



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

ORDER M-801

Appeal M_9600110

The Corporation of the City of Windsor



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NATURE OF THE APPEAL:

The Corporation of the City of Windsor (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 construction of an addition to a building located near the requester's home. The requester also sought access to any records relating to an application for a by-law variance which may have been made to the City's Committee of Adjustment. The City located a large number of responsive records and denied access to them, in their entirety, claiming the application of the following exemptions contained in the Act:

- law enforcement - sections 8(1)(a), (b) and 8(2)(a)

The requester (now the appellant) appealed the City's decision. The City issued a further decision letter in which it claimed the application of additional exemptions as follows:

- closed meeting - section 6(1)(b)
- advice or recommendations - section 7(1)
- law enforcement - section 8(1)(d)
- solicitor-client privilege - section 12

The City also advised that no application for a variance had been received by its Committee of Adjustment for the subject property. During the mediation of the appeal, a number of records were disclosed to the appellant, particularly those dealing with the City's inspection of the construction site and those which originated with or were sent to the appellant. There remain at issue, however, a large number of records which I have listed in reverse chronological order in Appendix "A" of this order. I have created a numbering system to assist the parties in identifying the records and have removed duplicates and those records which have already been provided to the appellant.

A Notice of Inquiry was provided to the City and the appellant. Representations were received from both parties. The appellant continues to seek any records relating to an application for a variance to the City's Committee of Adjustment, should they exist.

Record 57 is a Report of an alleged by-law violation which took place in 1991 regarding a property adjoining that of the construction site. Records 58 and 59 contain documents compiled in the course of a rezoning application made in 1986 by the then-owner of the subject lands. I find that as these records do not concern the problems surrounding the construction project presently under way, these records are not responsive to the appellant's request. I will not, accordingly, be addressing them further in this order.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 12 consists of two branches, which provide the City 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).

For a record to be subject to the common law solicitor-client privilege (Branch 1), the City must provide evidence that the record either (1) constitutes a written or oral communication of a confidential nature between a client and legal advisor which relates directly to seeking, formulating or giving legal advice; or (2) the document was created or obtained especially for a lawyer's brief for existing or contemplated litigation.

For a record to qualify for exemption under Branch 2, the City must establish that the document was prepared by or for counsel employed or retained by an institution and the document must have been prepared (1) for use in giving legal advice, or (2) in contemplation of litigation, or (3) for use in litigation.

The City submits that all of the records at issue in this appeal with the exception of Records 10, 15, 16, 36 and 56 were created as a result of a dispute arising from the granting of a building permit to a contractor by the City and its subsequent decision to revoke the permit on November 27, 1995. Soon after this date, counsel for the contractor and the property owner, the City Solicitor and the City's insurance adjusters entered into protracted discussions concerning the extent of the City's liability in law and possible damages to be quantified and paid.

The City submits that the records which document these discussions are exempt from disclosure under section 12 as they fall within either the common law solicitor-client privilege or were prepared by or for counsel in the course of giving legal advice or in contemplation of litigation.

The appellant submits that no litigation was ever commenced by the parties to the dispute so Branch 2 of the section 12 exemption is not applicable to the responsive records. In addition, the appellant insists that in order for the solicitor-client exemption to apply, the records must contain a legal opinion from the City Solicitor to other City officials.

I have carefully examined the records and the submissions of the parties and find that from the date that the building permit was revoked by the Building Commissioner, November 27, 1995, there existed the distinct likelihood that litigation would result from the City's actions. As a result, I find that as Records 1-4, 6-7, 9, 11, 14, 17-35, 37-40, 43 and 45-54 were prepared by or for counsel employed by the City in contemplation of litigation, they qualify for exemption under Branch 2 of the section 12 exemption.

Record 8 is a memorandum prepared for the Mayor, City Council and Chief Administrative Officer (CAO) by the Building Commissioner and City Solicitor to advise Council that litigation was likely to result from the dispute between the City and the building owner and contractor. I find that this record qualifies for exemption under the first part of Branch 1 of the section 12 exemption.

ADVICE OR RECOMMENDATIONS

The City claims that Records 10, 12, 15, 16, 36, 41 and 42 are exempt from disclosure under section 7(1) of the Act. Section 7(1) reads:

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.

Previous orders of this agency have established that advice and recommendations, for the purposes 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 7(1).

I have carefully reviewed the information contained in these records and find that Record 10 contains only the opinion of the individual who wrote the memorandum and does not contain either advice or recommendations within the meaning of section 7(1).

Record 12 contains a specific instruction from the Building Commissioner to the Deputy City Clerk concerning the disclosure of the records to which it was attached. I find that the recipient of the memorandum was not in a position to either accept or reject the course of action contained in the document but was required to follow the instructions. Record 12 does not, accordingly, contain advice or recommendations for the purposes of section 7(1).

Again, Record 15 contains specific instructions from the Building Commissioner to the Commissioner of Planning regarding notification of any meetings which are to take place regarding the subject property. For the reasons described in my discussion of Record 12, I find that section 7(1) does not apply to this document.

Record 16 contains advice from the City Solicitor to the Building Commissioner concerning certain issues surrounding the communication of the City’s position regarding the dispute over the construction of the building. I find that Record 16 qualifies for exemption under section 7(1).

Records 36 and 41 do not contain any advice or recommendations within the meaning of section 7(1). These records serve only as covering memoranda for other correspondence and do not, therefore, qualify for exemption under section 7(1).

Record 42 is a memorandum from the Building Commissioner to the CAO, Mayor and two Councillors which contains detailed advice from the City’s insurers and the City Solicitor’s office. I find that this document qualifies for exemption under section 7(1).

The City has not provided me with any information as to the circumstances under which Record 56 was prepared. Without knowing either its author or its recipient, I am unable to evaluate whether the information contained therein was meant as advice or recommendations under section 7(1). I find that Record 56 is not exempt under section 7(1) and should be disclosed to the appellant.

In summary, I find that Records 10, 12, 15, 36, 41 and 56 are not exempt under section 7(1). As no other exemptions have been claimed for them and no mandatory exemptions apply, they should be disclosed to the appellant. Records 16 and 42 qualify for exemption under section 7(1).

CLOSED MEETING

The City claims that section 6(1)(b) of the Act applies to exempt Record 5 from disclosure.

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 the council or one of its committees 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.

Record 5 is a memorandum from the City Clerk to the CAO, Building Commissioner and City Solicitor advising that the City Council passed a resolution at an in camera meeting held on April 1, 1996. Based on the submissions of the City, I am satisfied that the April 1 meeting took place, that the public was excluded from this meeting and that the Municipal Act authorizes the holding of this meeting in the absence of the public. The first two parts of the requirements for section 6(1)(b) have, therefore, been met.

I find that the disclosure of the resolution which is quoted in the memorandum would not, however, reveal the actual substance of the deliberations of the Council. The resolution simply records the fact that a report from the Building Commissioner was noted and filed. As the third requirement of the section 6(1)(b) exemption has not been satisfied, I find that Record 5 does not qualify for exemption under this section.

LAW ENFORCEMENT

The City recognizes in its representations that "section 8 may not be entirely applicable in this case." Following my review of the records remaining at issue, I agree. Accordingly, I find that as no other exemptions have been claimed and no mandatory exemptions apply, Records 5, 13, 44 and 55 should be disclosed to the appellant.

REASONABLENESS OF SEARCH

The appellant has asked for records relating to an application by the building owner or the contractor to the City's Committee of Adjustment for a by-law variance. I am satisfied based on the submissions provided to me that, as of the date of the City's representations, no such application has been filed.

ORDER:

1. I uphold the City's decision to deny access to Records 1-4, 6-9, 11, 14, 16-35, 37-40, 42_43 and 45-54.
2. I order the City to disclose to the appellant Records 5, 10, 12, 13, 15, 36, 41, 44, 55 and 56 by sending her a copy by **July 26, 1996**.
3. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of the records disclosed to the appellant pursuant to Provision 2.

Original signed by: _____

Donald Hale
Inquiry Officer

July 5, 1996

APPENDIX "A"

INDEX OF RECORDS AT ISSUE

RECORD NUMBER	DESCRIPTION OF RECORDS WITHHELD	EXEMPTIONS CLAIMED	DECISION ON RECORD
1	April 26, 1996 letter to McTague Law Firm from Brode	8 and 12	Exempt under section 12
2	April 25 Brode note to file	7(1), 8 and 12	Exempt under section 12
3	April 11 FAX to McTague Law Firm from Windsor Adjusting	8 and 12	Exempt under section 12
4	April 10 letter from Brode to Clark	8 and 12	Exempt under section 12
5	April 2 memorandum from City Clerk to CAO, Building Commissioner and City Solicitor	6(1)(b), 8 and 12	Disclose
6	April 1 letter from Brode to Windsor Adjusting	8 and 12	Exempt under section 12
7	March 27 letter from Clark to Brode	12	Exempt under section 12
8	March 21 Two-page memorandum from Building Commissioner and City Solicitor to Mayor, Council and CAO	6(1)(b), 8 and 12	Exempt under section 12
9	March 20 letter to Windsor Adjusting	8 and 12	Exempt under section 12
10	March 13 memorandum from FOI Coordinator to Building Commissioner and City Solicitor	7(1)	Disclose
11	March 12 letter from Paroian to Brode	8 and 12	Exempt under section 12
12	February 27 memorandum from Building Commissioner to City Clerk	7(1)	Disclose
13	February 27 FAX cover page from Clark to Brode	8 and 12	Disclose
14	February 23 letter from Clark to Brode	8 and 12	Exempt under section 12
15	February 16 memorandum from Building Commissioner to Commissioner of Planning	7(1)	Disclose
16	February 16 memorandum from Brode to Building Commissioner	7(1)	Exempt under section 7(1)

RECORD NUMBER	DESCRIPTION OF RECORDS WITHHELD	EXEMPTIONS CLAIMED	DECISION ON RECORD
17	February 15 letter from Brode to Clark	8 and 12	Exempt under section 12
18	February 15 letter from Clark to Paroian	8 and 12	Exempt under section 12
19	February 15 letter to Windsor Adjusting from Brode	12	Exempt under section 12
20	February 14 letter from Clark to Brode and Paroian	8 and 12	Exempt under section 12
21	February 13 letter from Posliff to Clark	8 and 12	Exempt under section 12
22	February 12 letter from Clark to Brode	8 and 12	Exempt under section 12
23	February 12 letter from Brode to Clark	8 and 12	Exempt under section 12
24	February 9 letter from Brode to Clark	8 and 12	Exempt under section 12
25	February 8 letter to Windsor Adjusting from Brode	8 and 12	Exempt under section 12
26	February 7 letter from Clark to Brode	8 and 12	Exempt under section 12
27	February 7 letter from Clark to Brode (same as 26) with attachments	8 and 12	Exempt under section 12
28	February 6 letter from Brode to Windsor Adjusting with attachment	12	Exempt under section 12
29	February 5 letter from Brode to Clark	8 and 12	Exempt under section 12
30	February 2 letter from Clark to Brode	8 and 12	Exempt under section 12
31	February 1 memorandum from Brode to Link	8 and 12	Exempt under section 12
32	January 30 FAX from Brode to Windsor Adjusting	12	Exempt under section 12
33	January 30 letter from Paroian to Brode	12	Exempt under section 12
34	January 30 memorandum to Link from Brode	8 and 12	Exempt under section 12
35	January 30 meeting notes	12	Exempt under section 12
36	January 26 memorandum from City Clerk to Building Commissioner	7(1)	Disclose

RECORD NUMBER	DESCRIPTION OF RECORDS WITHHELD	EXEMPTIONS CLAIMED	DECISION ON RECORD
37	January 22 letter from Brode to Windsor Adjusting	8 and 12	Exempt under section 12
38	January 19 memorandum from Link to Brode	7(1), 8 and 12	Exempt under section 12
39	January 17 letter from Clark to Brode	8 and 12	Exempt under section 12
40	January 17 letter from Brode to Windsor Adjusting	8 and 12	Exempt under section 12
41	January 16 memorandum from City Clerk to Building Commissioner	7(1)	Disclose
42	January 12 memorandum from Building Commissioner to CAO, Mayor and Councillors	7(1), 8 and 12	Exempt under section 7(1)
43	January 11 letter from Brode to Paroian and Clark	8 and 12	Exempt under section 12
44	January 9 letter from Link to Towsley	8 and 12	Disclose
45	January 9 letter from Paroian to Brode	8 and 12	Exempt under section 12
46	January 9 letter from Towsley to Paroian	8 and 12	Exempt under section 12
47	December 21, 1995 memorandum from Link to CAO	7(1) and 12	Exempt under section 12
48	December 20 letter from Brode to Windsor Adjusting	8 and 12	Exempt under section 12
49	December 18 notes by Brode of meeting with Building Inspector	7(1), 8 and 12	Exempt under section 12
50	December 15 notes by Brode of meeting with Link	7(1), 8 and 12	Exempt under section 12
51	December 14 FAX from Windsor Adjusting to Brode	8 and 12	Exempt under section 12
52	December ? notes by Brode of meeting	8 and 12	Exempt under section 12
53	December 13 letter from Brode to Windsor Adjusting	8 and 12	Exempt under section 12
54	December 11 letter to Brode from Paroian	8 and 12	Exempt under section 12

RECORD NUMBER	DESCRIPTION OF RECORDS WITHHELD	EXEMPTIONS CLAIMED	DECISION ON RECORD
55	November 27 letter from Link to Towsley	8 and 12	Disclose
56	November ? Note re R#7-59-159	7(1)	Disclose
57	May 13, 1991 Report of Alleged Bylaw Violation	8(1)(d)	Not Responsive
58	January 17, 1986 memorandum with attachments from Zoning Officer to Commissioner of Planning	7(1)	Not Responsive
59	undated Building Department Zoning Work Sheet	7(1)	Not Responsive