Neither party resisting disclosure, however, has included any details regarding the reasonableness of such an understanding, or an objective basis for it. I have not been provided with details of any assurances of confidentiality relating to the supply of drawings to the Township, nor is there any evidence before me which would show that the drawings have been treated consistently in a manner which indicates a concern for their protection from disclosure. Accordingly, I find that the requirements of the second part of the test have not been met.

To satisfy the third part of the test, the Township and/or the owner of the barn 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) would probably occur if the information contained in the records is disclosed.

The Township and the owner of the barn simply repeat the wording of the Act, without describing how or why disclosure of the drawings could reasonably be expected to result in the harms described. Based on the very general nature of submissions advanced by the Township and the owner of the barn, I find that the third part of the test has not been met and section 10(1) of the Act does not apply.

INVASION OF PRIVACY

The owner of the barn submits that the drawings are personal information, as they relate to financial transactions in which he has been involved, and were sent to the Township as private or confidential correspondence.

The drawings do not contain or reveal information **about** an identifiable individual, and do not relate in any direct way to a financial transaction. The drawings relate to renovations planned for the barn and do not, in my view, qualify as personal information. Accordingly, the section 14(1) exemption cannot apply.

ORDER:

1. I uphold the Township's decision not to disclose the letter to the law firm.
2. I order the Township to disclose the drawings and the building permit application to the appellant within thirty-five (35) days after the date of this order but not before the thirtieth (30th) day after the date of this order.
3. In order to verify compliance with this order, I reserve the right to require the Township 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

_____ June 5, 1995