



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

# ORDER M-729

Appeal M\_9500127

City of Oshawa



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## NATURE OF THE APPEAL:

The City of Oshawa (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all records relating to a proposed “No Loitering” by-law which was being considered by the City at the time of the request. The City identified a number of responsive records and provided the requester with access to 55 documents in their entirety, as well as parts of seven others. The City denied access to the remaining 23 records, in whole or in part, claiming the application of the following exemptions contained in the Act:

- draft by-law - section 6(1)(a)
- relations with other governments - section 9
- third party information - section 10
- solicitor-client privilege - section 12
- information published or available - section 15(a)

The requester (now the appellant) appealed the decision. The records at issue in this appeal consist of memoranda, letters, legal opinions and a series of draft by-laws, which were identified in an index prepared by the City and forwarded to the appellant with the City’s final decision letter.

A Notice of Inquiry was provided to the City, the appellant and the City of Kitchener (Kitchener) which was identified as having an interest in the disclosure of two of the records at issue.

## DISCUSSION:

### **DRAFT BY-LAW**

The City has claimed the exemption in section 6(1)(a) of the Act in respect of Records 19, 20, 22, 28, 83 and 84. Section 6 states:

- (1) A head may refuse to disclose a record,
  - (a) that contains a draft of a by-law or a draft of a private bill; or
  - (b) that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.
- (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,
  - (a) in the case of a record under clause (1) (a), the draft has been considered in a meeting open to the public;

- (b) in the case of a record under clause (1) (b), the subject matter of the deliberations has been considered in a meeting open to the public; or
- (c) the record is more than twenty years old.

### **Records 20, 28, 83 and 84**

Records 20, 28, 83 and 84 are all copies of drafts of the by-law at issue.

The City's representations in respect of these drafts of the by-law are limited to statements that these records were reviewed at in camera meetings and were not reviewed in a meeting to which the public had access. The City has not provided particulars of the dates of the in camera meetings at which these drafts of the by-law were considered.

The appellant, on the other hand, submits that drafts of the by-laws were discussed at three meetings of the Executive Committee of the Council of the City held on June 20, 1994, July 4, 1994 and July 18, 1994 and that the portions of the meetings at which the drafts were discussed were **not** held in camera. He submits, accordingly, that the exception to the section 6(1)(a) exemption which is provided by section 6(2)(a) applies to these records.

By way of evidence, the appellant has provided copies of the minutes of the Executive Committee meetings on those dates which indicate that drafts of the subject by-law were discussed. The appellant notes that the minutes do **not** indicate that these portions of the meetings of the Executive Committee were held in camera. He points out that, in fact, the minutes of the July 4, 1994 meeting contain notations that the Executive Committee reviewed **other** matters at that meeting "in camera", but that the portion of the meeting relating to the draft by-law has no such notation.

In Order M-102 Commissioner Tom Wright in considering the onus on an institution in establishing the application of the exemption provided by section 6(1)(b) stated:

Since meetings in the absence of the public are such a departure from the norm, in my opinion, there must be clear and tangible evidence that the meeting or parts of it were actually held in camera. For example, evidence could consist of a notation in the minutes of the meeting that a decision was made that the public be excluded from the meeting while a particular agenda item was discussed.

I agree and, in my opinion, an institution claiming the exemption in section 6(1)(a) has the onus of providing sufficient evidence to demonstrate that the record at issue does not fall within the exception set out in section 6(2)(a) of the Act. In the present appeal, the City has simply stated that the draft by-laws were considered at in camera meetings but has not provided any evidence to substantiate that fact. The appellant, however, has provided evidence that these records were, in fact, considered during the public portions of the Executive Committee meetings.

I am satisfied, on the evidence provided to me, that the exception to the section 6(1)(a) exemption set out in section 6(2)(a) applies to Records 20, 28, 83 and 84. Accordingly, I find that the exemption in section 6(1)(a) does not apply to these records,

### **Records 19 and 22**

Records 19 and 22 are memoranda which refer to drafts of the by-law. In addition to section 6(1)(a), the City has claimed that the exemption provided by section 12 of the Act applies to these records. Because of the findings I have made in relation to the section 12 exemption claim below, it is not necessary for me to address the claim made under section 6(1)(a) for these records.

### **INFORMATION PUBLISHED OR AVAILABLE**

The City has claimed the exemption provided by section 15(a) of the Act in relation to Records 90 and 91. Record 90 consists of several hundred photocopied pages of reported court decisions. Record 91 consists of 60 pages of photocopies of legal texts, statutes and by-laws.

In the case of both records a number of handwritten notes have been made on the printed materials. The City has also claimed the exemption provided by section 12 of the Act in relation to the notes. That exemption claim will be dealt with later in this order.

Section 15(a) states:

A head may refuse a to disclose a record if,  
  
the record or the information contained in the record has been  
published or is currently available to the public;

It has been clearly established in a number of previous orders that where an institution wishes to rely on section 15(a), it has a duty to inform the requester of the specific location of the publicly available records [Orders 123 and 191].

I have reviewed the documents comprising Records 90 and 91 and I am satisfied that all of the documents have been published or are currently available to the public, save and except for the handwritten notes made on them. As such, the printed portions of the documents comprising Records 90 and 91 are exempt from disclosure under section 15(a) of the Act. The handwritten notes on those documents are not exempt from disclosure under section 15(a).

With respect to the City's duty to inform the appellant of the location of publicly available records, I note that the City has provided the appellant with a list of the identifying citations for each of the court judgments in Record 90. I am satisfied that, by so doing, the City has fulfilled its obligation under section 15(a) to the appellant in respect of Record 90.

With respect to the record comprising Record 91, the City and the appellant have provided conflicting evidence in their representations as to what steps the City has taken to inform the appellant of the specific location of the publicly available records. Accordingly, I will order the

City to provide the appellant with a listing of the published documents comprising Record 91 and/or information about the location of the publicly available records comprising Record 91, if the City has not already done so.

### **SOLICITOR-CLIENT PRIVILEGE**

The City has claimed the exemption provided in section 12 of the Act for Records 19 to 22 inclusive, Records 27, 37 and 78 to 89 inclusive.

Section 12 states:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that 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.

Section 12 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 the City for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the City 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.

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

### **Records 19, 22 and 27**

Records 19 and 22 consist of the undisclosed portions of two memoranda from the Assistant City Solicitor to City Council and the City Manager. Record 27 is the undisclosed portion of a memorandum from the City Manager to the Assistant City Solicitor. The three memoranda discuss suggested amendments to the draft by-law. The City indicates that it relies on the first branch of the section 12 exemption for those portions of the records which have not been disclosed to the appellant.

I have reviewed the records and I am satisfied that Record 27 qualifies for exemption under the first branch of section 12. In respect of Records 19 and 22, I find that they satisfy the first, third and fourth elements of the first part of the Branch 1 test of section 12 of the Act.

The appellant submits that Records 19 and 22 do not meet the second part of the test as they are not confidential in nature because the memoranda were delivered to the City Manager and all members of City Council without any apparent restrictions on the use of the information contained in them. The appellant also argues that because the memoranda refer to prior drafts of the proposed by-law having been circulated, any privilege attaching to the records has been waived.

I do not agree. In my view, the provision of these records to the City Manager and members of Council by the Assistant City Solicitor falls within the definition of communication between a solicitor and his client, and, in the absence of any evidence that the opinions contained in the memoranda were shared with anyone other than the City Manager and Councillors, I do not find that there has been any waiver of privilege. Accordingly, I find that Records 19 and 22 are exempt from disclosure under section 12 of the Act.

### **Records 20 and 21**

Record 20 is a covering memorandum from the Assistant City Solicitor to the City Manager and members of Council. The City denied access to two draft by-laws attached to the memorandum. In its original decision the City claimed that the by-laws were exempt under section 12 of the Act. The City, however, has provided no evidence that the attached by-laws qualify for either branch of the section 12 exemption and, accordingly, I find that the draft by-laws are not exempt under that section. The covering memorandum, however, is a confidential communication between a solicitor and her client which relates to the provision of legal advice and is properly exempt from disclosure under Branch 1 of the section 12 exemption.

Record 21 consists of the severed portions of a memorandum from the Deputy City Solicitor to the Assistant City Solicitor. I have reviewed this record and the City's representations and I am satisfied that it also qualifies for exemption under the first branch of section 12 of the Act.

### **Record 37**

Record 37 is the severed portion of a memorandum from the City Solicitor to the City Clerk. I have reviewed the record and the City's submission and I am satisfied that it qualifies for exemption under the first branch of section 12.

### **Records 78-82 and 85-87**

Records 78, 80 and 82 are a series of legal opinions and drafts of legal opinions prepared by the City Solicitor for the Executive Committee of City Council relating to the proposed "No Loitering" by-law and a related legal matter. Several of the drafts contain handwritten notes by various members of the City Solicitor's department. Record 79 consists of five pages and Record 86 of one page of handwritten notes by members of the City Solicitor's department. Records 81, 85 and 87 are memoranda from members of the City Solicitor's department relating to the proposed by-law.

In its representations the City indicates that it is relying on the first branch of section 12 to exempt these records from disclosure. I have reviewed these records and the City's representations and I am satisfied that they qualify for exemption under the first branch of the section 12 exemption.

### **Records 88 and 89**

Record 88 is a legal opinion on an anti-loitering by-law prepared in 1991 by the Kitchener City Solicitor for a Kitchener alderman. A copy of this legal opinion was requested by the Oshawa City Solicitor and provided to him by the Kitchener City Solicitor.

Record 89 is a 1993 letter to the City Solicitor from another solicitor employed by Kitchener. The content of this letter reviews, explains and up-dates the legal opinion which comprises Record 88.

The City relies on Branch 1 of the section 12 exemption for both records and argues that they were supplied to the Oshawa City Solicitor by the Kitchener solicitors for his use in preparing a legal opinion to the City of Oshawa concerning a "No Loitering" bylaw. In Susan Hosiery Limited v. Minister of National Revenue [1969], 2 Ex. C.R.27, the criteria for the first part of the common law solicitor-client privilege are described as follows:

... all communications, verbal or written, of a confidential character between a client and a legal advisor directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal advisor's working papers directly related thereto) are privileged ...

It is clear from the submissions of the City and Kitchener that the Oshawa City Solicitor sought, obtained and made use of Records 88 and 89 for the purposes of preparing the legal opinion which his client, the City of Oshawa, had asked him to provide. I find that I have been provided with sufficient evidence to demonstrate that these records were obtained and used directly in the preparation of legal advice which was then communicated to the client. Accordingly, I find that

Records 88 and 89 constitute part of the solicitor's working papers within the meaning of the criteria expressed in Susan Hosiery. As such, Records 88 and 89 satisfy the requirements of the first part of the solicitor-client privilege test and are exempt from disclosure. In view of this finding, it is not necessary for me to consider the application of sections 9 and 10 of the Act to these records.

### **Records 90 and 91**

Records 90 and 91 were discussed above in connection with the section 15(a) exemption. The printed portions of the records were held to be exempt under that section. However, the records also contain handwritten notes to which the City claimed the exemption provided in section 12 of the Act.

The City did not specifically identify which branch of the section 12 test applied to the handwritten notes on Records 90 and 91 but, from the nature of the representations, it is clear that the City is relying on the second branch of section 12. The City submits that the handwritten notes on Records 90 and 91 were made by the City's solicitor or persons working under his direction while conducting research on a legal issue. That research, the City submits, was specifically conducted to provide the City with legal advice it had requested.

I am satisfied that the handwritten notes on Records 90 and 91 were prepared by or for the City's solicitor and were prepared for use in giving legal advice. Accordingly, those portions of Records 90 and 91 are also exempt from disclosure under section 12 of the Act.

### **ADDITIONAL RECORDS**

The appellant submits that he did not receive the four attachments referred to in Record 53, a record to which he had been given access to by the City. The appellant has argued that the City is obliged to render an access decision in respect of the attachments. Attachments 1, 3 and 4 to Record 53 are duplicates of Records 87, 85 and 82 respectively, and those records have been dealt with above. Attachment 2 to Record 53 has not been included in the records provided to this office by the City and I will, accordingly, order the City to make an access decision with respect to it.

### **ORDER:**

1. I uphold the City's decision to deny access to Records 19, 20 (the covering memo only), 21, 22, 27, 37, 78-82 and 85-89.
2. I order the City to disclose to the appellant the attachments to Record 20, and Records 28, 83 and 84 by **April 2, 1996**.
3. I order the City to conduct a search for Attachment 2 to Record 53 and to advise the appellant in writing of the results of that search by **April 2, 1996**. If the City locates the document, I order it to provide the appellant with an access decision with respect to this record by **April 9, 1996**.



4. I uphold the City's decision with respect to access to Records 90 and 91. However, I order the City to provide the appellant with a listing of the published documents comprising Record 91 and information concerning the location of the publicly available documents comprising Record 91 by **April 2, 1996**.
5. In order to verify compliance with the provisions of this order, I reserve the right to require that the City provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2 and a copy of the correspondence sent to the appellant referred to in Provisions 3 and 4.

Original signed by: \_\_\_\_\_  
Donald Hale  
Inquiry Officer

\_\_\_\_\_ March 12, 1996