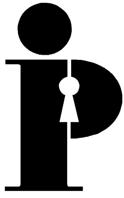

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-916

Appeal M_9600172

City of Stoney Creek

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BACKGROUND:

A named company (the Company) applied to the Ministry of Environment and Energy (the Ministry) for a Certificate of Approval under the Environmental Protection Act to develop and operate a landfill site. The site was in the vicinity of the City of Stoney Creek (the City) which thus became one of the "commenting agencies" on the proposal pursuant to the Environmental Assessment Act.

The Company and its consultants prepared an Environmental Assessment of the proposal and circulated drafts of its Environmental Assessment documents to the Ministry and all commenting agencies.

In June 1994, City Council formed the City Review Committee (the Committee) for the purpose of reviewing the documents in detail, and advising the City with respect to issues surrounding the landfill application. The Committee consisted of members of senior City staff and outside consultants with expertise in the various areas covered by the documents. The Mayor and another council member attended the meetings on a regular basis.

The Committee met regularly to discuss various planning, engineering and environmental issues related to the application. The Committee meetings culminated in various reports setting out recommendations to the City Council for the purpose of providing its comments to the Ministry. In January 1995, the Company submitted its final Environmental Assessment documents to the Ministry. The City, as one of the commenting agencies, received copies of these documents for its review in order to submit its formal response to the Ministry. The Committee continued to provide input to City Council for this purpose.

The City advised the Ministry that it did not support the application for a Certificate of Approval for the landfill site. The City did not request that the Minister hold a hearing with respect to the application.

Pursuant to the provisions of the Environmental Assessment Act, the Company's application for a Certificate of Approval was accepted by the Minister on April 22, 1996. The application was subsequently approved on July 15, 1996.

Many residents in the community opposed the application. The appellant represents one of the citizens' groups formed in opposition to the Environmental Assessment.

NATURE OF THE APPEAL:

The appellant submitted a request to the City under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the minutes and proceedings of all the meetings held by the Committee between January 1, 1995 and March 4, 1996.

The City identified 12 responsive records and granted access to the three documents related to public meetings. The City denied access to the minutes of the remaining meetings on the basis of the following exemptions in the Act:

- advice and recommendations - section 7(1)
- economic and other interests - section 11(e)
- solicitor-client privilege - section 12

The City also advised the requester that it had no record of any Committee meetings held after October 3, 1995.

The requester appealed this decision, claiming, among other matters, that additional records should exist. In particular, the appellant maintained that the Committee held additional meetings after October 3, 1995 dealing with a compensation package and conditions of approval.

The City undertook a further search for these records and located 12 additional documents. The City issued a second decision letter granting partial access to these records. Some of the records were not disclosed on the basis of the three exemptions previously claimed by the City.

During mediation of the appeal, the appellant raised the application of section 16 of the Act, maintaining that there is a compelling public interest in disclosure of the records.

A Notice of Inquiry was sent to the City and the appellant. Representations were received from both parties. In its representations, the City claimed the application of section 12 to certain records to which this exemption had not been originally applied. A Supplementary Notice of Inquiry was sent to the parties to solicit representations on the late raising of this discretionary exemption, in addition to certain other matters which had arisen. In addition, the Company was notified of the appeal and sent a copy of the Supplementary, as well as the initial Notice of Inquiry. All parties were also asked to comment on the application, if any, of section 10(1) of the Act (third party information) to the records at issue.

Representations in response to the Supplementary Notice of Inquiry were received from the City, the appellant and the Company. The Company advised that it took no position with respect to the issues raised in either Notice of Inquiry.

The City indicated that it had revised its position with respect to Records 12, 14, 15 and 16 and that it was now prepared to release them to the appellant. I will order it to do so. In addition, the City took the position that section 10(1) did not apply to the records. I have reviewed the records and also find that this exemption is not applicable.

At this time, the records at issue and the exemptions claimed by the City to apply to them are set out in Appendix A to this order.

PRELIMINARY MATTERS:

LATE RASING OF DISCRETIONARY EXEMPTIONS

Upon receipt of the appeal, this office provided the City with a Confirmation of Appeal notice. This notice indicated that the City had 35 days from the date of this notice (an expiry date was provided) to raise any additional discretionary exemptions not claimed in the decision letter. No additional exemptions were raised during this period.

Subsequently, in its representations, the City explicitly raised the application of the discretionary exemptions provided by sections 11(e) and 12 to Record 2. In addition, although not specifically referring to the exemption in section 12, the City, in its representations, claimed that Records 1, 3 and 8 contain "legal advice". Records 1, 2, 3 and 8 were all identified by the City in its first decision letter of May 13, 1996. Thus, by the time the City's representations were submitted, the expiry date provided in the Confirmation of Appeal had passed by almost two months.

It has been determined in previous orders that the Commissioner has the power to control the process by which an inquiry is undertaken (Orders P-345 and P-537). This includes the authority to limit the time during which an institution may raise new discretionary exemptions not claimed in its original decision letter.

In Order P-658, I concluded that in cases where a discretionary exemption(s) is claimed late in the appeals process, a decision maker has the authority to decline to consider the discretionary exemption(s). I adopt this reasoning for the purpose of this appeal.

In the Supplementary Notice of Inquiry, the City was requested to explain why it was claiming the application of sections 11(e) and 12 to Records 1, 2, 3 and 8 at this late date and the reasons why they should be considered at this time.

The City indicated that it was not claiming the application of section 12 to Record 1. It does confirm that its reliance on section 12 is implicit in its initial representations dealing with Records 2, 3 and 8. The City now states that these records contain legal advice and that no party will suffer prejudice if this exemption is not considered at this time. The City does not comment in any way on the application of section 11(e) to Record 2.

The appellant maintains that the City was provided with ample opportunity to raise any new discretionary exemptions during the 35-day period following the Confirmation of Appeal. The City was explicitly advised of this date and did not claim the application of section 12 to the additional records at that time.

Therefore, the appellant submits that the City has "relinquished" its right to claim this exemption. Furthermore, the appellant argues that no extenuating circumstances exist which would permit the City to rely on this exemption for the additional records "this late in the process".

The City has provided no explanation for the delay in either explicitly or implicitly raising the additional discretionary exemptions. In my view, a departure from the 35-day time frame is not justified in the circumstances of this appeal. Therefore, I will not consider the applications of sections 11(e) or 12 to Record 2; nor will I consider the application of section 12 to Records 3 and 8.

RESPONSIVENESS OF RECORDS

In its initial submissions, the City specifically claimed that portions of Records 4, 5 and 14 are not responsive to the appellant's request. It inferentially made the same claim with respect to those portions of Records 6 which deal with the same subject matter.

In its supplementary representations, the City reiterated this position with respect to Record 5. As indicated, the City has now agreed to disclose Record 14 to the appellant.

In Order P-880, I canvassed in detail the issue of responsiveness of records. That order dealt with a re-determination regarding this issue which resulted from the decision of the Divisional Court in Ontario (Attorney-General) v. Fineberg (1994), 19 O.R. (3d) 197.

In that case, the Divisional Court characterized the issue of the responsiveness of a record to a request as one of relevance. In my discussion of this issue in Order P-880, I stated as follows:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by the head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean responsiveness. That is, by asking whether information is "relevant" to a request, one is really asking whether it is responsive to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe the term describes anything that is reasonably related to the request.

I adopt these conclusions for the purposes of this appeal.

As indicated, the appellant's request was for access to the minutes of all meetings of the Company East Quarry Environmental Assessment City Review Committee from January 1, 1995 until Match 4, 1996. During the course of the appeal, this was clarified to include those meetings held after October 3, 1995 which dealt with the proposed compensation package and conditions of approval. Those portions of the records which the City now claims are not responsive, deal with the West Quarry. In its submissions, with respect to the application of section 11(e) to Record 11, the City itself indicates that plans dealing with the proposed use of the West Quarry

were part of the compensation package. Moreover, there are references throughout the records that the East and West Quarries are to be considered together for the purpose of resolving various issues.

On this basis, I am of the view that those portions of Records 4, 5, 6 and 11 dealing with the West Quarry are responsive to the request, in that they are reasonably related to the information contained in those records dealing with the proposed compensation package and terms and conditions of approval.

The City has made representations on the application of the various exemptions to those portions of Records 4, 5, 6 and 11 dealing with the West Quarry. I will consider these submissions in this order.

EXISTENCE OF ADDITIONAL RECORDS

In his submissions, the appellant claims that there is a "definite change in syntax, form and representation" between the minutes of the meeting of June 13, 1995 and those of subsequent meetings, such as those of the meeting of September 6, 1995. Because of this alleged difference, the appellant maintains that copies of the original notes and/or typed minutes of these records prepared by the engineers' department or any other staff member should exist.

It is possible to interpret the appellant's original request as including the records which he now maintains exist. However, I have no submissions from the City on this matter. If, after receiving the records ordered disclosed in this order, the appellant is still interested in pursuing this matter, he should forward another request to the City for these specific documents.

DISCUSSION:

ADVICE AND RECOMMENDATIONS

The City claims that Records 1-9 and 13 are exempt from disclosure in their entirety on the basis that they contain advice and recommendations as set out in section 7(1) of the Act.

Section 7(1) 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 many previous orders that advice and recommendations for the purpose of section 7(1) must contain more than just information. To qualify as "advice" or "recommendations", the information contained in the record must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. A record may also be withheld if its disclosure would "reveal" such advice in the sense that it would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given.

The City's position is that all of these documents deal with discussions of City staff and/or consultants retained by the City with respect to advice to be given by the Committee to City Council on environmental, planning, engineering, technical and compensation issues related to the Company's application.

Having reviewed the records, I find that, for the most part, they consist of comments, questions, remarks and exchanges of ideas related to the Company's application. In my opinion, they generally represent a collective effort by the Committee members and other staff and consultants to achieve the goal of formulating the position to be taken by the City as a commenting agency. Concerns expressed by the Committee members do not contain a suggested course of action.

With a few exceptions, the minutes do not document advice or recommendations which will ultimately be accepted or rejected by the City as part of its deliberative process. As the City itself states in its submissions:

> The results of the Committee's meetings culminated in various reports setting out recommendations to Council.

Thus, while the Committee reports, and those of the consultants, would arguably contain such advice and recommendations, these documents are not the records at issue in this appeal. Discussions of these documents, as recorded in the Committee minutes would only be subject to the section 7(1) exemption if disclosure of such information would reveal the advice ultimately contained in these reports.

Furthermore, although the words "advice" and "advised" are found in the records, I find that they are used to mean "reported" or "stated" in the sense that the speaker was providing information to the group for information purposes. The references to these words contain neither an action plan, nor a formalized manner of proceeding which are usually the hallmarks of advice or recommendations.

Based on the above, I find that only parts of Records 1-9 qualify for exemption pursuant to section 7(1) of the Act. I have highlighted these portions on the copies of the records provided to the City's Freedom of Information Co-ordinator with this order.

I find that none of Record 13 qualifies for exemption under section 7(1). As the City has not claimed that any other exemptions apply to this document, it should be disclosed in full to the appellant.

Although I have found that the requirements of section 7(1) have been established with respect of portions of the Records 1-9, I must now consider the potential application of section 7(2). The appellant submits that sections 7(2)(a), (d), (f), (i) and (j) are relevant in the circumstances of this appeal. These sections state:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;
>
> (d) an environmental impact statement or similar record;
>
> (f) a feasibility study or other technical study, including a cost estimate, relating to a policy or project of an institution;
>
> (i) a report of a committee or similar body within an institution, which has been established for the purpose of preparing a report on a particular topic;

(j) a report of a body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

As far as section 7(2)(a) is concerned, where opinion or factual material would not reveal a recommended course of action it is not covered by section 7(1) (Order 164). Accordingly, I have not found that any such information qualifies for exemption pursuant to section 7(1).

With respect to sections 7(2)(d) and (f), the appellant states that the City was in the process of deliberating a response to the Company's Environmental Assessment. Therefore, he maintains that the City was in the process of preparing an "environmental impact statement or similar record" (section 7(2)(d)) or a "feasibility study or technical report" (section 7(2)(f)).

I do not accept the appellant's submissions on this point. All of the exceptions set out in section 7(2) apply to the listed examples which are contained in a record itself. In this case, the records are minutes of meetings. They do not contain information of the nature described in sections 7(2)(d) and (f), even though the information in the records might have eventually been included in such documents. Accordingly, I find that sections 7(2)(d) and (f) have no application in this case.

Finally, the appellant submits that sections 7(2)(i) and (j) apply. He contends that the Committee was a committee of City Council established to study, receive information and report to Council on the Company's Environmental Assessment. In this regard, the appellant points to the statement of the City Clerk contained in her April 16, 1996 letter in which she states that "... Said committee was created as a study group to report, when appropriate, to the Executive Committee".

The appellant contends that this statement clearly indicates that the purpose of the Committee was to prepare a report on a particular topic (section 7(2)(i)) and/or undertake inquiries and make reports or recommendations to the institution (section 7(2)(j)). Therefore, the appellant submits that the minutes of the Committee are actually reports to Council.

Once again, I reject the appellant's contention. In order for either of sections 7(2)(i) or (j) to apply, the record must contain a "report". For a record to qualify as a report, it must consist of a formal statement or account of the results of the collation and consideration of information (Order 200). In my view, none of the portions of the records which I have found qualify for exemption under section 7(1) constitute a "report" within the meaning of the Act. As indicated previously, while the deliberations of the Committee ultimately resulted in the preparation of reports to Council, the records at issue consist solely of minutes of meetings. Accordingly, sections 7(2)(i) and (j) do not apply.

To summarize, I have found that only the highlighted portions of Records 1-9 qualify for exemption pursuant to section 7(1) of the Act.

SOLICITOR CLIENT PRIVILEGE

The City claims that Records 4-7 and 9 are subject to the exemption in section 12 of the Act.

This section 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 an institution 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 institution 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.

[Order 49. See also Order M-2 and Order M-19]

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 an institution; and

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

[See Order 210]

The City states that Records 4-7 and 9 contain legal advice which is subject to common law solicitor client privilege (Branch 1).

The appellant disputes this characterization and points to Order M-69 in which it was noted that not all communications between a legal advisor and his or her client are privileged. Furthermore, the appellant refers to Order M-394 in which I stated:

> As indicated in Appendix A, all these records consist of notes prepared by city staff of meetings attended by certain members of city staff, their counsel, OGH [the Oshawa General Hospital] staff, OGH counsel and consultants. In these circumstances, I find that the comments made by counsel for the City and OGH counsel at these meetings do not constitute **confidential** communications between counsel and their clients. [original emphasis]

While I agree with the appellant that not all communications between counsel and his or her client are privileged, I believe the facts in Order M-394 are distinguishable from those in the present case. In Order M-394, representatives of an outside body, the OGH, attended those meetings, the minutes of which the City claimed were subject to section 12. In the current appeal, the City has now agreed to disclose the minutes of those meetings attended by the Company and/or its representatives. The minutes remaining at issue in this case record Committee meetings that were attended by City staff and consultants retained by the City.

All of these parties, including counsel, were engaged in a common enterprise, the preparation of the City's response to the environmental assessment. In such situations, counsel must feel free to provide legal opinions and advice without waiving solicitor-client privilege. In effect, all the parties engaged in this enterprise may be considered to be the client group of counsel (Order P-1137).

In these circumstances, I find that portions of Records 4-7 and 9 consist of confidential communications between City staff, the consultants and counsel which are directly related to the seeking, formulating or giving of legal advice. As such, they qualify for exemption under section 12. I have highlighted these portions on the copy of the records provided to the City's Freedom of Information and Privacy Co-ordinator with this order.

ECONOMIC AND OTHER INTERESTS

The City claims that Records 9, 10 and 11 are exempt pursuant to section 11(e) of the Act. As I have found that portions of Record 9 are exempt pursuant to sections 7(1) and 12, I will only consider whether the balance of this record is subject to section 11(e). This section 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 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 City maintains that Records 9, 10 and 11 contain positions and plans which will be applied to negotiations with respect to the proposed compensation agreement with the Company.

In his submissions, the appellant correctly notes that in order for section 11(e) to be applicable, the negotiations must be ongoing or anticipated in the future (Order M-394). As part of his representations, the appellant has provided a copy of the City Engineering Report dated August 23, 1996 which refers to two compensation agreements. The first is a compensation agreement between the City, the Company and a "Study Group". The City confirms that this agreement was executed in September 1996.

The second compensation agreement is between the City, the Company and a third party. The City has also confirmed that this agreement has been recently executed and that the information contained in Records 9, 10 and 11, for which it has claimed section 11(e), relates to this second agreement.

In these circumstances, the information contained in these records to which the negotiations relate reflect matters which have already been successfully completed - the compensation agreement has been executed. Given that the submissions of the City do not link any particular plan with future negotiations, as opposed to those which have already been concluded, I find that section 11(e) does not apply to exempt Records 10 and 11 or the non-highlighted portions of Record 9 from disclosure.

The City has not claimed that any other exemptions apply to Records 10 and 11. Therefore, they should be disclosed to the appellant in their entirety. The non-highlighted portions of Record 9 should also be disclosed.

PUBLIC INTEREST IN DISCLOSURE

The appellant maintains that there is a public interest in disclosure of the records pursuant to section 16 of the Act which states:

> An exemption from disclosure of a record under sections **7**, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

As section 16 has no application to the records which are exempt under section 12, and I have not upheld the City's section 11(e) exemption claim, I will only consider if it applies to those portions of Records 1-9 which qualify for exemption under section 7(1).

It is the position of the appellant that the residents of the City "have become the unwilling hosts to another industrial landfill". In this regard, he notes that the City published a consultant's report which raised 133 concerns and that the City subsequently stated that the concerns had been resolved. However, the appellant states that the basis for the resolution of these matters has never been made public.

He also points to the media attention that the landfill controversy has generated and the actions of numerous residents in opposing the landfill to support his position that there is a strong public interest in this matter. He claims that disclosure of the records could potentially inform the public about how the City arrived at its ultimate position on the landfill.

The City emphasizes the purpose of the exemption in section 7(1) of the Act. It states:

> In an Application of this nature, it is crucial that staff and consultants be at liberty to discuss advice, recommendations and the consequences without restraint. We believe that this is particularly true in an environmental application such as this Application where comments received from the Municipality are likely to have a strong impact on decisions rendered by the Minister.

I accept the position of the appellant that there is a public interest in the landfill matter. However, in the circumstances of this case, I do not find that this public interest is a **compelling** one which clearly outweighs the purpose of the exemption in section 7(1) of the Act. The portions of the records which qualify for this exemption are minimal indeed. It is my view that the substantial amount of disclosure the appellant will receive as a result of this order will satisfy the public interest in this case.

Accordingly, I find that section 16 does not apply to those portions of the records which I have found to be exempt under section 7(1) of the Act.

ORDER:

1. I uphold the decision of the City not to disclose the **highlighted portions** of Records 1-9.

2. I order the City to disclose Records 10-16 to the appellant in their entirety and the **non-highlighted portions** of Records 1-9 by sending him a copy by **April 23, 1997**.

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 that are disclosed to the appellant in accordance with Provision 2.

Original signed by: ______________________ ______________ April 2, 1997
Anita Fineberg
Inquiry Officer

APPENDIX A

INDEX OF RECORDS AT ISSUE
Appeal Number M-9600172

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED	DECISION ON RECORD
1	Minutes No 95-01 of the East Quarry Environmental Assessment City Review Committee (the Committee) Meeting dated January 5, 1995 (5 pages)	7(1)	Disclose in part
2	Minutes No 95-02 of the Committee Meeting dated February 6, 1995 (5 pages)	7(1)	Disclose in part
3	Minutes No 95-03 of the Committee Meeting dated February 21, 1995 (5 pages)	7(1)	Disclose in part
4	Notes of a Meeting between City Staff and Consultants dated March 20, 1995 (8 pages)	7(1) and 12	Disclose in part
5	Minutes of a City Staff Meeting dated March 30, 1995 (17 pages)	7(1) and 12	Disclose in part
6	Minutes of the Committee Meeting dated April 4, 1995 (7 pages)	7(1) and 12	Disclose in part
7	Minutes of a City Staff Meeting dated April 24, 1995 (9 pages)	7(1) and 12	Disclose in part
8	Minutes of the Committee Meeting dated May 3, 1995 (7 pages)	7(1)	Disclose in part
9	Minutes of the Committee Meeting dated May 23, 1995 (5 pages)	7(1), 11(e) and 12	Disclose in part
10	Minutes of the Committee Meeting dated September 6, 1995 (1 page)	11(e)	Disclose in full
11	Minutes of the Committee Meeting dated September 12, 1995 (2 pages)	11(e)	Disclose in full
12	Handwritten Notes taken at a City Staff Meeting dated October 2, 1995 (2 pages)	7(1) and 11(e)	Disclose in full
13	Handwritten Notes taken at the Committee Meeting dated October 3, 1995 (1 page)	7(1)	Disclose in full
14	Portions of severed Handwritten Notes taken at a Meeting between the Company and City Staff dated October 31, 1995 (2 pages)	7(1), 11(e) and 12	Disclose in full

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED	DECISION ON RECORD
15	Handwritten Notes taken at a Meeting dated January 26, 1996 between the Company and City Staff on Proposed Compensation Agreement (3 pages)	11(e)	Disclose in full
16	Handwritten Notes taken at a Meeting dated April 1, 1996 (2 pages)	11(e)	Disclose in full