



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

ORDER M-616

Appeal M_9500374

Town of East Gwillimbury



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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 Town of East Gwillimbury (the Town) received a request for records relating to site plan and cemetery approval applications which had been submitted by a named company. The requester is counsel to the company. The request included, but was not limited to "all records, books, documents, minutes and proceedings of any Member of Council or Committee of Council (whether the acts of the Committee have been adopted or not) and other documents in the possession or under the control of the clerk or the Planning Department or any Council Member or any other department relating to any and all aspects of the [application] file."

The Town disclosed a number of the responsive records and applied the following exemptions to those records which it did not disclose:

- advice to government - section 7(1)
- solicitor-client privilege - section 12

The requester appealed the Town's decision and claimed that further responsive records exist. During the mediation stage of the appeal, the Town granted access in full to an additional 14 records and access in part to one further record. There are 18 records remaining at issue which are described in Appendix A to this order.

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

DISCUSSION:

ADVICE TO GOVERNMENT

The Town claims that Records 1, 3, 7 and 9-18, are exempt from disclosure pursuant to section 7(1) of the Act.

This section states:

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 Town submits that the records contain advice or recommendations, or information upon which the advice and/or recommendations were formulated, which relate to a suggested course of action which will ultimately be acted upon by Town Council.

In my view, there must be evidence of some type of communication of information from one person to another in order for that information to qualify as "**advice or recommendations**". Records 1, 7, 9, 15, 17 and 18 are either handwritten or typewritten notes in which there is no clear flow of information from one individual to another. With respect to Records 10, 11, 13, 14 and 16 and the information which has been severed from Records 3 and 12, it is my view that they contain statements of fact, or seek comments, and that they are not in the form of advice or recommendations.

Therefore, having reviewed the records and the representations submitted to me regarding section 7(1), it is my view that this exemption does not apply to any of the records listed above.

SOLICITOR-CLIENT PRIVILEGE

On June 29, 1995, the Commissioner's office provided the Town with a Confirmation of Appeal which indicated that an appeal from the Town's decision had been received. This Confirmation stated that, based on a policy adopted by the Commissioner's office, the Town would have 35 days from the date of the confirmation (until August 4, 1995) to raise any new discretionary exemptions not originally claimed in its decision letter. In its representations dated September 22, 1995, the Town indicated for the first time that it wished to claim the discretionary exemption under section 12 of the Act for Records 1 and 7.

Previous orders issued by the Commissioner's office have held that the Commissioner or his delegate have the power to control the manner in which the inquiry process is undertaken. This includes the authority to set time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter.

In Order P-658, Inquiry Officer Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 40 of the Act. The objective of the policy enacted by the Commissioner's office is to provide government organizations with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

In its decision letter, the Town claimed the application of section 12 for a number of records, but not for Records 1 and 7. The Town now seeks to extend the application of this exemption to include these two records. In my view, the 35 day "window of opportunity" is intended to allow the Town to address the kind of situation which has arisen in this case. During this period, it is incumbent upon the Town to confirm the discretionary exemptions on which it will rely as the appeal proceeds through the mediation and inquiry stages of the process. I have not been

provided with any explanation as to why I should consider the application of section 12 to Records 1 and 7 or why it was not originally applied in the decision letter. I will not, therefore, be considering the application of section 12 to Records 1 and 7 in this order.

In its decision letter, the Town claimed that section 12 applies to exempt from disclosure Records 2, 4, 5, 6, 8 and 9 and the information which has been severed from Record 3. With respect to Record 9, the Town's index indicates that section 12 was not specifically claimed to exempt this record. However, I note that Record 9 is identical to one of the attachments to Record 3 for which the section 12 exemption was claimed. Therefore, the decision I make with respect to Record 3 in relation to section 12 will also apply to Record 9.

Section 12 of the Act consists of two branches, which provide the Town 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 the Town 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 Branch 1 of the section 12 exemption.

For a record to qualify for exemption under the first branch of the solicitor-client privilege, the following four criteria must be satisfied:

1. there must be a written or oral communication;
2. the communication must be of a confidential nature;
3. the communication must be between a client (or his agent) and a legal adviser; and
4. the communication must be directly related to seeking, formulating or giving legal advice.

The Town submits that, at the time that the communications originated, it had retained counsel for litigation before the Ontario Municipal Board (the OMB) and that the records are, accordingly, subject to the common law solicitor-client privilege. It argues that all of these records are written communications between the client (the Town) and its counsel and are directly related to seeking, formulating or giving legal advice relating to the OMB proceeding. In addition, the Town submits that these were confidential communications.

I have carefully reviewed the records and the representations of the Town and find that they are confidential communications between a client and its legal advisor which relate directly to the seeking, formulating or giving of legal advice. Accordingly, in my view, Records 2, 4, 5, 6, 8

and 9 and the information which has been severed from Record 3 qualify for exemption under Branch 1 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 Authority indicates that such a record does not exist, it is my responsibility to ensure that the Authority has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Authority 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 Authority must provide me with sufficient evidence to show that they have made a **reasonable** effort to identify and locate records responsive to the request.

In approaching reasonableness of search issues in appeals, the Commissioner's office has recognized that an appellant is rarely in a position to **know** that records do, in fact, exist. An appellant is therefore asked to provide his or her reasons for believing that a record should exist. At the same time, the institution is asked to provide details of the search which it has conducted. Upon consideration of the information provided by the parties, a conclusion will be made as to whether or not the search was reasonable in the circumstances of the appeal.

The Town has provided a summary of the steps taken to search for records responsive to the appellant's request in the form of a sworn affidavit. These include searching the files in the Town's Planning Department and circulating a memorandum to all members of the Town Council advising them of the request and requesting that they provide the Town's Freedom of Information and Privacy Co-ordinator with all relevant documents. The appellant has not submitted representations on this issue.

In the circumstances of this appeal, I am satisfied that the Town has taken all reasonable steps to locate the records responsive to the appellant's request.

ORDER:

1. I uphold the decision of the Town not to disclose Records 2, 4, 5, 6, 8 and 9 and the information which has been severed from Record 3.
2. I order the Town to disclose Records 1, 7, 10-18 inclusive, in their entirety to the appellant within thirty-five (35) days of the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.
3. 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 which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____ October 18, 1995
Donald Hale
Inquiry Officer

**APPENDIX A
INDEX OF RECORDS AT ISSUE**

RECORD NUMBER	DESCRIPTION	NUMBER OF PAGES	TOWN'S DECISION	DISPOSITION ON APPEAL
1	Handwritten internal memorandum/ notes dated June 7, 1995	1 (double-sided)	Access denied in full	To Be Disclosed
2	Facsimile Transmittal Slip dated May 31, 1995	1	Access denied in full	Decision Upheld
3	Internal memorandum dated May 19, 1995 with 1 page letter dated April 25, 1995 and 1 page internal memorandum dated April 12, 1995 attached	4	Access denied in part	Decision Upheld
4	Facsimile Transmittal Slip dated May 4, 1995	1	Access denied in full	Decision Upheld
5	Letter dated April 26, 1995 with attachments	3	Access denied in full	Decision Upheld
6	Facsimile Transmittal Slip dated April 20, 1995	1	Access denied in full	Decision Upheld
7	Typewritten memo to file dated April 20, 1995	2	Access denied in full	To Be Disclosed
8	Facsimile Transmittal Slip dated April 18, 1995	1	Access denied in full	Decision Upheld
9	Memorandum dated April 12, 1995	1	Access denied in full	Decision Upheld
10	Facsimile Transmittal Slip dated February 28, 1995 with attachment	2	Access denied in full	To Be Disclosed
11	Facsimile transmission dated March 4, 1994	1	Access denied in full	To Be Disclosed
12	"Town Planner Report to Planning Committee" dated October 18, 1993	4 (3 pages double-sided)	Access denied in full	To Be Disclosed
13	Handwritten inter-office memorandum dated July 29, 1993	1	Access denied in full	To Be Disclosed
14	Handwritten inter-office memorandum dated July 22, 1993	1	Access denied in full	To Be Disclosed
15	Handwritten note dated July 19, 1993	1	Access denied in full	To Be Disclosed
16	Memorandum dated July 5, 1993	1	Access denied in full	To Be Disclosed
17	Telephone message and handwritten notes dated June 14, 1993	6	Access denied in full	To Be Disclosed
18	Handwritten note undated	2	Access denied in full	To Be Disclosed