



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

ORDER M-637

Appeal M_9500031

The Corporation of the Town of Pickering



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BACKGROUND:

The Town of Pickering (the Town) received a request for access to a series of documents relating to a landfill site. The Town did not respond to the request within the 30 day time limit imposed by section 19 of the Municipal Freedom of Information and Protection of Privacy Act (the Act) and the requester appealed the Town's failure to respond to the request to this agency. That appeal was resolved when the requester submitted a detailed listing of the records to which he was seeking access in response to the Town's request for clarification during the course of the appeal. The Town did not respond to the clarified request within 30 days, and the requester again appealed the Town's failure to issue a decision. During the course of that appeal the Town issued a time extension notice under section 20 of the Act and the requester appealed that decision as well. The deemed refusal issue was resolved when the Town issued a the time extension notice, and the time extension appeal was resolved in Order M-439, issued by Inquiry Officer Mumtaz Jiwan, in which the Town was ordered to undertake a search for responsive records and to provide the requester with a final decision regarding access on or before January 16, 1995.

NATURE OF THE APPEAL:

On January 19, 1995 the Town provided the requester with a decision letter identifying a number of responsive records and stating that, in respect of a number of the documents requested, no such records existed. The Town provided the requester with access to some of the responsive records and denied access to others in their entirety, relying on the solicitor-client privilege exemption provided by section 12 of the Act.

The requester appealed the Town's decision and maintains that further records responsive to its request should exist.

A Notice of Inquiry was provided to the appellant and the Town and representations were received from both parties.

The records at issue consist of 13 legal accounts (Request Item 16), a thirty-nine page opinion (Request Item 21), a six page opinion (Request Item 23) with attachments which include a consultants report (Request Item 26), all prepared by the Town's outside counsel. Also at issue is a four page opinion prepared by the Town Solicitor (Request Item 25) with attachments which include duplicates of the prior legal opinion (Request Item 23) and the consultants report (Request Item 26).

PRELIMINARY MATTER:

The appellant maintains that the Town is precluded from claiming the discretionary exemption provided by section 12 because it made the claim for exemption late in the appeals process.

As has been noted in previous orders, the Commissioner's office has adopted a policy which allows an institution only 35 days after an appeal is initiated to raise any new discretionary

exemptions not originally claimed in its decision letter. That policy is reflected in the Confirmation of Appeal notice sent to the institution by the Commissioner's office when an appeal from the institution's decision has been received. That notice specifies a date by which any **new** discretionary exemptions must be claimed.

The appellant's position is that the 35 day period should be calculated with reference to the original Confirmation of Appeal notice forwarded to the Town in connection with the appellant's appeal of the Town's deemed refusal and subsequent time extension and not with reference to the Confirmation of Appeal notice issued in this appeal. The original Confirmation of Appeal notice specified January 9, 1995 as the date by which additional discretionary exemptions could be claimed.

Alternatively, the appellant maintains that even if the Town is not bound by the deadline set out in the original Confirmation of Appeal notice, it was only entitled to raise discretionary exemptions if it complied with Order M-439 by issuing a final decision letter by January 16, 1995 as required by that order. As stated earlier, the Town did not issue a final decision letter until January 19, 1995, three days after the date required by the order.

In Order P-658, Inquiry Officer Anita Fineberg, when dealing with the issue of the late raising of discretionary exemptions, noted the following reasons why prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process:

- (1) Unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively achieve a mediated settlement of the matter.
- (2) Where a new discretionary exemption is raised after the Inquiry Status report is issued, it will be necessary to re-notify all parties to an appeal to solicit additional representations on the applicability of the exemptions raised. The processing of the appeal will, therefore, be further delayed.
- (3) In many cases, the value of information which is the subject of an access request diminishes with time. In these cases, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

While I certainly do not condone the Town's failure to issue a decision letter within the statutory time frame in the first instance nor its failure to comply with the terms of Order M-439, I do not find that claiming the discretionary exemption on January 19, 1995, rather than by January 9, 1995 as set out in the original Confirmation of Appeal notice, raises any concerns relevant to the reasons set out above. Additionally, Order M-439 did not contain any conditions which would limit the Town's ability to claim discretionary exemptions.

In the circumstances of this appeal, mediation efforts have not been adversely affected by the timing of the exemption claim and no representations on issues of access had been sought or received at the time the exemption claim was made. In addition, given the nature of the records at issue, I am not convinced that the delay prejudiced the appellant in any significant way.

Accordingly, I am prepared to consider the Town's reliance on section 12 of the Act to exempt the records at issue from disclosure.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Town claims that the solicitor-client privilege exemption found in section 12 of the Act applies to exempt all of the records at issue from disclosure.

Under section 12 of the Act, a municipality may 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 the municipality 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 the common law solicitor-client privilege (Branch 1) to exempt the contents of the legal accounts (Request Item 16) and the three legal opinions (Request Items 21, 23, and 25).

For a record to be subject to Branch 1 of the section 12 exemption, the Town must provide evidence that the record either:

1. constitutes a written or oral communication of a confidential nature between a solicitor and a client (or the client's agent) which relates directly to seeking, formulating or giving legal advice, or
2. that the document was created or obtained especially for a lawyer's brief for existing or contemplated litigation.

The 13 legal accounts which comprise Request Item 16 are legal accounts rendered to the Town by its counsel for services provided in relation to advice and litigation pertaining to the named landfill site.

In Order P-624, Assistant Commissioner Irwin Glasberg undertook a detailed analysis of the application of the common law solicitor-client privilege to various legal accounts. He concluded that a legal account is no different than an invoice for services remitted to an institution by a consultant or other category of professional. The only distinguishing feature of a legal account is that it is issued by a law firm to its client and that it relates to the provision of legal services. In that order, Assistant Commissioner Glasberg determined that findings on the application of solicitor-client privilege to legal accounts must be based on an independent review of each record based on the wording and intent of the Act. Therefore, for a legal account to qualify for exemption under section 12 of the Act, its contents must relate in a direct and tangible way to the seeking, formulating or provision of legal advice.

In Order P-676, Inquiry Officer Anita Fineberg elaborated on the principles set forth in Order P-624 and found that the test will be satisfied where the disclosure of the information contained in the account would reveal the subject(s) for which legal advice was sought, the strategy used to address the issues raised, the particulars of any legal advice provided or the outcome of these investigations. This approach reflects the fact that some information contained in a legal account may relate to the seeking, formulation or provision of legal advice but also allows the principle of severance to be applied to the record in a predictable fashion.

I agree with the approaches outlined by both Assistant Commissioner Glasberg and Inquiry Officer Fineberg and adopt them for the purposes of this appeal. On this basis, I have reviewed the records together with the representations of the parties.

I find that disclosure of those portions of the legal accounts which describe the matters attended to or the services rendered would reveal the subject matter on which legal advice was sought and/or given. In my view, this information qualifies as written communication of a confidential nature between a client and a legal advisor and relates directly to the seeking, formulating or giving of legal advice. On that basis, it is properly exempt under section 12 of the Act. I have highlighted portions of the records which qualify for exemption under section 12 in yellow on the copy of the records sent to the Town's Freedom of Information and Privacy Co-ordinator with a copy of this order. The remaining non-highlighted portions of the legal accounts do not qualify for exemption under this section and should be disclosed to the appellant.

In respect of Request Items 21, 23 and 25, I have reviewed the records and the representations of the parties and find that these records, in their entirety, qualify for exemption under the first part of Branch 1 of the section 12 exemption. These records constitute written communications of a confidential nature between a client and a legal advisor which are directly related to the seeking, formulating or giving of legal advice.

While the appellant has not explicitly accepted this position, it appears from its representations that it implicitly agrees that the legal opinion is subject to the solicitor-client privilege. However, it is the position of the appellant that the Town, as the client, has waived this privilege by virtue of having shared these same legal opinions with third parties, and, in particular, with a citizens' group. As evidence of the alleged sharing of these records the appellant has provided copies of minutes of a meeting of the Town Council which contain a resolution to provide copies of the records comprising Request Items 23 and 25 to the named citizens' group. Although the minutes are somewhat confusing in that they also deal with a successful amendment to the original resolution, I am satisfied that the original resolution (as amended) was not passed by the Council and that the records were not disclosed to the citizens' group pursuant to this resolution. In the absence of any other evidence of the sharing of the subject records with third parties, I am not satisfied that the Town has waived the solicitor-client privilege in respect of these records.

The Town indicates that it is relying on Branch 2 of the section 12 exemption in respect of the consultant's report which comprises Request Item 26. For a record to qualify for exemption under Branch 2, the Town must establish that the document was prepared by or for counsel employed or retained by it and that the record was prepared (1) for use in giving legal advice, (2) in contemplation of litigation or (3) for use in litigation.

Request Item 26 is the report of a consultant retained directly by the Town's outside counsel to provide the technical information and advice necessary for the purpose of enabling the outside counsel to formulate the legal advice ultimately provided to the Town. That the consultant's report was so used is evidenced by the fact that it was appended to and discussed in the legal opinion provided to the Town by the outside counsel (Request Item 23). It is also clear that the report was commissioned by the outside counsel not just to assist in formulating legal advice but, specifically, to assist in formulating legal advice relating to contemplated litigation. Accordingly, the consultant's report qualifies for exemption under Branch 2 of the section 12 exemption.

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he or she is seeking and the Town indicates that a record does not exist, it is my responsibility to ensure that the Town has made a reasonable effort to identify any records which are responsive to the request. The Act does not require the Town to prove with absolute certainty that the requested record does not exist. However, in my view, in order to properly discharge its obligations under the Act the Town must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

It should be noted that the Town, in its representations, indicated that it had located an additional 48 records responsive to the appellant's Request Item 17. The Town provided the appellant with a supplementary decision letter in respect of those records and they are not at issue in this appeal.

The Town's representations include an affidavit sworn by the Town Clerk which details the searches made for responsive records and the personnel who were asked to assist in those searches. The affidavit also states that some of the older records requested by the appellant may have at one time existed but that all records of the Town (and its predecessor, the Township of Pickering) prior to 1979 were destroyed when the Town implemented its records retention policy in the early 1980's.

The appellant's request for records described a number of entries contained in minutes of Town Council meetings which referred to specific documents or from which one could infer that specific documents existed. The affidavit of the Town Clerk deals with each one of the minute entries and either explains the search conducted for the specified document or provides an explanation for the
the non-existence of the document.

With respect to the appellant's request for petitions referred to in Council Resolution 150/86 (Request Item 9) the affidavit of the Clerk indicates that a search was made for petitions and none were located. However, attached as an exhibit to the affidavit are copies of three letters sent by the Town to other government offices which I believe are responsive to that portion of the appellant's original request. Accordingly, I will order that the Town issue a decision letter to the appellant in respect of those letters.

I have carefully reviewed the evidence provided by both parties. Based on the information as to the nature and extent of the searches undertaken which are outlined in the affidavit of the Town Clerk, I am satisfied that, with the exception of Request Item 9 discussed above, the efforts made by the City to locate records responsive to the request were reasonable in the circumstances.

ORDER:

1. I order the Town to disclose the legal accounts responsive to Request Item 16, in accordance with the highlighted version of the records which I have enclosed with the Town's copy of this order, to the appellant within twenty (20) days of the date of this order. The highlighted portions of the records should **not** be disclosed.
2. I uphold the decision of the Town to deny access to the remaining records.
3. I order the Town to issue a decision letter to the appellant in respect of the three letters attached as Exhibit "B" to the Town Clerk's affidavit within fifteen (15) days of the date of this order.
4. 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 disclosed to the appellant pursuant to Provision 1 as well as a copy of the decision letter referred to in Provision 3.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ November 6, 1995