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

ORDER M-630

Appeal M_9500382

City of Port Colborne

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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 City of Port Colborne (the City) received a request for access to records which relate to the zoning, building permits and operation of a specified business on a property in the City. The City granted partial access to the records, and relied on the following exemptions in denying access to six records:

- advice to government - section 7(1)
- law enforcement - sections 8(1)(a) and (g)
- solicitor-client privilege - section 12.

In addition, the City refused to confirm or deny the existence of a record/records pursuant to section 8(3) of the Act. The requester appealed the City's decision.

A Notice of Inquiry was provided to the appellant, the City and the business. No representations were received from any of the parties.

DISCUSSION:

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD

Section 8(3) of the Act provides the City with the discretion to refuse to confirm or deny the existence of records responsive to the appellant's request. This section provides:

> A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) applies.

An institution relying on section 8(3) of the Act must do more than merely indicate that records of the nature requested, if they exist, would qualify for exemption under sections 8(1) or (2). The institution must establish that disclosure of the mere existence or non-existence of such a record would communicate to the requester information that would fall under either section 8(1) or (2) of the Act.

The City has not provided me with any evidence which would establish that disclosure of the mere existence or non-existence of records responsive to part of the request would communicate to the requester information that would fall under either sections 8(1) or (2) of the Act. Accordingly, I find that section 8(3) does not apply.

As responsive records do exist, I will proceed to consider whether these records qualify for exemption under the Act.

ADVICE TO GOVERNMENT

The City claims that Records 1, 3, 6, 8, 10, 11 and 12 are exempt from disclosure pursuant to section 7(1) of the Act.

This section states that:

> A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 7(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

The City has not provided me with any submissions that the records contain advice or recommendations. Reviewing the record independently, it appears that there are a few sentences in a few records which suggest a course of action relative to a particular problem, but the City has not connected these sentences to the deliberative process of government decision-making or policy-making and has not shown how disclosure of these few sentences would having a chilling effect on the free flow of advice and recommendations within the City. Additionally, I have no information which would enable me to be satisfied that its exercise of discretion was proper.

Therefore, in the absence of any representations regarding section 7(1), it is my view that section 7(1) does not apply to any of the records for which this exemption has been claimed.

LAW ENFORCEMENT

Sections 8(1)(a) and (g) of the Act provide that:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

The purpose of the exemptions contained in section 8(1) is to provide the City with the discretion to preclude access to records in circumstances where disclosure of the records could reasonably be expected to result in one of the harms set out in this section. The City bears the onus of providing sufficient evidence to establish the reasonableness of the expected harm.

In order for the records to qualify for exemption under this section, the matter which generated the records must satisfy the definition of the term **"law enforcement"** as found in section 2(1) of the Act, which states that:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b).

Records 1, 3, 7, 8, 9, 10, 11 and 12 relate to by-law inspections and enforcement. I am satisfied that these matters are "law enforcement" matters for the purposes of the Act. However, having carefully considered the records, I find that I have not been provided with any evidence which would demonstrate that there exists a reasonable expectation that the harms envisioned by sections 8(1)(a) and/or (g) would occur should this information be disclosed. Therefore, I find that these records do not qualify for exemption under sections 8(1)(a) or (g) of the Act.

Section 8(2)(a) of the Act provides:

> A head may refuse to disclose a record,
>
> > that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

In order for a record to qualify for exemption under section 8(2)(a) of the Act, the City must satisfy each part of the following three-part test:

1. the record must be a report; **and**
2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[See Order 200 and Order P-324]

In order to satisfy the first part of the test (i.e. to be a report), a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact (Order 200).

Record 7 is a request, rather than a report. Record 8 does not contain the kind of detail or formality normally characteristic of a report. Record 9 is a letter to the subject of the investigation. Record 10 is more in the nature of a briefing note for the members of City Council, in anticipation of concerns being raised related to the property. Record 11 is a memo to the By-law Enforcement Officer, the City Solicitor, and the Chief Building Official attaching Record 12, which is a draft of Record 9. In my view, the information found in these particular records alone is not sufficient to attract the application of section 8(2)(a). In the absence of representations from the City, which would have been of great assistance to me in establishing the context for the creation of these records, clarifying which agency has the function of regulating compliance with the law (there appears to be some role for the Licensing Department of the Niagara Regional Police) and indicating the reasoning behind choosing to apply this discretionary exemption in the particular circumstances of this case, I find that section 8(2)(a) does not apply.

SOLICITOR-CLIENT PRIVILEGE

The City claims that section 12 applies to Records 2, 3, 4, 5, 7 and 12.

Section 12 of the Act 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).

For a record to qualify for exemption under Branch 1 of the exemption, the City must provide evidence that the record satisfies either of the following tests:

1. (a) there must be a written or oral communication;

   (b) the communication must be of a confidential nature;
   (c) the communication must be between a client (or his agent) and a legal adviser; 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]

None of the records are marked "confidential", and the City has not submitted any other evidence which would suggest that the records were to be considered confidential. Having carefully reviewed the records, I am not satisfied that the "advice" offered in Record 2 is **legal** advice, and I find that the Records 3, 5, 7 and 12 are not directly related to seeking, formulating or giving legal advice. Records 4 and 12 are not communications between a solicitor and his client. There is no evidence before me which would suggest that any of these records were created especially for the lawyer's brief for existing or contemplated litigation, and I find that these records do not qualify for exemption under the first branch of section 12 of the Act.

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.

[See Order 210]

The City Solicitor is on either the sending or receiving end of Records 2, 3, 4, 5 and 7. Record 12 appears to be a draft of a letter which was copied to the solicitor. Without representations from the City, I cannot determine whether the records were prepared for use in giving legal advice, or in contemplation of or for use in litigation. Of all of these records, only Record 2 contains advice from the City Solicitor. However, it is not apparent to me that this is necessarily **legal** advice. In the absence of such evidence from the City, I find that these records do not qualify for exemption under section 12.

ORDER:

1. I order the City to disclose the records at issue in their entirety 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.

2. In order to verify compliance with the provisions of this order, I reserve the right to require the City to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

3. In this order, I have disclosed the fact that responsive records exist. I have released this order to the City and the business in advance of the appellant in order to provide the City and the business with an opportunity to review this order and determine whether to apply for judicial review. If I have not been served with a Notice of Application for Judicial Review within fifteen (15) days of the date of this order, I will release this order to the appellant within five (5) days of the expiration of the 15-day period.

Original signed by: October 27, 1995
Holly Big Canoe
Inquiry Officer