



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

ORDER M-1113

Appeal M-9700240

County of Renfrew



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The County of Renfrew (the County) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for the following:

All records, documents, notes, planning opinions and recommendations, zoning opinions and recommendations, including changes of property ownership, public and agency correspondence the County of Renfrew has regarding the Rambeck Realty Limited, Smiths Construction Company Arnprior Limited &/or present owners of property at Lot 1 Concession 6, Horton Township, and the property at Lot 7 Concession 5, Horton Township, known as the Jamieson pit.

The request was made on behalf of a company which operates a gravel pit in the Township of Horton (the Township). The County responded to the appellant by advising her that it had already provided her with all of the responsive documents which are not subject to an exemption in response to her previous request #2-97. This request became the subject of Appeal Number M-9700160 and was resolved by Order M-1112, which is being issued concurrently with this order. The County denied access to the remaining records responsive to request #2-97 pursuant to section 12 of the Act (solicitor-client privilege). The County later clarified that all records responsive to the requester's present request (#4-97) were already identified as responsive to her previous request (#2-97).

The appellant appealed the County's decision, claiming that further records responsive to her present request should exist.

During the mediation of the appeal, the County conducted a further search and identified five additional records which were responsive only to the appellant's present request. The County disclosed one of these records to the appellant (Record FE-1 to FE-5) and, after giving notice to a number of affected parties pursuant to section 21 of the Act, made a decision to disclose two additional records (Records FE-11 and FE-12 to FE-46). Accordingly, as the County is no longer denying access to these records, and the affected parties who were notified have not appealed the County's decision to disclose the information which they contain, I order that Records FE-11 and FE-12 to FE-46 be disclosed to the appellant.

A Notice of Inquiry was provided to the appellant and the County. Upon her review of the records at issue, the Appeals Officer determined that section 10 of the Act may apply to the information contained in the records. Accordingly, the parties to the appeal, as well as a corporation whose rights may be affected by the disclosure of the information contained in the records (the affected party), were also requested to make submissions on the possible application of this exemption. Representations were received from the County, the appellant and from the affected party.

The remaining records consist of two letters (Records FE-6 and FE-7 to FE-10) written by the solicitor for the Township. Record FE-6 was addressed to a Planner employed by the County who was retained by the Township to provide planning services to it. Record FE-6 was provided to the Planner by the Township's solicitor with a view to bringing him up to date on a matter involving a motion before the Ontario Municipal Board (the OMB) brought by the appellant against the Township. In Order M-1112, I found that Record

FE-6, which is identical to Record DE-25 in that appeal, was exempt under Branch 2 of the section 12 exemption. As I have already found that this record qualifies for exemption in the earlier appeal, it is not necessary for me to address it again in the present appeal.

Accordingly, the only record remaining at issue is Record FE-7 to FE-10, to which the County has also applied section 12 of the Act.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Record FE-7 to FE-10 is a letter from the Township's solicitor to the Township Clerk which was copied to the Planner as a result of his involvement in the defence of the OMB proceeding. The County submits that this document is exempt from disclosure under section 12. 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 the County 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 County 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.

[Orders 49, M-2 and M-19]

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 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.

[Order 210]

The County submits that the record is exempt under both branches of section 12.

I have reviewed Record FE-7 to FE-10 and find that it represents a confidential written communication between a solicitor and his client (the Township) which was directly related to the giving of legal advice. Accordingly, I find that this document qualifies for exemption from disclosure under Branch 1 of section 12.

In Order M-1112, I made a finding that by providing planning services to the Township, the Planner acted in the capacity of agent for the Township in the conduct of both an OMB proceeding and other litigation involving the Township and the appellant. I adopt that finding for the purposes of the present appeal. Accordingly, in my view, because of the nature of the relationship between the Planner and the Township, the disclosure of the contents of Record FE-7 to FE-10 to the Planner by the Township's solicitor did not constitute a waiver of the solicitor-client privilege which exists in the document.

Because I have found that Record FE-7 to FE-10 qualifies for exemption under section 12, it is not necessary for me to address the possible application of section 10.

REASONABLENESS OF SEARCH

As was the case in the appeal which gave rise to Order M-1112, the appellant maintains that additional records which are responsive to her request should exist. She has provided a list of documents which she has obtained from other sources which she believes should also be in the custody or under the control of the County. I note that a number of the documents which are referred to in this list have in fact been addressed in the earlier appeal.

The County submits that the searches for records responsive to the appellant's present request were undertaken by its Senior Planner and took place in the County's Planning Department. I am satisfied that this individual was the most appropriate person to conduct the search as he has the necessary familiarity with the subject matter of the records.

Where a requester provides sufficient details about the records which she is seeking and the County indicates that such records do not exist, it is my responsibility to ensure that the County has made a reasonable search to identify any records which are responsive to the request. The Act does not require the County to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the County must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

Based on the information provided to me by the County, my review of the records and the submissions of the appellant, I am satisfied that the searches undertaken by the County for records responsive to the appellant's request were reasonable in the circumstances.

ORDER:

1. I uphold the County's decision to deny access to Records FE-6 and FE-7 to FE-10.
2. I find that the County's search for records responsive to the request was reasonable and dismiss this aspect of the appeal.
3. I order the County to provide the appellant with a copy of Records FE-1 to FE-5, FE-11 and FE-12 to FE-46 by **June 19, 1998**.
4. In order to verify compliance with the terms of this order, I reserve the right to require the County to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 3.

Original signed by: _____

June 4, 1998

Donald Hale
Adjudicator

(formerly Inquiry Officer)