



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

ORDER M-842

Appeal M_9600202

The Corporation of the Town of Whitchurch_Stouffville



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NATURE OF THE APPEAL:

The Corporation of the Town of Whitchurch-Stouffville (the Town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to the enactment of By-laws 90-111 and 90-112 and Official Plan Amendment No. 84, as well as any documents which pertain to the “appropriate location” of various industrial facilities. The enactment of these by-laws by the Town has resulted in a number of court proceedings and applications before the Ontario Municipal Board over the past six years.

The Town located a large number of responsive records and granted access, in whole or in part, to 258 of them. The Town denied access to an additional 98 records, in whole or in part, claiming the application of the following exemption contained in the Act:

- solicitor-client privilege - section 12

In a further decision letter issued by the Town within the time frames set out in the Confirmation of Appeal, the following additional exemptions were applied to various records:

- draft by-law - section 6(1)(a)
- closed meeting - section 6(1)(b)
- advice or recommendations - section 7
- third party information - section 10(1)

The appellant appealed the Town’s decision to deny access to the requested records. During the mediation of the appeal, the appellant submitted that he was no longer seeking access to the hourly rates contained in Records 49, 50, 51, 90 and 91, which was the only information to which section 10(1) had been applied. As the remainder of the information contained in these documents were disclosed to the appellant, it is not necessary for me to address these records further in this order.

This office provided the appellant and the Town with a Notice of Inquiry. Representations were received from both parties.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Town claims the application of section 12 to Records 12, 14-21, 23-48, 52-64, 67-77, 79, 80, 85, 87, 89, 93, 94 and 96-98. This section 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).

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

I have carefully reviewed the records and the submissions of the parties and make the following findings with regard to the application of section 12:

1. Records 14, 17, 18, 19, 20, 21, 23, 24, 25, 26, 29, 32, 41, 43, 44, 45, 46, 52, 59, 60, 64, 67, 71, 72, 75, 79, 80, 85, 89, 96 and 98 are confidential written communications between the Town and its legal advisors which are directly related to the seeking, formulating or giving of legal advice. As such, each of these records qualifies for exemption under the first part of Branch 1 of the section 12 exemption.
2. Records 27 and 54 were created especially for the lawyer's brief for then-existing litigation. As such, they qualify for exemption under the second part of Branch 1 of the section 12 exemption. In addition, the privilege has not been lost due to the termination or completion of the litigation as the matters to which these records relate remain on-going.

3. Records 34, 55, 56, 57, 58, 73, 74 and 97 were prepared by or for counsel retained by the Town and were prepared for use in giving legal advice, in contemplation of litigation or for use in litigation. These records qualify, therefore, for exemption under Branch 2 of the section 12 exemption.
4. Records 12, 16 and 33 are draft bylaws. The Town has not provided any evidence as to who may have prepared them and to whom they were directed. I am not, accordingly, able to determine whether they qualify for exemption under section 12.
5. Records 28, 37, 42, 69, 70 and 76 are memoranda passing between employees of the Town and notes taken by Town staff at meetings which they attended. These documents do not qualify for exemption under either Branch of the section 12 exemption.
6. Records 30, 31, 39, 47, 48, 53, 61, 62, 63, 68, 77, 87, 93 and 94 are communications to and from the consultants retained by the Town. These documents are not privileged under either Branch 1 or 2 of the section 12 exemption.
7. The Town has claimed the application of Branch 2 of the section 12 exemption to Records 15, 35, 36, 38 and 40, which are communications sent by the Town's counsel to other parties to the litigation or to other governmental bodies. I have not been provided with any evidence as to the circumstances surrounding the preparation of these documents. As such, I find that they do not qualify for exemption under section 12.

By way of summary, Records 14, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 29, 32, 34, 41, 43, 44, 45, 46, 52, 54, 55, 56, 57, 58, 59, 60, 64, 67, 71, 72, 73, 74, 75, 79, 80, 85, 89, 96, 97 and 98 are properly exempt from disclosure under section 12. The remaining documents, Records 12, 15, 16, 28, 30, 31, 33, 35, 36, 37, 38, 39, 40, 42, 47, 53, 61, 62, 63, 68, 69, 70, 76, 77, 87, 93 and 94, are not exempt under section 12.

DRAFT BY-LAW

The Town has claimed the application of section 6(1)(a) to portions of Records 2-11, 13-15, 19-25, 28, 33, 36-38, 40, 42-44, 59, 60, 62, 64-66, 81, 84, 86, 95, 96 and 98. I have already found that Records 14, 19, 20, 21, 23, 24, 25, 43, 44, 59, 60, 64, 96 and 98 are exempt under section 12. I will accordingly, only address the application of section 6(1)(a) to Records 2-11, 13, 15, 22, 33, 36-38, 40, 42, 65, 66, 81, 84, 86 and 95.

Section 6(1)(a) of the Act states:

A head may refuse to disclose a record,

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

I have reviewed the records and the submissions of the parties and make the following findings:

1. Records 3, 4, 5, 6, 7, 8, 9, 10, 11, 15, 22, 36, 38, 40, 65, 66 and 95 contain, either in whole or in part, drafts of by-laws, as well as Official Plan Amendment No. 84. These documents include correspondence between senior levels of government, the Town's

consultants and counsel regarding the appropriate wording to be included in the by-laws being contemplated by the Town, as well as the proposed amendments to its Official Plan. As such, these records qualify for exemption under section 6(1)(a).

2. Records 2 and 23 contain suggestions to be incorporated into the explanatory notes which will accompany the public meeting notice. These records do not contain either the whole draft bylaw or any portions thereof. As such, they cannot qualify for exemption under section 6(1)(a).
3. Records 13 and 81 are internal Town memoranda in which the Town's Planning Department is asked for its views on the proposed by-law. The contents of the by-law are not included in these documents and they are not, accordingly, subject to exemption under section 6(1)(a). Record 42 is a set of notes taken by a Town employee at a meeting held with parties who may have an interest in the proposed by-law. This document does not qualify for exemption under section 6(1)(a).
4. Record 37 is a draft planning report prepared by the Regional Municipality of York commenting on the appropriateness of the proposed by-law and Official Plan Amendments. Again, this record does not describe in any detail the contents of the draft by-law. As such, I find that it does not qualify for exemption under section 12.
5. Records 84 and 86 are draft press releases. Clearly, they do not qualify for exemption under section 6(1)(a).

Section 6(2)(a) provides that:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,

in the case of a record under clause (1) (a), the draft has been considered in a meeting open to the public;

Record 1 indicates that on April 14, 1992, a public hearing relating to the Town's policy on Industrial Extractive Industries was held. On June 23, 1992, a further public hearing was convened to consider and "adopt Official Plan Amendment and Zoning By-law policies". On June 30, 1992, a Council meeting open to the public was held "to enact by-laws to adopt Official Plan Amendment and Zoning By-law".

It is clear that the subject matter of the draft By-laws and Official Plan Amendment were the subject of public meetings on April 14 and June 23, 1992. In addition, the public was able to attend a Council meeting on June 30, 1992 at which time the By-laws and Official Plan Amendment were considered. Accordingly, I find that the exception contained in section 6(2)(a) applies to those records which qualify for exemption under section 6(1)(a). As such, none of the records is exempt under section 6(1)(a).

CLOSED MEETING

The Town has claimed the application of section 6(1)(b) to the undisclosed portion of Record 1, and Records 12, 16, 17, 18, 78, 82, 88 and 92. In order to qualify for exemption under section 6(1)(b), the Town 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.

As I have found above that Records 17 and 18 are exempt under section 12, I will not address the application of section 6(1)(b) to these records.

The first and second parts of the test for exemption under section 6(1)(b) require the Town to establish that a meeting was held and that it was held in camera.

The Undisclosed Portion of Record 1

I have examined that portion of Record 1 which was not disclosed to the appellant, along with the submissions of the parties. I find that a meeting of the Town Council took place on April 7, 1992 and that the meeting took place in camera, in accordance with the provisions of section 55(5) of the Municipal Act. I am also satisfied that the disclosure of this portion of the record would reveal the actual substance of the deliberations of the Council meeting. The undisclosed portion of Record 1 qualifies, therefore, for exemption under section 6(1)(b).

Records 12 and 16

I have examined the representations of the Town with respect to Record 12 and 16. I find that a meeting in fact took place on June 24, 1996, that it was held in camera and that a statute (the Municipal Act) authorizes the holding of the meeting in the absence of the public. As the meeting took place after January 1, 1995, the Town is also required to demonstrate that in camera meetings were authorized by a resolution of its' Council. I have been provided with a copy of this resolution.

In addition, I find that the disclosure of Records 12 and 16 would reveal the actual substance of the deliberations of the June 24, 1996 in camera Council meeting. Records 12 and 16 are, accordingly, exempt from disclosure under section 6(1)(b).

Records 78, 82, 88 and 92

Records 88 and 92 are identical. Records 78, 82 and 88 are extracts of minutes of in camera meetings of the Town Council which were held on March 3, 1992, September 24, 1991 and June 25, 1991, respectively. I am satisfied that each of these meetings took place, that they were held in the absence of the public and that the Municipal Act authorizes the holding of such meetings in camera. I am also satisfied that the disclosure of the information contained in these records

would reveal the substance of the deliberations of the meetings. Records 78, 82, 88 and 92 are, accordingly, properly exempt from disclosure under section 6(1)(b).

I have not been provided with any evidence that the exception provided by section 6(2)(b) of the Act has any application. I find, therefore, that the undisclosed portion of Record 1 and Records 12, 16, 78, 82, 88 and 92 are exempt under section 6(1)(b).

ADVICE OR RECOMMENDATIONS

The Town claims the application of section 7 of the Act to Records 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 27, 29, 30, 31, 32, 39, 41, 42, 47, 48, 53, 54, 55, 61, 63, 65, 66, 68, 69, 76, 77, 81, 83, 84, 86, 87, 93, 94 and 97. In my discussion of section 12 above, I have already found Records 27, 29, 32, 41, 54, 55 and 97 are exempt. I will not, therefore, address the possible application of section 7 to these records.

Section 7 of the Act 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.

The Town submits that the advice and recommendations contained in the records relate to the decision-making process with respect to the passage of By-laws 90-111, 90-112 and Official Plan Amendment No. 84. It further argues that all of this information was considered and either accepted or rejected in drafting the by-laws and amendment in question. In addition, the Town states that the advice or recommendations contained in the records has also been relied upon by the Town and its solicitors in the course of the several proceedings before the courts and the Ontario Municipal Board.

I have reviewed the submissions of the parties and the records and make the following findings:

1. Records 2, 3, 4, 5, 6, 8, 9, 10, 11, 30, 31, 47, 48 (which is the same as an attachment to Record 31), 53, 61, 63, 65, 66, 68 and 81 contain advice or recommendations within the meaning of section 7. As such, they qualify for exemption under this section.
2. Records 7 and 13 are internal memoranda between Town staff. Records 42, 69, 76 and 83 are notes taken at meetings attended by Town staff. Records 39, 77, 84, 86, 90 and 94 are correspondence between consultants and Town staff. Records 7, 13, 39, 42, 69, 76, 77, 83, 84, 86, 87, 90 and 94 do not contain advice or recommendations and, accordingly, these records do not qualify for exemption under section 7.
3. I have reviewed the records which I have found to qualify for exemption in order to determine whether any of the information falls within the exceptions listed in section 7(2). I find that none of these records contain the type of information listed in the exceptions.

By way of summary, I have found Records 1-6, 8-12, 14, 16-21, 23-27, 29-32, 34, 41, 43-48,

52-61, 63-68, 71-75, 78, 79, 80, 81, 82, 85, 88, 89, 92, 96, 97 and 98 to be exempt under either sections 6(1)(b), 7 or 12. The remaining records do not qualify for exemption under the Act and should be disclosed to the appellant.

ORDER:

1. I uphold the Town's decision to deny access to Records 1-6, 8-12, 14, 16-21, 23-27, 29-32, 34, 41, 43-48, 52-61, 63-68, 71-75, 78, 79, 80, 81, 82, 85, 88, 89, 92, 96, 97 and 98.
2. I order the Town to disclose Records 7, 13, 15, 22, 28, 33, 35-40, 42, 49, 50, 51, 62, 69, 70, 76, 77, 83, 84, 86, 87, 90, 91, 93, 94 and 95 to the appellant by providing him with a copy of these records by **October 11, 1996**.
3. In order to verify compliance with the terms 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: _____
Donald Hale
Inquiry Officer

_____ September 20, 1996