



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

ORDER M-593

Appeal M_9500352

The Corporation of the Town of Whitby



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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 Whitby (the Town) received a request for a copy of all correspondence submitted to it between March 1, 1995 and June 1, 1995 which relates to the requester. The Town located seven records totalling 15 pages and denied access to them, relying on the following exemptions contained in the Act:

- third party information - section 10(1)(b)
- solicitor client privilege - section 12
- danger to safety or health - section 13
- discretion to refuse requester's own information - section 38(a)
- invasion of privacy - section 38(b)
- evaluative or opinion material - section 38(c)

The requester appealed the Town's decision to deny access. A Notice of Inquiry was provided to the appellant, the Town and seven individuals whose interests may be affected by the outcome of this appeal (the affected persons). Representations were received from the Town and six of the affected persons.

PRELIMINARY MATTER

Counsel for the Town submits that section 43(3) of the Act provides that the Commissioner's order may contain any conditions the Commissioner considers appropriate. He requests that I order the appellant to pay the Town's costs associated with this appeal, for which he claims the sum of \$750.

In Order P-604, Assistant Commissioner Irwin Glasberg considered the issue of whether the Commissioner's office has the legal authority to award costs to a party to an appeal. He addressed the issue in the following fashion:

It is a general principle of administrative law that an administrative tribunal possesses only those powers which it has been granted by its enabling statute, by necessary implication or through some statute of general application (see Robert W. Macaulay, Practice and Procedure before Administrative Tribunals (Toronto: Carswell, 1988 at p. 27:10)

He then reviewed the relevant provisions of the Act and concluded that:

... the Act does not expressly provide the Commissioner or his delegate with the authority to award costs to a party in an appeal.

He next considered whether an implied power could be found in the legislation. In this regard, he considered sections 54(1) and (3) of the provincial Freedom of Information and Protection of Privacy Act. As well, he referred to section 52(1) of the Freedom of Information and Protection

of Privacy Act which outlines the scope of the duty of the Commissioner to conduct an inquiry. The aforementioned sections are virtually identical to the provisions of section 43(1), (3) and 41(1) of the municipal Act, respectively. Section 41(1) provides that:

If a settlement is not effected under section 40, the Commissioner shall conduct an inquiry **to review the head's decision.** [emphasis added]

He went on to conclude that:

Based on the wording of [section 52(1)], I believe that any terms or conditions attached to an order must bear directly on the contents of the head's decision or the process by which that decision was issued. In my view, the question of whether costs should be awarded in a proceeding is not directly related to the review of a head's decision. Based on this analysis, I find that the power of the Commissioner to award costs cannot be implied from the provisions of the Act.

He also found that there is no statute of general application, such as the Statutory Powers and Procedure Act, to which the Act is subject, which provides the Commissioner with the power to award costs.

I have considered the submissions put forward by counsel for the Town in this case. Based on the rationale contained in Order P-604, however, I find that the Commissioner's office does not possess the requisite authority to make an award of costs in this appeal.

DISCUSSION:

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/SOLICITOR-CLIENT PRIVILEGE

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the records at issue and I find that they contain the personal information of the appellant and affected persons.

Section 36(1) of the Act gives individuals a general right of access to records held by a government body which contain their own personal information. Section 38 provides a number of exceptions to this general right of access.

Under section 38(a) of the Act, the Town has the discretion to deny access to records which contain an individual's own personal information in instances where certain exemptions would otherwise apply to that information. The exemptions listed in section 38(a) include the solicitor_client privilege exemption provided by section 12. The Town claims that the records are exempt under section 38(a) because they qualify for exemption under section 12. Whether certain records qualify for exemption under this section is a preliminary step in determining whether the exemption in section 38(a) applies.

Under section 12 of the Act, the Town 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 Town for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

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 the Town; **and**
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

The records at issue are letters from the Town's employees to counsel retained by the Town. Accordingly, in my view, the records were prepared for counsel retained by the Town and the first part of the test has been met.

The records were prepared by employees of the Town and expressly provided to its counsel in contemplation of litigation instituted by the appellant arising from the termination of his employment with the Town. Having carefully reviewed the records and the representations, I am satisfied that the second part of the test has been met as well, and that the records qualify for exemption under Branch 2 of section 12 of the Act.

Having found that the records contain the personal information of the appellant and qualify for exemption under section 12, I find that they are exempt from disclosure under section 38(a).

ORDER:

I uphold the Town's decision.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ September 12, 1995