



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

# ORDER M-732

Appeal M\_9500539

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 records relating to the passage of by-laws 113/91, 114/91 and 60/94. The requester sought access to the above records as they relate to the Oshawa Harbour area generally and in particular, the property at a designated address and lands in the vicinity of that address. Partial access was granted to the records. The City denied access to the remaining 24 records, in whole or in part. The requester appealed the denial of access.

During mediation, the City identified an additional 17 records and granted access in full to all but two of them.

The records all relate to the passage of the by-laws and the City's proposed development of the Second March Interpretive Centre Lands. The records that remain at issue in this appeal consist of a total of 26 records, including the 24 listed and described in the index provided by the City to the appellant and the two records described in the City's supplementary decision letter. For ease of reference, I will refer to the latter two records as Supplementary Records 1 and 2.

The City denied access to the records, in whole or in part, on the basis of the following exemptions contained in the Act:

- draft by-law - section 6(1)(a)
- closed meeting - section 6(1)(b)
- advice or recommendations - section 7(1)
- third party information - section 10(1)(a)
- economic & other interests - section 11(e)
- proposed plans/projects/policies - section 11(g)
- solicitor-client privilege - section 12.

A Notice of Inquiry was provided by this office to the appellant and the City. Notice was also given to the Oshawa Harbour Commission (the Commission) as the affected party in this appeal. Representations were provided by all parties. In its representations, the City indicated that it no longer relies on section 10(1)(a) for Records 4, 5 and 7 and that section 6(1)(b) was applied to Record 8 in error.

## BACKGROUND:

In this appeal, I believe that some background information provided by the City would help to put the request and the nature of the records sought in perspective. As I have indicated previously, the records relate to the passage of the by-laws and the City's proposed land development.

The City states that its passage of the zoning by-laws was appealed to the Ontario Municipal Board by various parties including the appellant and the Commission and this litigation is ongoing at the present time. The City has recently also been the site of considerable expansion

of the Greater Toronto Waterfront Trail. The City advises that as part of the expansion project, it is involved in a land exchange which has been agreed to “in principle” but has yet to be formalized. In addition, the City has been and continues to be involved in negotiating acquisition of certain lands from the Commission for the purpose of establishing the Second Marsh Education and Interpretive Centre. The records at issue, therefore, relate to the City’s involvement in the above.

## **DISCUSSION:**

The City has applied various exemptions to the records. I will first examine the application of sections 6(1)(a) and (b) of the Act.

### **DRAFT BY-LAW**

The City has withheld Records 13, 27, 28 and 29 on the basis that section 6(1)(a) applies. Record 13 is a memorandum from the Deputy City Solicitor to a planner and contains the author’s comments on a proposed holding by-law together with some text of a draft by-law. Records 27 and 28 are an “Analysis Report” and a “Background Report” respectively, prepared by external consultants. Record 29 is a copy of a draft by-law.

Section 6(1)(a) states as follows:

A head may refuse to disclose a record,

That contains a draft of a by-law or a draft of a private bill;

The City contends that section 6(1)(a) applies to protect both draft by-laws **and** records which would indirectly reveal the contents of the draft by-laws. The City’s position is that if it is not required to release a draft by-law then it should not be required to release the comments or reports on the by-law. It maintains that to do so would indirectly disclose the contents of the by-law or some of its provisions.

The appellant contends that it is likely, due to the passage of time, that this by-law has been debated or discussed in a public meeting and that the exception in section 6(2)(a) applies. The City submits that the draft by-law was never discussed at a public meeting.

In my view, the wording of the statute is clear and applies only to records which actually **contain** the draft by-law. On this basis, I find that the exemption in section 6(1)(a) applies to Record 29 in its entirety. I find that section 6(1)(a) is not applicable to Records 13, 27 and 28.

With respect to the application of section 6(2)(a), the appellant has not provided me with any evidence that Record 29 was discussed in public. Therefore, in the absence of evidence to the contrary, I find that the exception in section 6(2)(a) is not applicable.

The City has also claimed the application of section 12 for Record 13 and section 7(1) for Records 27 and 28. I will consider these records in my discussion of the relevant sections.

## CLOSED MEETING

The City claims that section 6(1)(b) applies to Records 4, 7, 16, 20, 26 and Supplementary Records 1 and 2.

Section 6(1)(b) states:

A head may refuse to disclose a record,

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.

To qualify for exemption under section 6(1)(b), the City must establish that:

1. a meeting of a council, board, commission or other body or a committee of one of them took place; **and**
2. that a statute authorizes the holding of this meeting in the absence of the public; **and**
3. that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

[Order M-64]

The City has provided evidence with respect to Records 4, 7, 16, 20, 26 and Supplementary Record 1, all of which are marked "In Camera", that meetings of the Executive Committee of the council took place and that the public was excluded from these meetings.

Supplementary Record 2 is a memorandum from the Acting Commissioner, Department of Community Services to the Commissioner, Department of Development and Planning Services. The City argues that the record contains the comments of the author which were incorporated into Record 26 and discussed at an in-camera meeting of the Executive Committee of the Council on March 20, 1995. I have reviewed the record and attachments and I accept the position of the City.

Based on the evidence before me, I am satisfied that meetings of the Executive Committee of the Council took place on the various dates and that the public was excluded from these meetings. The first part of the test has been met.

With respect to the second part of the test, the City states that sections 55(5)(c), (e) and (f) of the Municipal Act, R.S.O. 1990 c. M.45, as amended, authorize the holding of such meetings in the absence of the public. These sections read:

A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

- (c) a proposed or pending acquisition of land for municipal or local board purposes;
- (e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
- (f) the receiving of advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

For in-camera meetings held after January 1, 1995, the City is required to show that this was authorized by a resolution of the Council. The City has provided evidence that resolutions to close the meetings to the public were passed by the Council for the purpose of discussing proposed acquisitions of land, litigation or potential litigation, including matters before the Ontario Municipal Board and receiving advice that is subject to solicitor-client privilege. The second part of the test has been met.

The third part of the test requires the City to show that the disclosure of the records would reveal the actual substance of the deliberations of the meetings. I have reviewed the information in the records together with the representations of the City. The Council's discussion at the in-camera meetings centred on the issues relating to proposed land acquisitions and litigation matters including matters before the Ontario Municipal Board and the receiving of advice from legal counsel, with a view to deciding how to proceed on each matter. On this basis, I find that disclosure of Records 4, 7, 16, 20, 26 and Supplementary Records 1 and 2 would reveal the actual substance of the discussions conducted by the Council and hence, its deliberations. Therefore, the third part of the test has been met and section 6(1)(b) applies to these records.

### **SOLICITOR-CLIENT PRIVILEGE**

The City claims that section 12 applies to Records 6, 9, 10, 11, 12, 13 and 25.

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 the first branch of solicitor-client privilege, the following four criteria must be satisfied:

1. there must be a written or oral communication; and
2. the communication must be of a confidential nature; and
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 City states that while it is primarily relying on the first branch of the exemption, “there are some documents, however, which quite clearly relate [to] legal opinions and/or advice, and fall within the second branch”.

Record 6 is a memorandum from the Deputy City Solicitor to the Head of the Police Planning Division of the City’s Development and Planning Services Dept. I have reviewed the record and I find that it contains the author’s legal opinion. In my view, Record 6 is subject to the common law solicitor-client privilege and qualifies for exemption under the first branch of the section 12 exemption.

Records 9, 10, 12, 13 and 25 are memoranda from the Deputy City Solicitor or City Solicitor to the City’s Policy Planning Division or the Planning and Development Department. I have reviewed the records and find that the records were prepared by the City’s counsel for use in giving legal advice or in contemplation of litigation. Therefore, the records qualify under the second branch of the exemption.

Record 11 is a memorandum from the head of the Policy Planning Division to the Deputy City solicitor. In my view, this record also qualifies under the second branch of the exemption as it is prepared for the City’s counsel for use in giving legal advice and for use in litigation.

In summary, I find that Records 6, 9, 10, 11, 12, 13 and 25 are exempt from disclosure under section 12 of the Act.

## **ECONOMIC & OTHER INTERESTS**

The City has claimed the exemption in section 11(e) for Records 1, 2, 3, 5, 8, 19 and 21. Section 11(e) states:

A head may refuse to disclose a record that contains,

positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution.

For a record to qualify for exemption under section 11(e), each part of the following test must be established:

1. the record must contain positions, plans, procedures, criteria or instructions; **and**
2. the positions, plans, procedures, criteria or instructions must be intended to be applied to any negotiations; **and**
3. the negotiations must be carried on currently, or will be carried on in the future; **and**
4. the negotiations must be conducted by or on behalf of an institution.

[Order M-92]

The purpose of section 11(e) is to protect the economic interests of an institution, in this case, the City. In addition, the timing of negotiations is key to the application of this exemption - it clearly applies to present or future negotiations, not those that have been completed.

The City submits that the records relate to its proposed acquisition of a certain property from the Commission; that the negotiations have not been completed but that the parties have agreed to put the negotiations on hold pending the hearings before the Ontario Municipal Board. The City submits that the records contain information pertaining to its position on a specific matter (the land acquisition) to be applied to its ongoing negotiations with the Commission.

The appellant submits that the fact of the City's negotiations with the Commission is known to the public and therefore, disclosure of the records could not cause harm to the City.

I find that Records 1, 2 and 8 contain the City's positions to be applied to its negotiations with the Commission. I am satisfied that these negotiations are ongoing and that they are conducted by the City or on its behalf. I find, therefore, that Records 1, 2 and 8 are exempt under section 11(e).

I find that Records 3, 5, 19 and 21 do not contain any positions, plans, procedures, criteria or instructions for the purposes of section 11(e). In addition, the City has provided no evidence with respect to any negotiations which may be ongoing with respect to Records 19 and 21. Therefore, I find that Records 3, 5, 19 and 21 are not exempt under section 11(e) of the Act.

The City has claimed that the following additional exemptions apply to Records 3, 5, 19 and 21: section 11(g) to Records 3 and 5, section 10(1)(a) to Record 3, and section 7(1) to Records 19 and 21. I will consider the application of these exemptions below.

### **PROPOSED PLANS, POLICIES OR PROJECTS OF AN INSTITUTION**

The City has withheld Records 3 and 5 under section 11(g) of the Act. In order to qualify for exemption under this section, the City must establish that a record:

1. contains information including proposed plans, policies or projects; **and**

2. that the disclosure of the information could reasonably be expected to result in:
  - (i) premature disclosure of a pending policy decision, or
  - (ii) undue financial benefit or loss to a person.

Each element of this two-part test must be satisfied (Order P-229).

The City submits that its inability to deal with land transactions in confidence will result in undue financial loss to the City.

I have reviewed the records. I find that the records do not contain proposed plans, policies or projects. Additionally, I am not satisfied that disclosure of the information in the records could reasonably be expected to result in any of the harms listed above. Therefore, section 11(g) does not apply to the records. No other exemption has been claimed for Record 5 and it should be disclosed to the appellant.

### **THIRD PARTY INFORMATION**

I will now examine the application of section 10(1)(a) to Record 3.

Section 10(1)(a) of the Act states as follows:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

For a record to qualify for exemption under section 10(1)(a), the City and/or the affected party, in this case the Commission, must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a) of section 10(1) will occur.



Failure to satisfy the requirements of any part of the test will render the section 10(1) claim invalid.

### **Part One**

The City submits that the record contains commercial information. Previous orders of the Commissioner's office have established that information pertaining to the purchase or sale of merchandise, services or property qualifies as "commercial" information for the purposes of section 10(1) of the Act.

Record 3 is a covering letter from the City to the Commission and relates to the land acquisition. However, in my view, this does not qualify the record as containing "commercial" information for the purposes of section 10(1). I have also reviewed the record to determine whether it contains a trade secret or scientific, technical, financial or labour relations information. In my view, the information in the record cannot be characterized as any of the foregoing. The first part of the test has not been met.

As I have indicated previously, all three parts of the section 10(1) test must be met in order for the exemption to apply. The first part has not been satisfied and accordingly, I find that section 10(1) is not applicable to the record. No other exemption has been claimed for Record 3 and it should be disclosed to the appellant.

### **ADVICE OR RECOMMENDATIONS**

I will now consider the application of section 7(1) to the remaining records, i.e. Records 14, 15, 19, 21, 27 and 28.

Section 7(1) of the Act states that:

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

It has been established in a number of previous orders that advice or 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. Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13(1) of the Act. In addition, the information must relate to the **giving** of advice as opposed to seeking advice (Orders P-848 and P-872).

In Order 94, former Commissioner Sidney B. Linden commented on the scope of this exemption. He states that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making".

Records 14 and 15 contain three tables with the headings "appellant", "issues" and "recommended action/comments". It is only the information under the third columns "recommended action/comments" which is at issue. I have reviewed the information in the third columns and in my view, they contain the advice and recommendations of an employee(s) of the institution. I have also reviewed the exceptions listed under section 7(2) and in my view, none of the exceptions listed are applicable to the records.

Record 19 is a memorandum marked "confidential" from the Manager of the Planning Branch, Department of Development and Planning Services, to a Councillor in response to Record 21, a request from the same Councillor for verification of certain information. The City submits that the information in these records constitutes the "free-flow" of advice that was intended to be protected by section 7(1). I do not agree. Record 21 seeks advice as opposed to giving advice which contains a suggested course of action, which will ultimately be accepted or rejected. Record 19 contains information which could be construed as "advice" but is in fact factual in nature as it simply verifies the scope of permitted uses under the by-law. Even if I were to accept the information in Record 19 as "advice" for the purposes of section 7(1), the exception in section 7(2) would still apply. Therefore, I find that Records 19 and 21 are not exempt under section 7(1). No other exemption has been claimed for these records and they should be disclosed to the appellant.

Record 27 is a Zoning By-law Study Analysis Report dated November 22, 1989 prepared by consultants retained by the City. Record 27 consists of three parts: an introduction, review of existing by-laws and recommendations. Also attached are Appendices A (review of general provisions with recommendations), B (summary of existing regulations with recommendations) and C (review of special conditions with recommendations). Record 28 is a Background Report dated May 18, 1988 prepared by the same consultants which is the precursor to Record 27.

The City submits that the consultants were retained by the City to draft a new comprehensive zoning by-law. The City has claimed that section 7(1) applies to exempt both these records in their entirety.

I have reviewed the records. I find that the recommendations portion of Record 27 together with Appendices A, B and C qualify as "advice" and "recommendations" for the purposes of section 7(1) of the Act. The remaining portions of the record (pages 1-4) do not qualify under section 7(1) and should be disclosed to the appellant.

I find that Record 28 contains the analysis and discussion which formed the basis of the recommendations which were finally made in Record 27 and which I have found to be exempt under section 7(1). In my view, the information in Record 28 constitutes the free-flow of advice and recommendations during the deliberative process of government decision-making and policy-making, intended to be protected under section 7(1) of the Act. I find that Record 28 qualifies for exemption under section 7(1) of the Act. I find that none of the exceptions listed in section 7(2) apply to Record 28 or the portions of Record 27 that I have found to be exempt under section 7(1) of the Act.

In summary, I have found as follows:

- (1) Record 29 is exempt under section 6(1)(a),

- (2) Records 4, 7, 16, 20, 26 and Supplementary Records 1 and 2 are exempt under section 6(1)(b),
- (3) Records 6, 9, 10, 11, 12, 13 and 25 are exempt under section 12,
- (4) Records 1, 2 and 8 are exempt under section 11(e),
- (5) Records 14, 15, 28 and pages 1-4 of Record 27 are exempt under section 7(1).

I have found that none of the exemptions claimed by the City are applicable to Records 3, 5, 19, 21 and pages 1-4 of Record 27, which should be disclosed to the appellant.

**ORDER:**

1. I uphold the City's decision to deny access to Records 1, 2, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 20, 25, 26, 28, Supplementary Records 1 and 2 and Record 27 with the exception of pages 1-4.
2. I order the City to disclose Records 3, 5, 19 and 21 in their entirety and pages 1-4 of Record 27 to the appellant by sending him copies of these records not later than **April 23, 1996** and not earlier than **April 18, 1996**.
3. In order to verify compliance with the terms of this order, I reserve the right to require the City to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: \_\_\_\_\_  
Mumtaz Jiwan  
Inquiry Officer

\_\_\_\_\_ March 19, 1996